

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 11-ALJ-22-0381-AP

Rest Assured, LLC, ...Appellant,

v.

South Carolina Department of Employment and Workforce, ...Respondent.

RECORD ON APPEAL

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SC Bar # 5197
David C. Dick
SC Bar # 78053
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Attorney for Respondent

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Certificate of Appellant

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,	)	Docket No. 11-ALJ-22-0381-AP
	)	
Appellant,	)	
	)	
vs.	)	ORDER DENYING MOTION FOR REHEARING
	)	
South Carolina Department of Employment	)	
and Workforce,	)	
	)	
Respondent.	)	

APPEARANCES: For the Petitioner: David C. Dick, Esquire
For the Respondent: Romi Y. Robinson, Esquire

This matter is an appeal by Rest Assured, LLC (Appellant) challenging the decision of the South Carolina Department of Employment and Workforce (Department) upholding its Administrative Ruling 2006-8. After this case was filed with the Administrative Law Court (ALC or Court), Respondent South Carolina Department of Employment and Workforce (Department) filed a Motion to Dismiss. This Court granted that motion finding that this case was untimely filed with the ALC. Petitioner thereafter filed a Motion for Rehearing of that decision.¹ I generally find that the Petitioner's arguments are without merit or are a reiteration of the arguments made in the hearing into this matter. See 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995) (While Rule 59(e) motions may be appropriate to preserve an issue raised in a contested case for appellate review or to ask the court to decide an issue which has been raised but not ruled upon, they "may not be used to relitigate old matters."). Nevertheless, I do briefly address the following:

Petitioner asserts that this court can consider Appellant's untimely filed appeal because it timely filed an appeal in circuit court. Appellant does not assert that circuit court had jurisdiction to hear its appeal but rather that even though the appeal was errantly filed, the Department was not misled or irreparably harmed by that filing. To support its position,

¹ It is questionable whether Appellant timely filed its Motion for Rehearing. Nevertheless, in light of the decision regarding the ultimate issue of the timeliness of this appeal, I have not addressed that issue.

February 3, 2012

Appellant cites 5 Am. Jur. 2d Appellate Review § 294 which states that: "Most state jurisdictions follow the rule that notices of appeal are to be liberally construed in favor of their sufficiency so long as the opposing party has not been misled to his or her irreparable harm." However, this court has found no South Carolina law supporting that proposed standard of review in determining whether an appellant failed to timely serve a party with the notice of appeal. To the contrary, the South Carolina courts have clearly held that a court does not have the authority to extend the time for taking an appeal from a decision of an administrative agency. See, e.g., id.; Burnette v. S.C. State Highway Dep't, 252 S.C. 568, 167 S.E. 2d 571 (1969). In fact, the Supreme Court in addressing the Workers' Compensation Commission authority to extend the time for the filing an appeal from the decision of a single commissioner recently explained that:

[W]e hold that the Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner. This holding is consistent with the general rule that an appellate body may not extend the time to appeal.

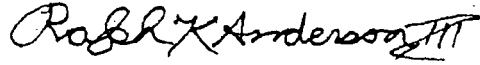
Allison v. W.L. Gore & Assoc., 394 S.C. 185, 189, 714 S.E.2d 547, 549-550 (2011).

Furthermore, the cases cited in American Jurisprudence do not support the proposition that an untimely filed appeal should be accepted as long as the opposing party has not been irreparable harmed or misled. Rather, the cited cases address the sufficiency of the content of timely filed notice of appeals. See Karnes v. Milo Beauty and Barber Supply Co., Inc., 434 N.W.2d 288 (Minn. Ct. App. 1989); Allison v. Sverdrup & Parcel & Associates, Inc., 738 S.W.2d 440, 443 (Mo. Ct. App. 1987); Int'l Union of Operating Engineers Local No. 49 on Behalf of Maack v. Aberdeen Sch. Dist. No. 6-1, 463 N.W.2d 843, 844 (S.D. 1990); People v. Bost, 770 P.2d 1209, 1212 (Colo. 1989); City of Phoenix v. Bellamy, 153 Ariz. 363, 367, 736 P.2d 1175, 1179 (Ct. App. 1987). Here, the issue is the timeliness of Appellant's appeal not the sufficiency of the notice itself. Therefore, I do not find that the assertion set forth in American Jurisprudence supports this court's acceptance of Appellant's appeal.²

² Notably, though no South Carolina case set forth that notices of appeal should be liberally construed in favor of their sufficiency, our courts have recognized that "[c]lerical errors in a notice of appeal do not destroy the appeal." Charleston Lumber Co., Inc. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995).

IT IS THEREFORE ORDERED that Petitioner's Motion for Reconsideration is **DENIED.**

AND IT IS SO ORDERED.

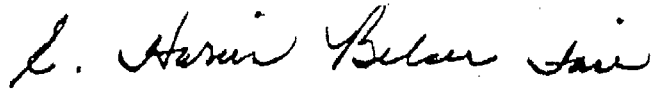
A handwritten signature in black ink, reading "Ralph King Anderson, III". The signature is written in a cursive style with a horizontal line underneath it.

Ralph King Anderson, III
Chief Administrative Law Judge

February 3, 2012
Columbia, South Carolina

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

February 3, 2012
Columbia, South Carolina

failure to timely file the Notice of Appeal divests the ALC of subject matter jurisdiction. "Subject matter jurisdiction of a court depends upon the authority granted to the court by the constitution and laws of the state." Paschal v. Causey, 309 S.C. 206, 209, 420 S.E. 2d 863, 865 (Ct. App.1992). It "refers to [the] court's power to hear and determine cases of the general class or category to which [the] proceedings in question belong" Black's Law Dictionary 1425 (6th ed. 1990).

The Supreme Court has set forth that a court must dismiss an appeal where the Appellant fails to serve a party with the notice of appeal in a timely manner. See Southbridge Properties, Inc. v. Jones, 292 S.C. 198, 355 S.E. 2d 535 (1987) (applying appellate court rules and dismissing case for failure to serve a notice of intent to appeal in a timely manner); Mears v. Mears, 287 S.C. 168, 337 S.E. 2d 206 (1985) (applying appellate court rules and finding lack of jurisdiction for failure to serve a notice of intent to appeal in a timely manner). Additionally, it is also well established that a court does not have the authority to extend the time for taking an appeal from a decision of an administrative agency. See, e.g., id.; Burnette v. S.C. State Highway Dep't, 252 S.C. 568, 167 S.E. 2d 571 (1969). This tribunal recognizes the harsh result of this decision but is constrained by the rules and legal precedent in this State. See McClain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994). Nonetheless, this matter must be dismissed.

IT IS THEREFORE ORDERED that the Respondent's Motion to Dismiss is **GRANTED**.
AND IT IS SO ORDERED.

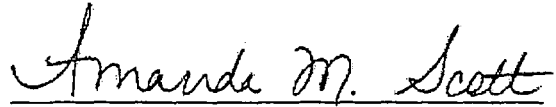


Ralph King Anderson, III
Chief Administrative Law Judge

August 30, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Amanda M. Scott, 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).

A handwritten signature in cursive script that reads "Amanda M. Scott". The signature is written in dark ink and is positioned above a horizontal line.

Amanda M. Scott
Judicial Law Clerk

August 30, 2011
Columbia, South Carolina

COMMISSIONERS
J. William McLeod
Becky D. Richardson
McKinley Washington, Jr.

EXECUTIVE DIRECTOR
Roosevelt T. Halley
803.737.2617



Your
onestop
for Workforce Solutions
www.sces.org

1550 Gadsden Street
Post Office Box 995
Columbia, SC 29202

March 2, 2006

Ms. Reatha Johnson
Rest Assured, LLC
9400 Two Notch Road Ste. D
Columbia, SC 29223

Re: Account 420688-1: Employer-Employee Relationship
Certified Nursing Assistants

Dear Ms. Johnson:

This office is in receipt of a request submitted by one of our Field Deputies, Ms. Cheryl Clay, to issue a determination stating whether an employer-employee relationship exists between your company and individuals who perform services as Certified Nursing Assistants, Personal Care Assistants or companions in the homes of clients

According to the information submitted, Rest Assured, LLC is in the business of providing clients with home health care workers and personal care assistants. Your company contracts with a client to determine the type of services required and negotiates the fee to be paid. You then assign a worker who you feel matches their needs and scheduling requirements. The workers are paid by the hour and are not directly supervised within the client's home. However, you do consult with your clients to verify the services are being performed to their satisfaction. If not, or the if worker does not conduct themselves in a professional manner or manner deemed to be appropriate by Rest Assured, LLC, the company has the right to discharge the worker. Additionally, workers are required to provided proof of at least ten hours of professional training each year.

Section 41-27-230(1) (b) of the South Carolina Employment Security Law defines employment as:

§ 41-27-230. Employment.

"Employment" means:

(1) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this

EXHIBIT
1 / 2 23

Ms. Reatha Johnson

Page 2

March 2, 2006

subsection, service performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:

(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

Under the usual common law rules, the relationship of employer and employee generally exists when the person for whom services are rendered has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. In this connection it is not necessary that the employer actually directs or controls the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

Based on the information submitted, it is my determination that the individuals in question should be reclassified as employees of Rest Assured, LLC. The service provided by the workers is integrated into the business operation and essential for its continued success. The workers do not have a substantial investment in a business of their own. In addition, the company maintains direct control over payments to the workers. Therefore, the compensation paid to these workers and all similarly employed workers is wages subject to the unemployment tax.

If you disagree with this determination, you have the right to request an administrative review within thirty days of this notice. It may be noted that since an administrative review is a quasi-judicial process, a request can only be made by the owner of a business, an officer of a corporation, or an attorney.

Should you decide to appeal this determination, all reports and taxes are due and payable until such time as a decision is either modified or reversed. A credit will be issued for any overpayment of taxes. If you have any questions, please contact me at (803) 737-3075.

Sincerely,



Philis R. Mefford
Employer Status Supervisor

cc: Jack Sanders, Division Director Field Service
Cheryl Clay, Field Deputy

UI-4

BOYKIN, DAVIS, HAWKINS & CALDWELL, LLC

Attorneys and Counselors at Law

914 RICHLAND STREET, SUITE A-200
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11844
COLUMBIA, SOUTH CAROLINA 29211

Adm 2006-8

TELEPHONE: 803-254-0707
FACSIMILE: 803-254-5609

CHARLES J. BOYKIN*

KENNETH A. DAVIS

KARLA McLAWHORN HAWKINS

DARRYL C. CALDWELL

C. CHADWICK BOYKIN*

* CERTIFIED CIVIL ARBITRATOR AND MEDIATOR
* ADMITTED IN LOUISIANA ONLY

April 3, 2006

VIA HAND DELIVERY

Ms. Philis R. Mefford
Employer Statue Supervisor
1550 Gadsden Street
Columbia, South Carolina 29202

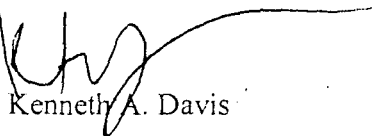
Re: Rest Assured, LLC Account 420688-1 Employer-Employee Relationship
Certified Nursing Assistant

Dear Ms. Mefford:

This letter is to request an administrative review of the determination regarding the Employer-Employee Relationship regarding Rest Assured, LLC. A determination letter was issued by Philis Mefford on March 2, 2006. Please schedule a hearing in accordance with this request.

Thank you for your attention to this matter.

Sincerely,


Kenneth A. Davis

cc: Reatha Johnson



**THE SOUTH CAROLINA
EMPLOYMENT SECURITY COMMISSION**

631 Hampton Street
P.O. Box 995
Columbia, SC 29202

REST ASSURED, LLC)
9400 TWO NOTCH ROAD, SUITE D)
COLUMBIA, SC 29223)

Administrative Ruling

)
)
Appellant: Reatha Johnson, Owner)
SCES Account No. 420688)

On March 2, 2006, Ms. Philis R. Mefford, Employer Status Supervisor, issued a determination to Reatha Johnson, Owner of Rest Assured, LLC (hereinafter referred to as "Rest Assured") wherein it was held that an employer-employee relationship exists between the business and certain workers classified as independent contractors.

By letter dated April 3, 2006, Ms. Johnson, requested an administrative review. A hearing was held on September 12, 2006, for the purpose of receiving testimony, exhibits, and any other evidence deemed relevant to the issue under review. This having been done, the matter is now before me for consideration.

Statutes Applicable

Section 41-27-230 (1) (b) of the South Carolina Employment Security Law defines employment as follows:

(1) Any service performed prior to January 12, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:

(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee;

Section 41-27-380 (1) of the South Carolina Employment Security Law defines wages as follows:

(1) Wages means all remuneration paid for personal services, including commissions and bonuses, any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or by private agreement, consent, or arbitration for loss of pay by reason of discharge and cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration paid in any medium other than cash is estimated and determined in accordance with regulations prescribed by the Commission. 'Wages' includes all tip income (including charged tips) which constitute employment and are included in a written statement furnished to the employer.

Section 41-39-10 of the South Carolina Employment Security Law reads, in part, as follows:

No agreement by any individual to waive, release or commute his rights to benefits or any other rights under Chapters 27 through 41 of this Title shall be valid...

§ 41-27-30 of the South Carolina Employment Security Law states:

Nothing in chapters 27 through 41 of this Title shall be construed to cause the Commission or the courts of this State in interpreting such chapters to be bound by interpretations as to liability or non-liability of employers by Federal administrative agencies, nor is it the intent of the General Assembly to require an identical coverage of employers under such chapters with that under § 3101 et seq. of the Federal Internal Revenue Code.

Discussion

Rest Assured is a business entity which provides custodial care services to elderly clients.

Rest Assured utilizes workers called Personal Care Assistants ("Assistants") to provide these services to the clients. Assistants apply upon recommendation by friends and co-workers. Rest Assured does not advertise. The assistant must pass a criminal background check and possess minimum skills. After satisfying these requirements, the assistant is placed in a work registry of potential workers. Rest Assured consistently maintains a large depository of workers. Rest

Assured places an assistant with a particular client by comparing the client's needs with the assistant's availability and skill level. Each assistant also signs an "Independent Contractor Agreement" with the employer prior to beginning work. Occasionally, Rest Assured will provide personal training on certain chores.

Rest Assured negotiates a fee with each client for the services. The services cost about \$13 to \$15 per hour; this fee is paid directly to Rest Assured. The assistant does not negotiate with the client. Rest Assured typically pays the Assistant about \$8 to \$9 per hour, depending on the skill level of the assistant. Generally, the client fee dictates the assistant's hourly rate. No taxes are withheld from the assistant's wages. The difference between the client fee and the assistant's wage is retained by Rest Assured. Rest Assured pays the assistant their wages regardless of whether the client pays for the services. The assistant submits a weekly report of services provided from which they are paid.

The assistant performs the services in the client's homes with no direct supervision from the employer; however, there are periodic visits by Rest Assured to audit services. Rest Assured provides no equipment or transportation. The assistants wear a name tag on their clothing with a picture of an angel which is a symbol for the employer. Assistants sometimes escort clients to their appointments, but Rest Assured discourages this. Rest Assured has liability insurance and instructs the assistant to notify the owner immediately if there is an accident. Rest Assured provides workers compensation. Rest Assured does not provide health insurance, holiday pay, or bonuses.

The Independent Contractor Agreement states that the employer has the right to terminate if the assistant "engages in conduct that is harmful, detrimental, improper, or fraudulent to or for

the business of the company ...” Rest Assured asserted in the hearing that an assistant is only terminated on a client’s request.

Rest Assured also asserted that each assistant is allowed to work for companies who offer the same services as Rest Assured. However, according to the Independent Contractor Agreement, the assistant agrees not to “participate directly or indirectly ... in any business or activity that is in competition with the Company ...” Rest Assured explains this discrepancy by stating that this language was used to prevent assistants from taking clients to a competitor for a higher rate of pay.

Rest Assured asserted that the employer chose to begin classifying the assistants as independent contractors rather than employees because many public and private entities which provide the same services as Rest Assured also classify workers as independent contractors.

Decision

The determination dated March 2, 2006, is affirmed.

Under the usual common law rules, the relationship of employer and employee generally exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work (the end sought to be accomplished) but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

As a general rule, an independent contractor has complete autonomy. While there are some factors in the relationship if taken alone would indicate some independence of the workers, the record overwhelmingly shows Rest Assured exercises sufficient control over assistants; therefore, they are considered employees for unemployment tax purposes.

Rest Assured manifests this control in several ways. Specifically, the client services, fees, and reports are controlled by Rest Assured. Training is given and services are supervised. Rest Assured also controls the method of payment by requiring reports from the workers. Although withholding for taxes, holiday, and other benefits may not be paid, Rest Assured provides worker's compensation and insures payment even if the client defaults. Other forms of control are found in the assistant's identification with the company by the wearing of the name tag and the contractual agreement

Additionally, the provisions of the Independent Contractor Agreement also indicate control. Though Ms. Johnson may actually terminate the assistant at the request of the client, the Agreement shows that the employer has the *right* to terminate. Having the right does not require that the employer actually exercise that right. Also, the Agreement prohibits assistants from competing with Rest Assured in the sense they cannot recruit its clients for similarly situated companies. This too is a form of control.

One other factor is whether the employer can conduct its business without the workers in question. Since Rest Assured's primary purpose is to provide custodial services to the elderly and Rest Assured uses the assistant's for such purposes, the Tribunal finds that the assistant's indispensability to the employer further demonstrates the existence of an employer-employee relationship.

Rest Assured's assertion that similar entities provide the same services and declares its workers as independent contractors is without merit. The only entity at issue before the Tribunal is Rest Assured, and its tax liability is solely based on its workers and practices.

It is the finding of the Tribunal that these workers are, in fact, employees of the business and should be covered for unemployment tax purposes.

It is so ordered.

This decision will become the final decision of the Agency, unless within thirty (30) calendar days, including weekends and holidays, of the mailing date of this decision: (1) the Commission on its own motion acts to review this decision, or (2) you file application for leave to appeal further to the Full commission. Such appeal may be filed in person in any Employment Security Office or by mail addressed to: **South Carolina Employment Security Commission 631 Hampton Street, PO Box 995 Columbia, SC 29202, Attn: Commission Appeals.**



Chauntel Bland
Administrative Hearing Officer

CB: adb

Date: February 16, 2007

CC: Legal-Bill Funderburk
Accounting-Jim Singleton
Field Service
Status-Philis Mefford

BOYKIN, DAVIS & HAWKINS, LLC

Attorneys and Counselors at Law

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FACSIMILE: 803-254-5809

kdavis@boykinlawsc.com

March 16, 2007

VIA FACSIMILE AND U.S. MAILSouth Carolina Employment Security Commission
Attn: Commission Appeals
631 Hampton Street
PO Box 995
Columbia, SC 29202

Re: Rest Assured, LLC

Dear Sir:

Please find enclosed the application of Rest Assured, LLC to appeal the Administrative Ruling of Chauntel Bland dated February 16, 2007, to the full Employment Security Commission.

If you have any questions, please contact me directly.

Sincerely,



Kenneth A. Davis

/rar

Enclosures

cc: Reatha Johnson

APP-1111 Revised 2/05
 Catalog#: 05170

Appeal No. 2006-8

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

APPLICATION FOR LEAVE TO APPEAL TO COMMISSION

Claimant's Name: _____ SSN: _____
 Address: _____ Date Of Initial Claim: N/A

Employer's Name: Rest Assured, LLC

Address: 9400 Two Notch Road, Suite D, Columbia, SC 29220

Party Appealing: Rest Assured, LLC

On 4-21-07, I received Appeal Tribunal Decision Number 2006-8

mailed to me on 2-16-07 and ask for review of the record on the following grounds:

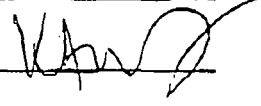
See attached

* If appeal is untimely, state the reason. If appellant failed to attend Appeal Tribunal hearing, state the reason and whether postponement was requested:

I know that I must continue to file my claims for each week of unemployment during the pendency of this appeal. I know that I can only be paid for those weeks that I have timely claimed. If I have received benefits and am ruled disqualified or ineligible, I know that I will be required to repay the benefits I have received for that time period.

As a Board of Review, the Commission is confined strictly to the record submitted by the Appeal Tribunal and does not accept additional evidence or testimony in its consideration of the appeal.

Appellant: Rest Assured, LLC

Signed by: Kenneth A. Davis 

Title: Attorney Date: 3-16-07

Does claimant need an interpreter? ☐ YES ☒ NO What language/dialect? _____

Claimant is ☐ Deaf ☐ Mute

(For Workforce Center Use Only)

Filed at: _____ Date: _____
 (Workforce Center Name and Number)

Received by: _____
 (Workforce Center Representative)

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF:

Rest Assured, LLC)
101 Rice Bent Way #8)
Columbia, SC 29229)
Account No. 420688)

APPELLATE PANEL
DECISION

The Appellant in this case has sought review of Administrative Ruling 2006-8, issued February 16, 2007, holding that individuals working as home health aides for the Appellant are employees for the purposes of South Carolina law.

The Appellate Panel notified the parties of its hearing to consider the appeal

APPLICABLE AUTHORITY

S.C. Code Ann. §41-27-230 (1) (b) defines employment as follows:

- (1) Any service... performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:
 - (b) Any individual, who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee....

An employer-employee relationship is established when an employer has control over the means and manner by which the work is performed. Four factors have been enumerated by the courts to evaluate the existence of an employer-employee relationship: (1) the right, or exercise, of control; (2) the method of

payment; (3) the right to discharge; and (4) the provision of tools or equipment.¹ Language in a contract or agreement declaring the existence of an independent contractor relationship is not dispositive.²

FACTS

The Appellant began operating on January 1, 2005, as a subchapter S corporation providing home health services for its clients. On January 11, 2006, the Appellant notified the Department that it would be using subcontractors for field assignments. The workers are not required to be certified as Certified Nursing Assistants. Most of the workers are not certified and most work for the Appellant as a second job to supplement their income. They must pass a criminal background check and possess minimal skills. The Appellant assigns workers to clients based on the client's need and the worker's skill level. Each worker signs an "Independent Contractor Agreement" when hired and his or her hourly salary is negotiated at that time. The Appellant is responsible for all monies and the worker is not involved in the financial transactions with the client. The Appellant provides some training and encourages workers to seek training away from the office. Workers are covered under the Appellant's liability insurance and are required to report any accidents. The Appellant asks workers not to escort clients; however, this occurs on occasion. The Appellant pays the workers even if the client does not pay. The workers have no

¹ Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

² Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993).

investment in the company. They are required to submit documentation weekly for services provided and the Appellant periodically contacts clients to assess the care the clients are receiving. The Appellant may terminate the contracts of the workers if they violate their contracts or act in a way which may be harmful to the business. Workers must wear a name tag identifying them with the Appellant. The badges are provided by the Appellant. The contract prohibits workers from employment with a competitor in the same industry.

DECISION

Administrative Ruling 2006-8, issued on February 16, 2007 is affirmed.³

Under the usual common law rules, the relationship of employer and employee generally exists when the entity for whom services are performed has the right to control and direct the individual who performs the services both as to the results to be accomplished and as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer. In this context, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient that it has the right to do so. Merely labeling a worker independent does not establish independence. The substance of the relationship taken as a whole establishes whether an employer-employee relationship exists.

³ If this enterprise is operated as a partnership or sole proprietorship for tax purposes, the owner is not an employee, and his wages would not be reportable to the Department.

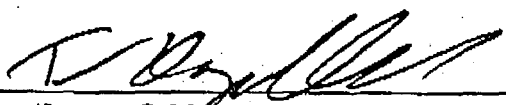
The Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed. The Appellant controls the method and manner in which payment is made to the workers and the collects all of the monies. Workers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services. Equipment is not furnished; however, the Appellant provides liability insurance and a name tag identifying the workers with the business. Finally, the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship.

Therefore, we find the workers are employees and should be reported for unemployment tax purposes. The Administrative Ruling is affirmed.

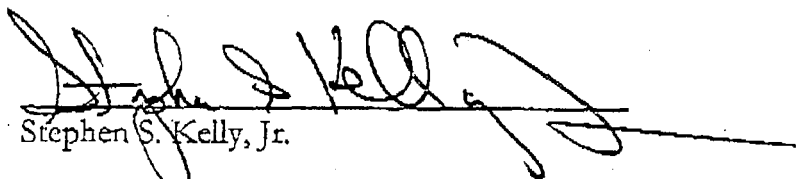
**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E.B. Ayers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 05/11/11
Date Mailed: 05/31/11
Mailed By: _____

201 1 CP4004262

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) FIFTH JUDICIAL CIRCUIT

Rest Assured, LLC,

Civil Action No.: 2010-CP-40-

Plaintiff,

vs.

South Carolina Department of
Employment and Workforce,

Defendant.

SUMMONS

JEANETTE H. WOODRIDGE
C.C.P. & G.S.

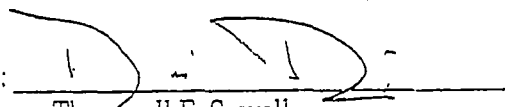
2011 JUN 30 PM 4: 09

RICHLAND COUNTY
FILED

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to make the necessary filing with the Court in response to the Petition and Notice of Intent to Appeal in the above captioned action, a copy of which is herewith served upon you, and to serve a copy of your response on the subscribers located at 1310 Gadsden Street, Post Office Box 11449, Columbia, South Carolina 29211, as required after service hereof, exclusive of the day of such service.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Plaintiff Rest Assured, LLC

Columbia, South Carolina
June 30, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff(s)

vs.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP -

South Carolina Department of Employment and
Workforce

Defendant(s)

(Please Print)

Submitted By: David C. Dick, Esquire

Address: Sowell Gray Stepp & Laffitte, LLC

Post Office Box 11449

Columbia, South Carolina 29211

SC Bar #: 78053

Telephone #: 803-929-1400

Fax #: 803-929-3600

Other:

E-mail: ddick@sowellgray.com

kanders@sowellgray.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
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NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| ☐ Contracts
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Submitting Party Signature: _____

Date: 06/30/2011

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FOR MANDATED ADR COUNTIES ONLY
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE
DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. ~~The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this~~ action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Rest Assured, LLC,) Civil Action No.: 2011- CP-40-

Plaintiff,)

vs.)

South Carolina Department of Employment)
and Workforce,)

Defendant.)

PETITION AND NOTICE OF INTENT
TO APPEAL

TO: THE HONORABLE JEANETTE W. MCBRIDE, CLERK OF COURT,
RICHLAND COUNTY; AND SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE:

YOU WILL PLEASE TAKE NOTICE that plaintiff Rest Assured, LLC ("Rest Assured") by and through their undersigned attorneys, intends to and does hereby appeal from the Appellate Panel Decision and Order of the South Carolina Department of Employment and Workforce ("SCDEW") Appellate Decision No. 2011-P-10, dated May 31, 2011, and received on June 3, 2011, in the above styled cause to the Court of Common Pleas, Richland County, State of South Carolina, pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and South Carolina Rules of Civil Procedure R. 74. The plaintiff submits its grounds to reverse or modify the referened agency decision on appeal as follows:

1. The SCDEW erred and/or abused its discretion in its finding that "[t]he Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed." Said error being such finding ignores the evidence in the record and is not supported by the

substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. The SCDEW erred and/or abused its discretion in its finding that “[t]he Appellant controls the method and manner in which payment is made to the workers and collects all of the monies.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3. The SCDEW erred and/or abused its discretion in its finding that “[w]orkers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

4. The SCDEW erred and/or abused its discretion in its finding that “the Appellant provides liability insurance and name tag identifying the workers with the business.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally,

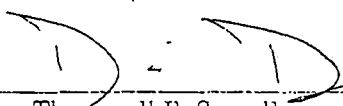
the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

5. The SCDEW erred and/or abused its discretion in its finding that "the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. The SCDEW erred and/or abused its discretion in its finding that "the workers are employees and should be reported for unemployment tax purposes." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Plaintiff

Columbia, South Carolina
June 30, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
)
)

IN THE COURT OF COMMON PLEAS
CASE NO. 2011-CP-40-04262

Rest Assured, LLC,
Plaintiff,

)
)

vs.

)
)

NOTICE OF SPECIAL
APPEARANCE AND
MOTION TO DISMISS

SC Department of Employment and Workforce,
Defendant.

)
)

TO: David C. Dick, Attorney for Plaintiff

NOTICE IS HEREBY GIVEN that the S.C. Department of Employment and Workforce, through its undersigned attorney, makes a special appearance and moves the Court to dismiss the Plaintiff's Petition and Notice of Intent to Appeal for lack of jurisdiction pursuant to Rule 12(b), South Carolina Rules of Civil Procedure, on the following grounds:

1. The petition filed with this court is ostensibly an appeal of a final agency decision of the S.C. Department of Employment and Workforce in an employer status case which determined the existence of an employee-employer relationship. This honorable court has no jurisdiction to review the Department's decision, consider this appeal or to grant the relief requested in the petition.
2. Jurisdiction of this matter is exclusively governed by S.C. Code Ann. §41-35-750 (as amended, 2010), which requires that a Petition for Judicial Review be filed in the Administrative Law Court within thirty days after the agency's decision. The transmittal letter which accompanied the agency decision informed Plaintiff that further appeal of this

decision must be filed with the SC Administrative Law Court pursuant to S.C. Code Ann. § 41-35-750. (Exhibit A)

WHEREFORE, the Defendant S.C. Department of Employment and Workforce prays that the Petition be dismissed with prejudice for lack of jurisdiction.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Romi Y. Robinson", is written over a horizontal line.

Romi Y. Robinson, Attorney for
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202
(803) 737-2666
(803) 737-0124 fax
legal@dew.sc.gov

Columbia, SC
July 11, 2011

EXHIBIT !

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

John L. Finan
Executive Director

May 31, 2011

Ms. Aretha Johnson
t/a Rest Assured, LLC
101 Rice Bent Way #8
Columbia, SC 29229

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Enclosed is a copy of the Appellate Panel decision issued in the above captioned case. You have the right to appeal this decision within thirty days to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. §41-35-750.

Higher Authority Appeals
803-737-0239

Enclosure

cc: Patrick Holmes
Barry Alexander
Leland Teal
File

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO. 11-CP-40-4262

Rest Assured LLC,
Plaintiff,)

vs.)

SC Dept. of Employment and
Workforce,
Defendant(s).)

AFFIDAVIT OF SERVICE

BY MAIL

PERSONALLY appeared before me Jessica Chesley, who being duly sworn, deposes and says: that she is the Administrative Legal Assistant for the SC Dept. of Employment and Workforce; that she served by mail a copy of the Answer of the SC Dept. of Employment and Workforce in reference to the above named case on the Plaintiff by mailing a copy thereof to the attorney for the Plaintiff addressed to: David Dick, Esquire, PO Box 11449, Columbia, SC 29211; that the postage was duly prepaid; and that it was deposited in the United States mail on the 11th day of July, 2011.

Jessica Chesley
Jessica Chesley

SWORN to before me this the

11th day of July, 2011

Ronald W. Robinson (LS)
Notary Public for South Carolina

My Commission Expires: 5/3/2012

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,	)	
	)	Docket No.
Appellant,	)	
	)	
v.	)	NOTICE OF APPEAL
	)	
South Carolina Department of	)	
Employment and Workforce,	)	
	)	
Respondent.	)	

YOU WILL PLEASE TAKE NOTICE that Rest Assured, LLC ("Rest Assured") by and through their undersigned attorneys, hereby appeals from the Appellate Panel Decision and Order of the South Carolina Department of Employment and Workforce ("SCDEW") Appellate Decision No. 2011-P-10, dated May 31, 2011, and received on June 3, 2011, in the above styled cause to the State of South Carolina Administrative Law Court pursuant to Rule 33, Rules of Civil Procedure for the Administrative Law Court. This matter was previously filed in the Circuit Court for Richland County. *See* Petition and Notice of Appeal attached as **Exhibit A**. The appeal was timely filed in Circuit Court. Rest Assured submits its grounds to reverse or modify the referenced agency decision on appeal as follows:

1. The SCDEW erred and/or abused its discretion in its finding that "[t]he Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an

FILED

JUL 15 2011

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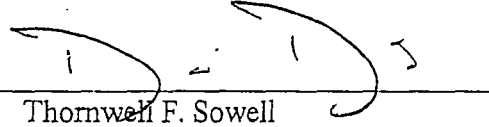
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7. Information required by Rule 33(A) is as follows:

Appellant: Rest Assured, LLC
101 Rice Bent Way, Suite 8
Columbia, SC 29229
Phone: 803-865-8113.

Appellant is represented by counsel whose information appears below.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

Phone: (803) 929-1400

Email: bsowell@sowellgray.com

ddick@sowellgray.com

Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
July 19, 2011

EXHIBIT A

2011 CP4004262

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) IN THE COURT OF COMMON PLEAS

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RICHLAND COUNTY
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SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Plaintiff Rest Assured, LLC

Columbia, South Carolina
June 30, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff(s)

vs.

South Carolina Department of Employment and
Workforce

Defendant(s)

(Please Print)

Submitted By: David C. Dick, Esquire

Address: Sowell Gray Stepp & Laffitte, LLC

Post Office Box 11449

Columbia, South Carolina 29211

SC Bar #: 78053

Telephone #: 803-929-1400

Fax #: 803-929-3600

Other:

E-mail: ddick@sowellgray.com

kanders@sowellgray.com

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You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff,

vs.

South Carolina Department of Employment
and Workforce,

Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2011- CP-40-

) PETITION AND NOTICE OF INTENT
) TO APPEAL

TO: THE HONORABLE JEANETTE W. MCBRIDE, CLERK OF COURT
RICHLAND COUNTY; AND SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE:

YOU WILL PLEASE TAKE NOTICE that plaintiff Rest Assured, LLC ("Rest Assured") by and through their undersigned attorneys, intends to and does hereby appeal from the Appellate Panel Decision and Order of the South Carolina Department of Employment and Workforce ("SCDEW") Appellate Decision No. 2011-P-10, dated May 31, 2011, and received on June 3, 2011, in the above styled cause to the Court of Common Pleas, Richland County, State of South Carolina, pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and South Carolina Rules of Civil Procedure R. 74. The plaintiff submits its grounds to reverse or modify the referened agency decision on appeal as follows:

1. The SCDEW erred and/or abused its discretion in its finding that "[t]he Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed." Said error being such finding ignores the evidence in the record and is not supported by the

substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. The SCDEW erred and/or abused its discretion in its finding that “[t]he Appellant controls the method and manner in which payment is made to the workers and collects all of the monies.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3. The SCDEW erred and/or abused its discretion in its finding that “[w]orkers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

4. The SCDEW erred and/or abused its discretion in its finding that “the Appellant provides liability insurance and name tag identifying the workers with the business.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally,

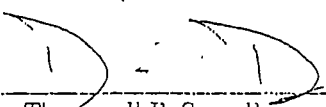
the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

5. The SCDEW erred and/or abused its discretion in its finding that "the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. The SCDEW erred and/or abused its discretion in its finding that "the workers are employees and should be reported for unemployment tax purposes." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Plaintiff

Columbia, South Carolina
June 30, 2011

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF:

Rest Assured, LLC)
101 Rice Bent Way #8)
Columbia, SC 29229)
Account No. 420688)
_____)

APPELLATE PANEL
DECISION

The Appellant in this case has sought review of Administrative Ruling 2006-8, issued February 16, 2007, holding that individuals working as home health aides for the Appellant are employees for the purposes of South Carolina law.

The Appellate Panel notified the parties of its hearing to consider the appeal.

APPLICABLE AUTHORITY

S.C. Code Ann. §41-27-230 (1) (b) defines employment as follows:

- (1) Any service... performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:
 - (b) Any individual, who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee....

An employer-employee relationship is established when an employer has control over the means and manner by which the work is performed. Four factors have been enumerated by the courts to evaluate the existence of an employer-employee relationship: (1) the right, or exercise, of control; (2) the method of

payment; (3) the right to discharge; and (4) the provision of tools or equipment.¹ Language in a contract or agreement declaring the existence of an independent contractor relationship is not dispositive.²

FACTS

The Appellant began operating on January 1, 2005, as a subchapter S corporation providing home health services for its clients. On January 11, 2006, the Appellant notified the Department that it would be using subcontractors for field assignments. The workers are not required to be certified as Certified Nursing Assistants. Most of the workers are not certified and most work for the Appellant as a second job to supplement their income. They must pass a criminal background check and possess minimal skills. The Appellant assigns workers to clients based on the client's need and the worker's skill level. Each worker signs an "Independent Contractor Agreement" when hired and his or her hourly salary is negotiated at that time. The Appellant is responsible for all monies and the worker is not involved in the financial transactions with the client. The Appellant provides some training and encourages workers to seek training away from the office. Workers are covered under the Appellant's liability insurance and are required to report any accidents. The Appellant asks workers not to escort clients; however, this occurs on occasion. The Appellant pays the workers even if the client does not pay. The workers have no

¹ Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

² Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993).

investment in the company. They are required to submit documentation weekly for services provided and the Appellant periodically contacts clients to assess the care the clients are receiving. The Appellant may terminate the contracts of the workers if they violate their contracts or act in a way which may be harmful to the business. Workers must wear a name tag identifying them with the Appellant. The badges are provided by the Appellant. The contract prohibits workers from employment with a competitor in the same industry.

DECISION

Administrative Ruling 2006-8, issued on February 16, 2007 is affirmed.³

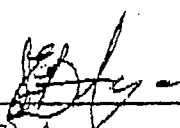
Under the usual common law rules, the relationship of employer and employee generally exists when the entity for whom services are performed has the right to control and direct the individual who performs the services both as to the results to be accomplished and as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer. In this context, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient that it has the right to do so. Merely labeling a worker independent does not establish independence. The substance of the relationship taken as a whole establishes whether an employer-employee relationship exists.

³ If this enterprise is operated as a partnership or sole proprietorship for tax purposes, the owner is not an employee, and his wages would not be reportable to the Department.

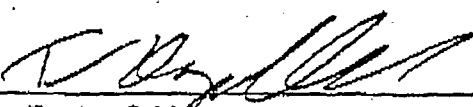
The Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed. The Appellant controls the method and manner in which payment is made to the workers and the collects all of the monies. Workers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services. Equipment is not furnished; however, the Appellant provides liability insurance and a name tag identifying the workers with the business. Finally, the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship.

Therefore, we find the workers are employees and should be reported for unemployment tax purposes. The Administrative Ruling is affirmed.

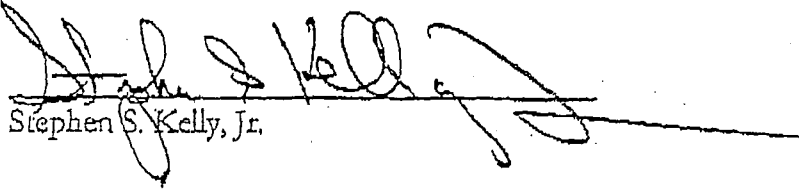
SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE



E.B. Ayers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 05/11/11
Date Mailed: 05/31/11
Mailed By: _____

Request for Transcript of Record

I, David C. Dick, Esquire, request the Transcript of the Record for the case *IN THE MATTER OF: REST ASSURED, LLC, 101 Rice Bent Way #8, Columbia, SC 29229, Account No. 420688, Docket No. 2006-8*. The hearing in this matter was held on May 11, 2011 before the Workforce Appellate Panel consisting of E.B. Ayers, Tim Dangerfield, and Stephen S. Kelly, Jr.

I understand that I am responsible for all costs with the preparation of this transcript pursuant to Rule 32 of the Rules of Procedure for the Administrative Law Court.



David C. Dick
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211

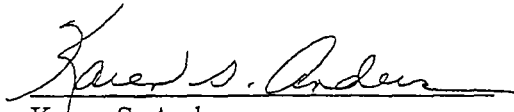
7/19/11
Dated

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for the Appellant Rest Assured, LLC, do hereby certify that I served the persons listed below with a copy of the pleading(s) hereinbelow by placing a copy of same in the U.S. Mail, postage prepaid, addressed as follows:

Pleadings: Notice of Appeal

Served: South Carolina Department of Employment and Workforce
Post Office Box 995
Columbia, South Carolina 29202


Karen S. Anders

July 19, 2011

FILED

JUL 15 2011

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,
Appellant,

vs.

SC Department of Employment and Workforce,
Respondent.

) Docket No. 11-ALJ-22-0381-AP
)
)

) NOTICE OF SPECIAL
) APPEARANCE AND
) MOTION TO DISMISS
)
)
)

TO: David C. Dick, Attorney for Appellant

NOTICE IS HEREBY GIVEN that the Respondent, S.C. Department of Employment and Workforce (Department), through its undersigned attorney, makes a special appearance and moves the Court to dismiss the Appellant's Notice of Appeal requesting judicial review of a final administrative decision of the Department for lack of jurisdiction pursuant to Rule 33 of the Rules of Procedure of the Administrative Law Court.

This Motion is made on the following grounds:

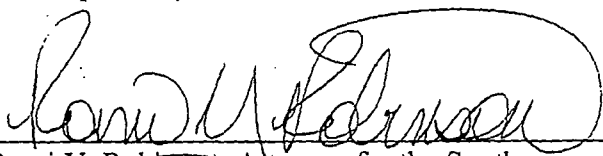
LACK OF JURISDICTION – FAILURE TO TIMELY FILE NOTICE OF APPEAL

1. This action is ostensibly a petition for judicial review of a final decision of the Department in an employer status case which determined the existence of an employee-employer relationship.
2. S.C. Code Ann. §41-35-750 requires that a petition for judicial review be filed in the Administrative Law Court and served upon the Department within thirty (30) days from the date of mailing the Department's decision.
3. ALC Rule 33 also requires that "the notice of appeal must be filed and served within thirty (30) days of the date of the decision". (Emphasis added.)

4. The final decision of the Department was mailed to the Appellant on May 31, 2011. Attached to the decision was a transmittal letter advising Appellant that any further appeal must be filed in the Administrative Law Court in accordance with S.C. Code Ann. §41-35-750. (See Exhibit A.)
5. Appellant filed this appeal with the Administrative Law Court on July 19, 2011, after the thirty day appeal period required by Court rules and the statute, and such requirement is mandatory for jurisdiction.
6. The Department is informed and believes that an appellate court lacks jurisdiction over an appeal when the notice of appeal is untimely. *See Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (2004).
7. The Department is also informed and believes that since the Appellant has not complied with the statutory requirements for the Court to obtain jurisdiction to review the Department's decision, the petition should be dismissed.

WHEREFORE, Respondent prays that the appeal be dismissed with prejudice and that all time requirements and deadlines be held in abeyance pending resolution of this motion.

Respectfully Submitted,



Romi Y. Robinson, Attorney for the South
Carolina Dept. of Employment and Workforce
Post Office Box 995
Columbia, SC 29202
803.737.2666
803.737.0124
legal@dew.sc.gov

Columbia, SC
August 2, 2011

EXHIBIT

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

John L. Finan
Executive Director

May 31, 2011

Ms. Aretha Johnson
t/a Rest Assured, LLC
101 Rice Bent Way #8
Columbia, SC 29229

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Enclosed is a copy of the Appellate Panel decision issued in the above captioned case. You have the right to appeal this decision within thirty days to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. §41-35-750.

Higher Authority Appeals
803-737-0239

Enclosure

cc: Patrick Holmes
Barry Alexander
Leland Teal
File

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured,	)	
Appellant,	)	DOCKET NO. 11-ALJ-22-0381-AP
	)	
v.	)	AFFIDAVIT OF SERVICE
	)	BY MAIL
SC Dept. of Employment and Workforce,	)	
Respondent(s).	)	
_____	)	

PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Administrative Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Motion to Dismiss of Respondent SC Department of Employment and Workforce in the above named action to the Petitioner by mailing a copy addressed to the Attorney for the Petitioner addressed to: David Dick, Esquire, PO Box 11449, Columbia, SC 29211, that the postage was duly prepaid; and that it was deposited in the United States Mail on the 2nd day of August, 2011.

Jessica Chesley
Jessica Chesley

SWORN to before me this the
2nd day of AUGUST, 2011

Randy Robinson (L.S.)

Notary Public for South Carolina

My Commission Expires: 5/31/2012

August 17, 2011

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

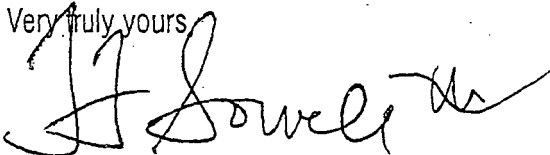
Re: Rest Assured, LLC vs. South Carolina Department of Employment and Workforce
Docket No.: 11-ALJ-22-0381-AP
Our File No.: 6251/1500

Dear Judge Anderson:

Enclosed is the original and one copy of the Response of Appellant Rest Assured, LLC to Motion to Dismiss of Respondent South Carolina Department of Employment and Workforce and Affidavit of Service by Mail in the above-referenced matter. I would appreciate your filing as appropriate and returning a clocked-in copy to me in the self-addressed, stamped envelope provided.

By copy of this letter and as evidenced by the Affidavit of Service by Mail, same has been served upon counsel for the Respondent. Please let me know if you have any questions.

Very truly yours,



Thornwell F. Sowell
TFS:ksa

cc: Romi Y. Robinson, Attorney for the South
Carolina Department of Employment and Workforce

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,	)	Docket No. 11-ALJ-22-0381-AP.
	)	
Appellant,	)	
	)	
vs.	)	RESPONSE OF APPELLANT REST
	)	ASSURED, LLC TO MOTION TO
	)	DISMISS OF RESPONDENT SOUTH
South Carolina Department of	)	CAROLINA DEPARTMENT OF
Employment and Workforce,	)	EMPLOYMENT AND WORKFORCE
	)	
Respondent.	)	
	)	
	)	

**TO: ROMI Y. ROBINSON, ATTORNEY FOR THE RESPONDENT, SOUTH
CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE**

In opposition to the Motion to Dismiss filed by the Respondent, S.C. Department of Employment and Workforce (SCDEW), Appellant Rest Assured, LLC (Rest Assured), by and through its undersigned counsel, submits this response.

FACTS

Rest Assured is a business acting as a placement firm for in-home care services. Rest Assured places personal care aides into clients' homes to help with the clients' daily care. On March 2, 2006, Ms. Philis R. Mefford, an Employment Status Supervisor with The South Carolina Employment Security Commission (SCESC) (currently known as SCDEW), 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 SCESC. 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, Rest Assured filed an application to appeal the Administrative Ruling of Chauntel Bland to the full Employment Security Commission. The SCESC acknowledged receipt of this appeal.

Rest Assured did not hear from the SCESC or the SCDEW until March 28, 2011 when Rest Assured was informed by the now SCDEW that the appeal had been scheduled for review. Counsel for Rest Assured promptly provided the SCDEW with a brief on Rest Assured's position, and informed the SCDEW: "Please be aware that the counsel for the Appellant has changed since the original ruling on February 16, 2007. Appellant was originally represented by Kenneth Davis, and is now represented by David Dick and Biff Sowell of the law firm Sowell Gray Stepp & Laffitte." *See Exhibit 1* attached hereto. The SCDEW acknowledged the change in counsel, and informed Rest Assured, with copy to its counsel, that a hearing would be held on May 11, 2011.

At the hearing on May 11, 2011, undersigned counsel for Rest Assured made oral arguments to the Appellate Panel. Subsequently, the SCDEW issued an Appellate Panel Decision and Order, Appellate Decision No. 2011-P-10, dated May 31, 2011. This decision was mailed directly to Rest Assured **with no copy to Rest Assured's counsel.** *See Exhibit 2* attached hereto. Prior to the issuance of the Appellate Decision, every correspondence with the SCESC and the SCDEW had copied counsel. *See Exhibit 3* attached hereto.

On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. *See Exhibit 4* attached hereto.

This appeal was filed in Richland County pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and South Carolina Rules of Civil Procedure R. 74. South Carolina Code of Regulations § 47-57 provides:

Any party to the appeal before the Commission who has exhausted his remedies before the Commission may, within such time as specified in the South Carolina Administrative Procedures Act, **file a petition with the Court of Common Pleas** for the County in which the employee resides or the County in which he was last employed, for a review of the decision of the Commission.

(emphasis added).

On July 11, 2011, the SCDEW filed a Notice of Special Appearance and a Motion to Dismiss the Richland County Court of Common Pleas action. *See Exhibit 5* attached hereto. This was the first instance counsel for Rest Assured was made aware of the letter (Exhibit 2) sent directly to Rest Assured.

ARGUMENT

Based on the foregoing facts, notice of the final decision of the SCDEW was not properly provided to Rest Assured. Accordingly, Rest Assured has timely filed this appeal and the Motion to Dismiss should be denied. In addition, Rest Assured's dispute with the SCESC and the SCDEW arose under the prior version of South Carolina Code § 41-35-750 which provided that the Court of Common Pleas was the appropriate jurisdiction.

Throughout the entire dispute process with the SCESC and the SCDEW Rest Assured was represented by counsel. Rest Assured was represented by counsel at the appeal before the SCDEW, and counsel made all oral and written arguments before the Appellant Panel. The SCDEW was aware that Rest Assured was represented by Sowell

Gray Stepp & Laffitte in this dispute. In every correspondence prior to the final decision of the SCDEW, counsel for Rest Assured was copied and provided notice.

However, counsel for Rest Assured **was not** copied on the notice of final decision by the SCDEW. "In general, notice to an attorney is notice to his client, **but obviously notice is not imputed to an attorney in all his personal, professional, and official connections from the fact that one of his clients has notice.**" *Wardlaw v. Troy Oil Mill*, 74 S.C. 368, 54 S.E. 658, 660 (1906) (emphasis added). Until the filing of SCDEW's Motion to Dismiss, Rest Assured and its counsel had never properly been noticed about the final decision of the SCDEW. Accordingly, Rest Assured is within the 30 days provided by Rule 33 of the Rules of Procedure of the Administrative Law Court to file its Notice of Appeal, and the SCDEW's motion to dismiss should be denied.

In addition to the improper notice, this dispute was brought under the former version of South Carolina Code § 41-35-750 which provided that the Court of Common Pleas was the appropriate jurisdiction. This dispute process was initiated in 2006 against the SCESC. In 2007, Rest Assured appealed before the entire Commission. During both of these time frames South Carolina Code § 41-35-750 provided that the Court of Common Pleas was the appropriate jurisdiction. It was not until March 30, 2010 that § 41-35-750 was changed to provide that the administrative law court retained jurisdiction over these disputes.

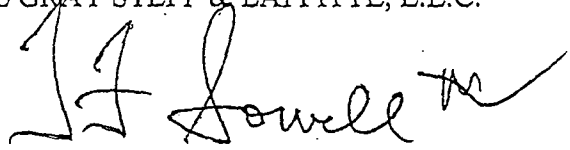
It is still not clear which court retains jurisdictions over these matters, as indicated by South Carolina Code of Regulations § 47-57. Coupled with the fact that Rest Assured was never provided proper notice of the final decision of the SCDEW or of the proper jurisdiction, it would be wholly unjust to allow the SCDEW to dismiss this action based

on a failure to timely file the appeal. Based on this argument, and for good cause shown, Rest Assured has properly filed its appeal based on the Rules of Procedure of the Administrative Law Court, and the SCDEW's motion to dismiss should be denied.

In the alternative, for good cause shown, the Administrative Law Judge, pursuant to Rule 3.B. of the Rules of Procedure for the Administrative Law Court, should extend the time for filing this appeal.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400
Email: bsowell@sowellgray.com
ddick@sowellgray.com

Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
August 17, 2011

EXHIBIT 1

April 6, 2011

The South Carolina Employment Security Commission
631 Hampton Street
P. O. Box 995
Columbia, South Carolina 29202
ATTN: Higher Authority Appeals

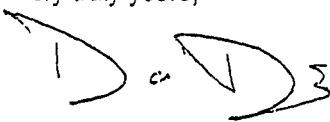
Re: Administrative Appeal #06-08

Dear Sirs:

Enclosed please find the original and one copy of the Brief of Appellant for consideration in the scheduled review before the Appellate Panel in the above-referenced matter. I would appreciate your returning a clocked-in copy to me in the self-addressed envelope also enclosed.

Do not hesitate to call me if you have any questions or need anything further in this regard.

Very truly yours,



David Dick
DCD:ksa
Enclosure

THE SOUTH CAROLINA
EMPLOYMENT SECURITY COMMISSION
631 Hampton Street
P.O. Box 995
Columbia, SC 29202

REST ASSURED, LLC	)	Appeal No. 2006-8
9400 TWO NOTCH ROAD, SUITE D	)	
COLUMBIA, SC 29223	)	
	)	BRIEF OF APPELLANT
	)	
Appellant: Reatha Johnson, Owner	)	
SCESC Account No. 420668	)	
	)	

Pursuant to notice dated March 28, 2011, Appellant Reatha Johnson ("Johnson"), Owner of Rest Assured, LLC ("Rest Assured"), provides this brief for review by the Appellate Panel in Appeal No. 2006-8. The brief is timely submitted, after counsel for the Appellant was informed by Ronny Hoover that the brief deadline was not as stated in the notice dated March 28, 2011. Please be aware that the counsel for the Appellant has changed since the original ruling on February 16, 2007. Appellant was originally represented by Kenneth Davis, and is now represented by David Dick and Biff Sowell of the law firm Sowell Gray Stepp & Laffitte.

In addition to this brief, counsel for the Appellant requests an opportunity to appear before the Appellate Panel and make a full argument. This case is over four years old, and counsel for the Appellant believes that it would be advantageous for all parties to hear arguments in person. By and through her appeal, Johnson asks that the Appellate Panel vacate the Administrative Ruling dated February 16, 2007 and states the following in support:

Background

The South Carolina Employment Security Commission ("SCESC") found that the relationship between our client, Rest Assured, Inc., and its workers, known as Personal Care Aides ("Aides"), was that of an employer-employee for unemployment tax purposes because Rest Assured "exercises sufficient control" over its workers. This brief analyzes the factors related to the Aides and their independent contractor status.

Analysis

Pursuant to the South Carolina Labor and Employment Act, the SCESC uses, among other specific provisions, common law rules to determine whether an employer-employee relationship exists versus an independent contractor relationship. S.C. Code Ann. § 41-27-230(1)(b) (1976). The common law rules regarding the employee/independent contractor analysis have developed in the context of a wide spectrum of agencies. For example, many workers' compensation cases cite to employment security cases for propositions regarding the employee/independent contractor relationship, and vice versa. As such, our guidance will necessarily draw from a number of cases outside of the SCESC context.

Even so, the settled law in South Carolina is that the determination of whether a worker is an employee or an independent contractor focuses on the issue of control; specifically, whether the purported employer had the right to control the worker 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) (citing *Ray Covington Realtors*, 318 S.C. at 547, 459 S.E.2d at 303; *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971)). In evaluating the right to control, the court examines 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) the furnishing of equipment; (3) the method of payment; and (4) the right to fire. *Id.* (citing *Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970); *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000)). In *Wilkinson*, the South Carolina Supreme Court overturned its traditional employee-friendly analysis, and returned to a “jurisprudence that evaluates the four factors with equal force in both directions.” *Id.*

When a court’s or an agency’s employment determination is challenged, the court will begin its analysis with the terms of the agreement itself. *Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702 (“In evaluating the four factors, we are guided initially by the parties’ independent contractor agreement.”). However, the court is ultimately guided by the parties’ conduct “which mirror[s] the terms of the contract.” *Id.* (citing *Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (noting that “in determining the nature of [the parties’] relationship,” the contract “has considerable weight,” but recognizing that “language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive”)). “Though the parties do not control the legal effect of the contract, the primary test of the contract’s character is the intention of the parties, which is to be gathered from the whole scope of the language used.” Anderson, *Master and Servant – Test for Independent Contractor v. Employee*, S.C. Requests to Charge - Civil, § 5-12 (2002); see also *Todd’s Ice Cream, Inc. v. S.C. Employment Sec. Comm’n*, 281 S.C. 254, 258, 315 S.E.2d 373, 376 (Ct. App. 1984). Therefore, it is instrumental to look at the terms of the contract with the Aides.

- Termination Provision

The SCESC found that two specific terms in the Independent Contractor Agreement between Rest Assured and its Aides indicate control: the termination clause and the covenant-not-to-compete. Without explaining further, the opinion states that because Rest Assured has the right to terminate the assistants at the request of the client, this is a form of control. The SCESC fails to mention that both Rest Assured and a contractor may terminate the agreement at any time prior to completion. As noted by the *Wilkinson* court, an important consideration regarding the "right to fire" is "the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term 'fire,' for it embraces the employment relationship." *Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704. The *Wilkinson* Court ultimately concluded that where termination was controlled by the terms of their agreement, and the putative employer did not retain the "right to fire," a finding of an independent contractor arrangement was warranted. *Id.*

Accordingly, it is important to note that Rest Assured has no control over the means and methods of the Aides work. See *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437, reh'g denied, 322 N.C. 116, 367 S.E.2d 923 (1988)). ("The right to fire is one of the most effective means of control. An independent contractor is subject to discharge only for cause and not because he adopts one method of work over another. An employee, on the other hand, may be discharged without cause at any time."). Rest Assured does not retain the right to fire the Aide; rather it only retains the right to terminate the agreement. The Aide also retains the same right. Rest Assured is acting only as a personal aide broker, connecting the Aide and the client. A

termination of the agreement would only mean the Aide would no longer be placed into the pool of eligible applicants for a job.

The right to fire as it relates to an employment relationship centers on whether that right creates some control in the alleged employee. However, in Rest Assured's case it provides no right to control. The agreement with Aides is only terminated if the Aide fails to show up or the client is dissatisfied. This is analogous to the situation of a construction subcontractor who may be fired if he fails to do the job or the client (the owner) is dissatisfied. Rest Assured in no way controls the Aides work, and if the job is completed to the clients' satisfaction, the agreement remains in effect.

- **Non-Compete Clause**

The SCESC also found that the provision prohibiting the workers from competing with Rest Assured is a form of control. However, despite this non-compete clause it does not prevent the Aide from working for other home care agencies or employers. See, e.g., *Rhoney v. Fele*, 134 N.C. App. 614, 619, 518 S.E.2d 536, 539 (Ct. App. 1999) (listing as a factor supporting a finding that a registered nurse was an independent contractor to a placement service that the nurse "could and did provide nursing services through other placement services. . . ."). In fact, at the hearing, Johnson handed up a document that showed that of Rest Assured roughly 250 Aides, over 90% of them work for other agencies as well.

In addition, the IRS considers "independent contractors" who receive all of their income from one source "employees." David E. Dubberly, *Structuring and Managing Contingent Worker Arrangements*, 10-FEB S.C. Law. 38 (January/February, 1999)

(citing Rev. Rul. 87-41, 1987-1 C.B. 296). However, this is clearly not the case with the Rest Assured Aides.

Regarding the in-home nursing field specifically, one Florida case notes that where nurses are allowed to offer their services to the general public and to other registry services during the same period that they are available for placement by an agency, this suggests independent contractor status. *In re Serino*, 190 B.R. 778 (Bankr. M.D. Pa. 1995). It is clear that the majority of Aides for Rest Assured also work for similar personal care agencies and are therefore not the employees of Rest Assured.

- **Other Conduct Indicating Control**

Aside from the agreement itself, the SCESC found that the parties' conduct manifests Rest Assured's control over its workers; specifically referring to the client services, fees, and reports in Rest Assured's control. The control principle provides that "if the employee is not free to do much of what he could otherwise do, he is an employee and not an independent contractor." *Nelson v. Yellow Cab Co.* 349 S.C. 589, 564 S.E.2d 110 (2002).

As direct evidence of the right to or the actual exercise of control, courts have considered whether the employer inspects the work in progress, the terms of any written or oral contracts and, for temporary workers, the chain of contractual authority that leads from the worker to the employer and from the employer to the client business that exercises control and direction on the job site. *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993); *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996).

When jobs are subject to change during their execution according to the customer's wishes which are communicated to the employer, who then gives appropriate instructions to the worker, with which the latter is obligated to comply, the worker is likely to be considered an employee. *Chavis v. Watkins*, 256 S.C. 30, 180 S.E.2d 648 (1971). This is because the agent lacks autonomy to deal with the customer directly. With regard to the Rest Assured Aides, it is the customer who directs the actions of the Aides. The customer does not tell Rest Assured how the Aide is to perform their job; rather those matters are discussed directly with the Aide.

It is important to note that the control element applies to the Aide's nursing—the function for which Rest Assured hired him/her. Despite control over extraneous aspects of the nurse's work, such as the dates and times when work is offered and collection of compensation, where Rest Assured exercises no control over the actual method of service, then the contractor is more likely a free agent. The more similar Rest Assured's role is "to that of a broker or other middleman," the more likely a court will not find sufficient control to create an employment relationship. See, e.g., *Rhoney v. Fele*, 134 N.C.App. 614, 619, 518 S.E.2d 536, 539 (N.C. App. 1999). As such, the provision in the written agreement that states that the individual contractor (Aide) and the patient set their hours of work, without input by Rest Assured, weighs heavily in favor of independent contractor status. See, e.g., *In re Serino*. Further, an employment relationship is not indicated where the employer does not require any specific number of hours worked. *Id.* Clearly the Aides for Rest Assured do not fall within the scope of employees.

- Training and Supervision

The SCESC also lists training and Rest Assured's supervision of services as an element of control. The existence of the power to supervise an individual does not necessarily establish an employment relationship, 20 S.C. Jur. Master and Servant § 2. Again, Rest assured does not supervise the Aides or control their method of work. Rest Assured makes occasional visits to the homes of the clients, but this is to ensure client satisfaction, not to supervise or control the Aide.

As an additional argument, the health care industry, unlike other service providers, is heavily regulated and monitored by governmental agencies. Arguably, reasonable supervision by Rest Assured is required to ensure that its independent contractors are complying with state and federal health codes. In any event, "requiring a worker to comply with the law is not evidence of control by the putative employer." *Wilkinson*, 382 S.C. at 302, 676 S.E.2d at 703 (quoting *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 563 Pa.480, 762 A.2d 328, 335 (2000) ("employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status.")). Stated differently, "a strong regulatory presence equates with control by the government, not the putative employer." *Id.*

- Method of Payment

The SCESC also found that Rest Assured controls the method of payment by requiring reports from the Aide and insuring payment to the Aide even if the client defaults. However, "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." 20 S.C. Jur. Master and Servant § 2.

While South Carolina Courts have generally held that hourly pay is an indicator of employment status, it is not dispositive. The personal care aide profession makes it impossible for there to be any other compensation system other than hourly. It is clear that this factor should weigh very little in this analysis, as there is no other feasible alternative to payment.

- **Identification with the Company**

The SCESC found that the Aides' identification with Rest Assured by wearing a company name tag also indicates control to negate an independent contractor relationship. However, the employer-employee relationship does not arise simply because someone displays a company's emblem and sells the company's product. 20 S.C. Jur. Master and Servant § 2.

The court in *Wilkinson* refuted the argument that a company name tag reflected an employment relationship, where as possibly here, a name tag was required by accreditation guidelines and/or applicable provisions of state or federal law. *Wilkinson*, 382 S.C. at 302, 676 S.E.2d at 703 ("requiring a worker to comply with the law is not evidence of control by the putative employer.").

- **Indispensability of Workers**

The SCESC also found as an additional factor that the indispensability of the Aides in question to Rest Assured's business indicates an employer-employee relationship. If an individual's work is sporadic rather than regular and the individual is able to accept or reject a job assignment offered by Rest Assured, a court is more likely to

find the requisite autonomy of an independent contractor. See, e.g., *Rhoney v. Fele*, 134 N.C.App. 614, 619, 518 S.E.2d 536, 539 (N.C. App. 1999).

Additionally, a typical independent contractor provides skilled labor, including registered nurses. *Hospital Resource Personnel, Inc. v. United States*, 94-2 U.S. Tax. Cas. (CCH) ¶ 50, 341 (S.D. Ga. 1994); *Critical Care Register Nursing, Inc. v. United States*, 776 F. Supp. 1025 (E.D. Pa. 1991). Again, Rest Assured only acts as a broker of these Aides, and they do not employ them.

- **Furnishing of Equipment and Transportation**

The SCESC seems to completely ignore the provision of equipment/tools factor in its employment/independent contractor analysis. H.W. Funderburk, Jr., *Independent Contractors, Temporary Workers: More Myth than Reality*, 11-FEB S.C. Law. 15 (January/February 2000) ("The third factor is the furnishing of equipment by the employer."). Such equipment includes tools, materials, supplies, office space, clerical support, uniforms, business cards, order forms, and price lists. *South Carolina Industrial Commission v. Progressive Life Ins. Co.*, 242 S.C. 547, 131 S.E.2d 694 (1963) (agents were provided supplies, including forms, rate scales, policies, lapse schedule and instruction manual). Rest Assured's Independent Contractor Agreement explicitly states that the Aide is responsible for all supplies and transportation and associated operating costs incurred to provide services. Moreover, the Aides are responsible for maintaining their own licenses and proving at least ten hours of professional training each year. Again, this factor weighs heavily in finding the Aides are independent contractors.

- **Control in the Home Healthcare Context**

A 1995 bankruptcy case provides additional guidance for home health agencies such as Rest Assured. In *In re Serino*, 190 B.R. 778 (Bkrtcy.M.D.Pa. 1995) the court found that a nursing registry operator was not the employer of nurses for federal withholding tax purposes. Even though the nurses were paid on hourly basis and made little investment in their trade apart from education, the nurses controlled the nurse-patient relationship. This was true even though the agency provided nurses with workers' compensation insurance for a short period of time, and the agency would suffer complete loss of income without nurses' services.

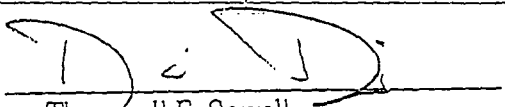
Where, as here, the patients and nurses set working hours rather than the agency and no work occurs at the agency's office, nurse's furnish their own tools, and are not given benefits other than compensation for services rendered, the court found the requisite indicia of control lacking to find an employment relationship.

Conclusion

It is clear that South Carolina looks mainly to the control exerted over the Aides to determine their employment status. In Rest Assured's case, the Aides are allowed to pick and choose their own schedule, accept or deny jobs, perform the tasks and jobs however they see fit, and provide their own equipment and training. Rest Assured acts only as a broker, posting the available jobs and allowing the Aides to pick and choose them accordingly. Rest Assured exerts no control over these Aides, and they are free to do as they please as long as the job is completed to the clients' satisfaction. As with any contractor, it is only the final outcome that Rest Assured is interested in. Because Rest Assured exerts little to no control over the Aides, Appellant asks this Appellate Panel to

vacate the Administrative Ruling dated February 16, 2007, and find that the Aides are independent contractors for unemployment tax purposes.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell

David C. Dick

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Rest Assured, LLC

Columbia, South Carolina
April 6, 2011

EXHIBIT 2

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www.dew.sc.gov



Nikki R. Haley
Governor

John L. Finan
Executive Director

May 31, 2011

Ms. Aretha Johnson
t/a Rest Assured, LLC
101 Rice Bent Way #8
Columbia, SC 29229

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Enclosed is a copy of the Appellate Panel decision issued in the above captioned case. You have the right to appeal this decision within thirty days to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. §41-35-750.

Higher Authority Appeals
803-737-0239

Enclosure

cc: Patrick Holmes
Barry Alexander
Leland Teal
File

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF:

Rest Assured, LLC)
101 Rice Bent Way #8)
Columbia, SC 29229)
Account No. 420688)

APPELLATE PANEL
DECISION

The Appellant in this case has sought review of Administrative Ruling 2006-8, issued February 16, 2007, holding that individuals working as home health aides for the Appellant are employees for the purposes of South Carolina law.

The Appellate Panel notified the parties of its hearing to consider the appeal.

APPLICABLE AUTHORITY

S.C. Code Ann. §41-27-230 (1) (b) defines employment as follows:

- (1) Any service... performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:
 - (b) Any individual, who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee....

An employer-employee relationship is established when an employer has control over the means and manner by which the work is performed. Four factors have been enumerated by the courts to evaluate the existence of an employer-employee relationship: (1) the right, or exercise, of control; (2) the method of

payment; (3) the right to discharge; and (4) the provision of tools or equipment.¹

Language in a contract or agreement declaring the existence of an independent contractor relationship is not dispositive.²

FACTS

The Appellant began operating on January 1, 2005, as a subchapter S corporation providing home health services for its clients. On January 11, 2006, the Appellant notified the Department that it would be using subcontractors for field assignments. The workers are not required to be certified as Certified Nursing Assistants. Most of the workers are not certified and most work for the Appellant as a second job to supplement their income. They must pass a criminal background check and possess minimal skills. The Appellant assigns workers to clients based on the client's need and the worker's skill level. Each worker signs an "Independent Contractor Agreement" when hired and his or her hourly salary is negotiated at that time. The Appellant is responsible for all monies and the worker is not involved in the financial transactions with the client. The Appellant provides some training and encourages workers to seek training away from the office. Workers are covered under the Appellant's liability insurance and are required to report any accidents. The Appellant asks workers not to escort clients; however, this occurs on occasion. The Appellant pays the workers even if the client does not pay. The workers have no

¹ Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

² Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993).

investment in the company. They are required to submit documentation weekly for services provided and the Appellant periodically contacts clients to assess the care the clients are receiving. The Appellant may terminate the contracts of the workers if they violate their contracts or act in a way which may be harmful to the business. Workers must wear a name tag identifying them with the Appellant. The badges are provided by the Appellant. The contract prohibits workers from employment with a competitor in the same industry.

DECISION

Administrative Ruling 2006-8, issued on February 16, 2007 is affirmed.³

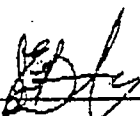
Under the usual common law rules, the relationship of employer and employee generally exists when the entity for whom services are performed has the right to control and direct the individual who performs the services both as to the results to be accomplished and as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer. In this context, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient that it has the right to do so. Merely labeling a worker independent does not establish independence. The substance of the relationship taken as a whole establishes whether an employer-employee relationship exists.

³ If this enterprise is operated as a partnership or sole proprietorship for tax purposes, the owner is not an employee, and his wages would not be reportable to the Department.

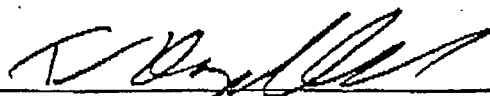
The Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed. The Appellant controls the method and manner in which payment is made to the workers and the collects all of the monies. Workers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services. Equipment is not furnished; however, the Appellant provides liability insurance and a name tag identifying the workers with the business. Finally, the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship.

Therefore, we find the workers are employees and should be reported for unemployment tax purposes. The Administrative Ruling is affirmed.

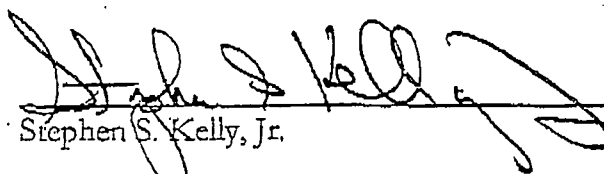
SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE



E.B. Ayers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 05/11/11
Date Mailed: 05/31/11
Mailed By: _____

EXHIBIT 3

PO Box 995
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Nikki R. Haley
Governor

John L. Finan
Executive Director

P. O. Box 995
631 Hampton Street
Columbia, SC 29202
(803) 737-2663
(803) 737-0124 Fax

April 27, 2011

Rest Assured, LLC
Attn: Aretha Johnson
9400 Two Notch Road, Suite D
Columbia, SC 29223

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Please take notice that a hearing will be held by the Appellate Panel in the above captioned appeal on **Wednesday, May 11, 2011 at 2:00 PM** in Room 350 at its offices located at 631 Hampton Street, Columbia, South Carolina.

No further testimony will be taken, and the case will be considered upon the record already compiled.

Higher Authority Appeals

Enclosures

cc: File
David Dick, Esquire
Biff Sowell, Esquire

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Columbia, SC 29202
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Nikki R. Haley
Governor

John L. Finan
Executive Director

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(803) 737-2663
(803) 737-0124 Fax

April 22, 2011

Rest Assured, LLC
Attn: Aretha Johnson
9400 Two Notch Road, Suite D
Columbia, SC 29223

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Please take notice that a hearing will be held by the Appellate Panel in the above captioned appeal on **Wednesday, May 11, 2011 at 9:30 AM** in Room 350 at its offices located at 631 Hampton Street, Columbia, South Carolina.

No further testimony will be taken, and the case will be considered upon the record already compiled.

Higher Authority Appeals

Enclosures

cc: File
David Dick, Esquire
Biff Sowell, Esquire

DIRECTIONS TO THE HARPER BUILDING FOR
APPELLATE PANEL HEARINGS
PARKING AND ENTRANCE ON WAYNE STREET

I-20 West from Florence, SC - turn off at SC 277 (Exit 73) towards Columbia. Stay on this freeway which becomes Bull Street. Follow Bull Street until it intersects with Taylor Street. Turn right on Taylor Street and proceed across Assembly Street and Gadsden Street (first light after Assembly). One block after Gadsden Street, take a left at the top of the hill at the next intersection onto Wayne Street. The Harper Building will be on the right at the corner of Wayne and Hampton.

I-20 East from N. Augusta, SC - turn off at Exit 64 (I-26 and I-126 to Columbia) and exit right onto Huger Street. Turn left onto Hampton Street and cross a bridge over a railroad and take the next left onto Wayne Street. The Harper Building is on the corner of Wayne and Hampton.

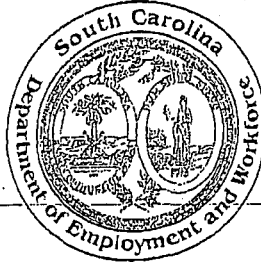
I-26 East from Spartanburg, SC - follow I-126/US 76 toward downtown Columbia and exit right onto Huger Street. Turn left onto Hampton Street and cross a bridge over a railroad and take the next left onto Wayne Street. The Harper Building is on the corner of Wayne and Hampton.

I-26 West from Charleston, SC - take the exit 111-B (US 1) and continue until you see the Congaree River. The street name changes from Meeting Street to Gervais Street after you cross the bridge. After the State Museum, take a left onto Huger Street. Proceed to the next traffic light and take a right onto Hampton Street. Cross a bridge over a railroad and take a left onto Wayne Street. The Harper Building is on the corner of Wayne and Hampton.

US 76/378 from Sumter, SC - US 76/378 will change from Sumter Highway to Garners Ferry Road to Devine Street. Devine Street will intersect with Harden Street at Five Points. Turn right onto Harden Street and follow Harden Street until you reach Taylor Street. Turn left onto Taylor Street. You will cross Assembly and Gadsden (first light after Assembly Street). One block after Gadsden Street, take a left at the top of the hill at the next intersection onto Wayne Street. The Harper Building will be on the right at the corner of Wayne and Hampton.

I-77 from Charlotte, NC - exit onto SC 277 towards Columbia. Stay on this freeway which becomes Bull Street. Follow Bull Street until it intersects with Taylor Street. Turn right on Taylor Street and proceed until you cross Assembly Street and then Gadsden Street (first light after Assembly). One block after Gadsden Street, take a left at the top of the hill at the next intersection onto Wayne Street. The Harper Building will be on the right at the corner of Hampton and Wayne.

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Nikki R. Haley
Governor

John L. Finan
Executive Director

P. O. Box 995
631 Hampton Street
Columbia, SC 29202

March 28, 2011

Rest Assured, LLC
101 Rice Bent Way
Columbia, SC 29229

RE: Administrative Appeal #06-08

The above captioned appeal has been scheduled for review before the Appellate Panel. No further evidence or testimony will be received; however, you may submit a written argument or brief for consideration. Your submission must be postmarked or received no later than seven (7) days from the mailing date of this notice, to be considered.

A written decision will be issued by the Appellate Panel following their review.

Higher Authority Appeals
803.737.2663

File
Kenneth Davis, Esquire

COMMISSIONERS
J. William McLeod
Becky D. Richardson
McKinley Washington, Jr.

EXECUTIVE DIRECTOR
Roosevelt T. Halléy
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April 19, 2007

VIA FACSIMILE AND US MAIL

Kenneth A. Davis, Esquire
PO Box 11844
Columbia, SC 29211

RE: *Appeal No. 06-08*
Account No. 420688

Dear Mr. Davis:

This is to acknowledge receipt of your letter appealing the administrative ruling in the above referenced case to the full Commission. We are accepting your letter of appeal and you will be notified of the date and time for a hearing and receive a copy of the transcript of testimony at a later date. If you have any questions, please contact me at the above number.

With kind regards, I am

Sincerely,

Jessica Chesley

Jessica Chesley
Administrative Legal Assistant

cc: Jimmy Jones
Allen Larson
Jim Singleton
Field Service
Phillis Mefford

EXHIBIT 4

201 1 CP400 4262

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) FIFTH JUDICIAL CIRCUIT

Rest Assured, LLC,

) Civil Action No.: 2010-CP-40-

Plaintiff,

vs.

South Carolina Department of
Employment and Workforce,

Defendant.

SUMMONS

JEANETTE H. WOODRIDGE
C.C.P. & G.S.

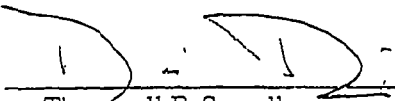
2011 JUN 30 PM 4:09

RICHLAND COUNTY
FILED

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to make the necessary filing with the Court in response to the Petition and Notice of Intent to Appeal in the above captioned action, a copy of which is herewith served upon you, and to serve a copy of your response on the subscribers located at 1310 Gadsden Street, Post Office Box 11449, Columbia, South Carolina 29211, as required after service hereof, exclusive of the day of such service.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thorndell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Plaintiff Rest Assured, LLC

Columbia, South Carolina
June 30, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff(s)

vs.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP -

South Carolina Department of Employment and
Workforce

Defendant(s)

(Please Print)

Submitted By: David C. Dick, Esquire

Address: Sowell Gray Stepp & Laffitte, LLC

Post Office Box 11449

Columbia, South Carolina 29211

SC Bar #: 78053

Telephone #: 803-929-1400

Fax #: 803-929-3600

Other:

E-mail: ddick@sowellgray.com

kanders@sowellgray.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20__-CP-____ | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | ☐ Notice/ File Med Mal (230) | ☐ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |
-
- | | | | |
|--|---|---|--|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| | ☐ Transcript Judgment (740) | ☐ Forfeiture-Petition (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Forfeiture-Consent Order (850) | ☐ SCDOT (950) |
| | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Other (899) | ☐ Worker's Comp (960) |
| | ☐ Other (799) | | ☐ Zoning Board (970) |
-
- | | | |
|--|--|---------------------------------------|
| Special/Complex /Other | Pharmaceuticals (630) | Employment Security Comm (991) |
| ☐ Environmental (600) | ☐ Unfair Trade Practices (640) | ☐ Other (999) |
| ☐ Automobile Arb. (610) | ☐ Out-of State Depositions (650) | |
| ☐ Medical (620) | ☐ Motion to Quash Subpoena in an Out-of-County Action (660) | |
| ☐ Other (699) | ☐ Sexual Predator (510) | |

Submitting Party Signature: _____

Date: 06/30/2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Rest Assured, LLC,) Civil Action No.: 2011- CP-40-

Plaintiff,)

vs.)

PETITION AND NOTICE OF INTENT
TO APPEAL

South Carolina Department of Employment
and Workforce,)

Defendant.)

TO: THE HONORABLE JEANETTE W. MCBRIDE, CLERK OF COURT
RICHLAND COUNTY; AND SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE:

2011 JUN 30 PM 4:09
JEANETTE W. MCBRIDE
C.C.P. & G.S.
FILED
RICHLAND COUNTY

YOU WILL PLEASE TAKE NOTICE that plaintiff Rest Assured, LLC ("Rest Assured") by and through their undersigned attorneys, intends to and does hereby appeal from the Appellate Panel Decision and Order of the South Carolina Department of Employment and Workforce ("SCDEW") Appellate Decision No. 2011-P-10, dated May 31, 2011, and received on June 3, 2011, in the above styled cause to the Court of Common Pleas, Richland County, State of South Carolina, pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and South Carolina Rules of Civil Procedure R. 74. The plaintiff submits its grounds to reverse or modify the referened agency decision on appeal as follows:

1. The SCDEW erred and/or abused its discretion in its finding that "[t]he Appellant exercises control over its workers by offering training and assigning and supervising work. It has control over the manner in which the work is performed." Said error being such finding ignores the evidence in the record and is not supported by the

substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. The SCDEW erred and/or abused its discretion in its finding that “[t]he Appellant controls the method and manner in which payment is made to the workers and collects all of the monies.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3. The SCDEW erred and/or abused its discretion in its finding that “[w]orkers are an integral part of the business and essential to the operation and success of the business. They have no investment in the business and do not stand to lose if clients do not pay for services.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

4. The SCDEW erred and/or abused its discretion in its finding that “the Appellant provides liability insurance and name tag identifying the workers with the business.” Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally,

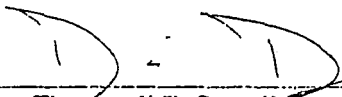
the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

5. The SCDEW erred and/or abused its discretion in its finding that "the Appellant may supervise and may terminate workers if they violate their contract or the Appellant's expectations. This is indicative of an employee-employer relationship." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. The SCDEW erred and/or abused its discretion in its finding that "the workers are employees and should be reported for unemployment tax purposes." Said error being such finding ignores the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Plaintiff

Columbia, South Carolina
June 30, 2011

EXHIBIT 5

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

John L. Finan
Executive Director

631 Hampton Street
P.O. Box 995
Columbia, South Carolina 29202
(803) 737-2666
FAX (803) 737-0124

July 11, 2011

The Honorable Jeanette McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, SC 29202

RE: Rest Assured LLC v. SC DEW
Case No. 11-CP-40-04262

Dear Clerk:

Enclosed please find the original and one copy of the Defendant's Notice of Special Appearance and Motion to Dismiss in the above case. Also enclosed is an Affidavit of Service to the Plaintiff. If you have any questions, please contact me at the address or number above.

With kind regards, I am,

Sincerely,

A handwritten signature in cursive script that reads "Jessica Chesley".

Jessica Chesley
Legal Assistant for
Romi Y. Robinson, Esq.
SC Dept. of Employment and Workforce
legal@dew.sc.gov

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
) IN THE COURT OF COMMON PLEAS
) CASE NO. 2011-CP-40-04262

Rest Assured, LLC,)
 Plaintiff,)
)
 vs.)
)
SC Department of Employment and Workforce,)
 Defendant.)
)

NOTICE OF SPECIAL
APPEARANCE AND
MOTION TO DISMISS

TO: David C. Dick, Attorney for Plaintiff

NOTICE IS HEREBY GIVEN that the S.C. Department of Employment and Workforce, through its undersigned attorney, makes a special appearance and moves the Court to dismiss the Plaintiff's Petition and Notice of Intent to Appeal for lack of jurisdiction pursuant to Rule 12(b), South Carolina Rules of Civil Procedure, on the following grounds:

1. The petition filed with this court is ostensibly an appeal of a final agency decision of the S.C. Department of Employment and Workforce in an employer status case which determined the existence of an employee-employer relationship. This honorable court has no jurisdiction to review the Department's decision, consider this appeal or to grant the relief requested in the petition.
2. Jurisdiction of this matter is exclusively governed by S.C. Code Ann. §41-35-750 (as amended, 2010), which requires that a Petition for Judicial Review be filed in the Administrative Law Court within thirty days after the agency's decision. The transmittal letter which accompanied the agency decision informed Plaintiff that further appeal of this

decision must be filed with the SC Administrative Law Court pursuant to S.C. Code Ann. §
41-35-750. (Exhibit A)

WHEREFORE, the Defendant S.C. Department of Employment and Workforce
prays that the Petition be dismissed with prejudice for lack of jurisdiction.

Respectfully Submitted,

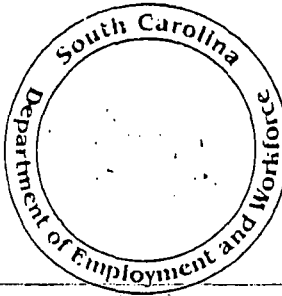
A handwritten signature in black ink, appearing to read "Romi Y. Robinson", written over a horizontal line.

Romi Y. Robinson, Attorney for
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202
(803) 737-2666
(803) 737-0124 fax
legal@dew.sc.gov

Columbia, SC
July 11, 2011

EXHIBIT A

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

John L. Finan
Executive Director

May 31, 2011

Ms. Aretha Johnson
t/a Rest Assured, LLC
101 Rice Bent Way #8
Columbia, SC 29229

RE: Administrative Appeal 06-08

Dear Ms. Johnson:

Enclosed is a copy of the Appellate Panel decision issued in the above captioned case. You have the right to appeal this decision within thirty days to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. §41-35-750.

Higher Authority Appeals
803-737-0239

Enclosure

cc: Patrick Holmes
Barry Alexander
Leland Teal
File

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO. 11-CP-40-4262

Rest Assured LLC,
Plaintiff,
)
vs.)
)
SC Dept. of Employment and)
Workforce,)
Defendant(s).)

AFFIDAVIT OF SERVICE

BY MAIL

PERSONALLY appeared before me Jessica Chesley, who being duly sworn, deposes and says: that she is the Administrative Legal Assistant for the SC Dept. of Employment and Workforce; that she served by mail a copy of the Answer of the SC Dept. of Employment and Workforce in reference to the above named case on the Plaintiff by mailing a copy thereof to the attorney for the Plaintiff addressed to: David Dick, Esquire, PO Box 11449, Columbia, SC 29211; that the postage was duly prepaid; and that it was deposited in the United States mail on the 11th day of July, 2011.

Jessica Chesley
Jessica Chesley

SWORN to before me this the
11th day of July, 2011
Ronald H. Johnson (LS)
Notary Public for South Carolina
My Commission Expires: 5/3/2012

September 12, 2011

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Re: Rest Assured, LLC vs. South Carolina Department of Employment and Workforce
Docket No.: 11-ALJ-22-0381-AP
Our File No.: 6251/1500

Dear Judge Anderson:

Enclosed is the original and one copy of a Notice and Motion for Rehearing along with our Firm's check in the amount of Fifty and 00/100 Dollars (\$50.00) representative of the filing fee. I would appreciate your filing as appropriate and returning a clocked-in copy to me in the self-addressed, stamped envelope provided.

By copy of this letter and as evidenced by the Affidavit of Service and Filing by Mail, same has been served upon counsel for the Respondent. Please let me know if you have any questions.

Very truly yours,



David C. Dick
DCD:ksa

cc: Romi Y. Robinson, Attorney for the South
Carolina Department of Employment and Workforce

106

and timely *served* on the South Carolina Department of Employment and Workforce. See **Exhibit A** attached hereto. "Most state jurisdictions follow the rule that notices of appeal are to be liberally construed in favor of their sufficiency so long as the opposing party has not misled to his or her irreparable harm." 5 AM. JUR. 2D *Appellate Review* § 294. Because Rest Assured served the South Carolina Department of Employment and Workforce with a notice of appeal within the 30 days, and the Department has not been misled to its detriment, the Court should reverse its prior Order and deny the Motion to Dismiss.

WHEREFORE, Appellant prays that the Court rehear and reverse its prior Order dated August 30, 2011, and deny the Respondent's Motion to Dismiss.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:  

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400
Email: bsowell@sowellgray.com
ddick@sowellgray.com

Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
September 12, 2011

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff,

vs.

South Carolina Department of Employment
and Workforce,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011- CP-40-04262

JEANETTE WYMCBRIDE
C.C.P. & G.S.

2011 JUL -6 PM 4:10

FILED

SENDER - COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
☒ Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ☒ Print your name and address on the reverse so that we can return the card to you. ☒ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature X SCDEW ☐ Agent ☐ Addressee	
1. Article Addressed to: South Carolina Dept. of Employment and Workforce P.O. Box 995 Columbia, SC 29202		B. Received by (Printed Name) KEVIN BONE C. Date of Delivery JUL 05 2011	
		D. Is delivery address different from item 1? ☒ Yes If YES, enter delivery address below:	
		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☒ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.	
		4. Restricted Delivery? (Extra Fee) ☐ Yes	
2. Article Number (Transfer from service label)		7009 2820 0003 3702 5332	

PS Form 3811, February 2004 Domestic Return Receipt \$251/1500 102595-02-M-15401

PROOF OF SERVICE
OF CIVIL ACTION COVERSHEET, SUMMONS, AND PETITION
AND NOTICE OF INTENT TO APPEAL
UPON DEFENDANT SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE
ON JULY 5, 2011

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,

Appellant,

v.

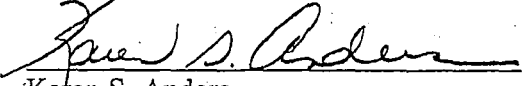
South Carolina Department of
Employment and Workforce,

Respondent.

Docket No. 11-ALJ-22-0381-AP

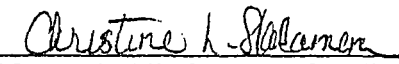
AFFIDAVIT OF SERVICE AND
FILING BY MAIL

PERSONALLY appeared before me Karen Anders who being duly sworn, deposes and says: that she is a Paralegal for Sowell Gray Stepp & Laffitte, L.L.C.; that she served by mail a copy of Notice and Motion for Rehearing in the above-named action to the Respondent by mailing a copy to the Attorney for the Respondent addressed to: Romi Y. Robinson, Attorney for South Carolina Department of Employment and Workforce, Post Office Box 955, Columbia, South Carolina 29202, and that the postage was duly prepaid; and, that it was deposited in the United States Mail on the 12th day of September, 2011 and, filed same by mailing the original to: The Honorable Ralph King Anderson, III, Chief Administrative Law Judge, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201.


Karen S. Anders

SWORN to before me this the

12th day of September, 2011

 (L.S.)

Nortary Public for South Carolina

My Commission Expires: 4/25/2015

Rest Assured, LLC,) Docket No. 11-ALJ-22-0381-AP
)
)
Appellant,)
)
)
vs.)
)
)
)
South Carolina Department of)
Employment and Workforce,)
)
)
Respondent.)
)
)

NOTICE IS HEREBY GIVEN that Appellant Rest Assured, LLC (Rest Assured), by and through its undersigned counsel, moves the Court for a rehearing on its Order of Dismissal dated August 30, 2011.

On August 30, 2011, the Court issued an Order dismissing the appeal of Rest Assured for failure to timely serve the Notice of Appeal. The Order was received by Rest Assured on August 31, 2011. On September 12, within the ten days prescribed by Rule 40 of the Rules of Procedure for the Administrative Law Court (RPALC), Rest Assured filed a motion for rehearing via U.S. Mail. *See Exhibit A*, attached hereto; *see also* RPALC 4(B). Rest Assured has recently been informed by the Court that the motion for rehearing was never received. *See Exhibit B*, attached hereto. It now appears that the motion for rehearing was lost in the U.S. Mail. Rest Assured now resubmits its motion for reconsideration on the basis that it was timely filed pursuant to Rule 4(B) of the

JAN 26 2012

RPALC which provides the “date of filing is the date of delivery or **the date of mailing.**” (emphasis added). This is further supported by the Affidavit of Service and Filing by Mail attached to Exhibit A and by the fact that same was admittedly received by the SCDEW.

As an additional argument for Rest Assured’s position, Rule 62 of the RPALC provides “the Administrative Law Judge has the discretion to determine that a document is timely filed upon a finding that a party who filed the document made a good faith effort to file the document within the applicable time limits.” Clearly, Rest Assured made a good faith effort to file the document by submitting and filing the document within the time prescribed in the RPALC and according to the filing requirements of the RPALC.

ARGUMENT

In its order dismissing the appeal, the Court relied on the decisions of the South Carolina Supreme Court which held that failure to *serve* the notice of appeal divested the court of jurisdiction. *See Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 355 S.E. 2d 535 (1987); *Mears v. Mears*, 287 S.C. 168, 337 S.E. 2d 206 (1985). These cases relied on the date the notice of appeal was *served*, not when or where it was *filed*.

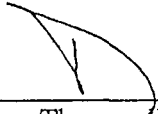
On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. This notice of appeal was properly and timely *served* on the South Carolina Department of Employment and Workforce. *See Exhibit A*, attached hereto. “Most state jurisdictions follow the rule that notices of appeal are to be liberally construed in favor of their sufficiency so long as the opposing party has not misled to his or her irreparable harm.” 5 AM. JUR. 2D *Appellate Review* §

294. Because Rest Assured served the South Carolina Department of Employment and Workforce with a notice of appeal within the 30 days, and the Department has not been misled to its detriment, the Court should reverse its prior Order and deny the Motion to Dismiss.

WHEREFORE, Appellant prays that the Court rehear and reverse its prior Order dated August 30, 2011, and deny the Respondent's Motion to Dismiss.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:  

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400
Email: bsowell@sowellgray.com
ddick@sowellgray.com

Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
January 26, 2011

EXHIBIT A

September 12, 2011

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

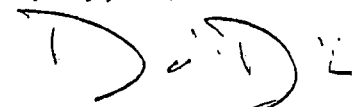
Re: Rest Assured, LLC vs. South Carolina Department of Employment and Workforce
Docket No.: 11-ALJ-22-0381-AP
Our File No.: 6251/1500

Dear Judge Anderson:

Enclosed is the original and one copy of a Notice and Motion for Rehearing along with our Firm's check in the amount of Fifty and 00/100 Dollars (\$50.00) representative of the filing fee. I would appreciate your filing as appropriate and returning a clocked-in copy to me in the self-addressed, stamped envelope provided.

By copy of this letter and as evidenced by the Affidavit of Service and Filing by Mail, same has been served upon counsel for the Respondent. Please let me know if you have any questions.

Very truly yours,


David C. Dick
DCD:ksa

cc: Romi Y. Robinson, Attorney for the South
Carolina Department of Employment and Workforce

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,

Appellant,

VS.

South Carolina Department of
Employment and Workforce,

Respondent.

Docket No. 11-ALJ-22-0381-AP

NOTICE AND MOTION FOR
REHEARING

TO: ROMI Y. ROBINSON, ATTORNEY FOR THE RESPONDENT, SOUTH
CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE

NOTICE IS HEREBY GIVEN that Appellant Rest Assured, LLC (Rest Assured), by and through its undersigned counsel, moves the Court for a rehearing on its Order of Dismissal dated August 30, 2011.

ARGUMENT

On August 30, 2011, the Court issued an Order dismissing the appeal of Rest Assured for failure to timely serve the Notice of Appeal. The Court relied on the decisions of the South Carolina Supreme Court which held that failure to *serve* the notice of appeal divested the court of jurisdiction. *See Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 355 S.E. 2d 535 (1987); *Mears v. Mears*, 287 S.C. 168, 337 S.E. 2d 206 (1985). These cases relied on the date the notice of appeal was *served*, not when or where it was *filed*.

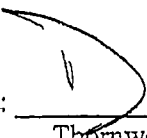
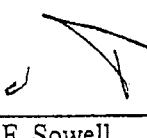
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and timely *served* on the South Carolina Department of Employment and Workforce. *See* Exhibit A attached hereto. "Most state jurisdictions follow the rule that notices of appeal are to be liberally construed in favor of their sufficiency so long as the opposing party has not misled to his or her irreparable harm." 5 AM. JUR. 2D *Appellate Review* § 294. Because Rest Assured served the South Carolina Department of Employment and Workforce with a notice of appeal within the 30 days, and the Department has not been misled to its detriment, the Court should reverse its prior Order and deny the Motion to Dismiss.

WHEREFORE, Appellant prays that the Court rehear and reverse its prior Order dated August 30, 2011, and deny the Respondent's Motion to Dismiss.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:   

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400
Email: bsowell@sowellgray.com
ddick@sowellgray.com

Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
September 12, 2011

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Rest Assured, LLC,

Plaintiff,

VS.

South Carolina Department of Employment
and Workforce,

Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2011- CP-40-04262

JEANETTE WYCKBRIDE
C.C.P. & G.S.

2011 JUL -6 PM 4:10

FILED
RICHLAND COUNTY

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION FOR DELIVERY	
☒ Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ☒ Print your name and address on the reverse so that we can return the card to you. ☒ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature X SCDEW ☐ Agent ☐ Addressee	
1. Article Addressed to: South Carolina Dept. of Employment and Workforce P.O. Box 995 Columbia, SC 29202		B. Received by (Printed Name) KEVIN BONNET C. Date of Delivery JUL 05 2011	
2. Article Number (Transfer from service label) 7009 2820 0003 3702 5332		D. Is delivery address different from item 1? ☒ Yes If YES, enter delivery address below: WYCKBRIDE, SC 29202	
		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☒ Return Receipt for Merchandise ☐ Insured Mail ☐ O.O.D.	
		4. Restricted Delivery? (Extra Fee) ☐ Yes	

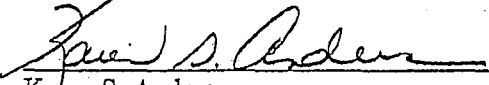
PS Form 3811, February 2004 Domestic Return Receipt \$25/1500 102595-02-M-1689

PROOF OF SERVICE
OF CIVIL ACTION COVERSHEET, SUMMONS, AND PETITION
AND NOTICE OF INTENT TO APPEAL
UPON DEFENDANT SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE
ON JULY 5, 2011

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,	)	
	)	Docket No. 11-ALJ-22-0381-AP
Appellant,	)	
	)	
v.	)	AFFIDAVIT OF SERVICE AND
	)	FILING BY MAIL
South Carolina Department of	)	
Employment and Workforce,	)	
	)	
Respondent.	)	

PERSONALLY appeared before me Karen Anders who being duly sworn, deposes and says: that she is a Paralegal for Sowell Gray Stepp & Laffitte, L.L.C.; that she served by mail a copy of Notice and Motion for Rehearing in the above-named action to the Respondent by mailing a copy to the Attorney for the Respondent addressed to: Romi Y. Robinson, Attorney for South Carolina Department of Employment and Workforce, Post Office Box 955, Columbia, South Carolina 29202, and that the postage was duly prepaid; and, that it was deposited in the United States Mail on the 12th day of September, 2011 and, filed same by mailing the original to: The Honorable Ralph King Anderson, III, Chief Administrative Law Judge, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201.


Karen S. Anders

SWORN to before me this the

12th September
day of August, 2011

Christine L. Salaman (L.S.)

Nortary Public for South Carolina

My Commission Expires: 4/25/2015

SOWELL GRAY STEPP & LAFFITTE, L.L.C. - OPERATING ACCOUNT

26446

VENDOR

OUR REF. NO.	YOUR INVOICE NO.	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	NET AMOUNT
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80811

09/12/11

09/12/2011

30.00

0.00

Administrative Law Court

KSA 6251/1500 Filing fee

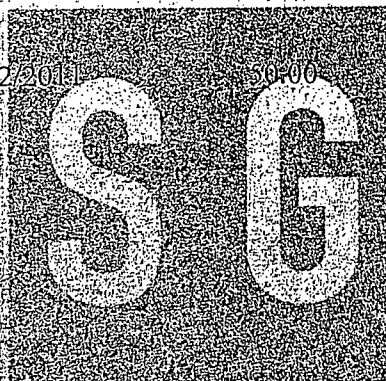


EXHIBIT B

Anders, Karen S.

From: Harvin Fair [hfair@scal.c.net]
Sent: Thursday, January 26, 2012 2:48 PM
To: Tedeschi, Debra
Cc: Dick, David C.; Anders, Karen S.; Sowell, Biff; Jana E. Shealy; Susan C. Dickerson
Subject: RE: Rest Assured, LLC v. SC Department of Employment and Workforce, Docket No. 11-ALJ-22-0381-AP

The Administrative Law Court does not have a filed copy of the Motion for Rehearing from September 2011 and does not have a record of ever receiving a check for the filing of the Motion. Therefore, there is no Motion pending for the Court to rule on.

Thank you for your attention to this matter.

E. Harvin Belser Fair
Judicial Law Clerk to
The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

1205 Pendleton Street, Suite 224
Columbia, SC 29201
(803) 734-6409
(803) 734-6400 fax

From: Tedeschi, Debra [mailto:DTedeschi@dew.sc.gov]
Sent: Thursday, January 26, 2012 11:49 AM
To: Harvin Fair
Cc: Dick, David C.; Anders, Karen S.; 'Sowell, Biff'
Subject: RE: Rest Assured, LLC v. SC Department of Employment and Workforce, Docket No. 11-ALJ-22-0381-AP

Harvin,

I am unclear as to what the status of the Motion for Rehearing is and would like some clarification.

The parties appeared before the **circuit court** on this case last week for a motions hearing, and the judge has asked for proposed orders (due this Monday).

We really need to be able to tell the circuit court exactly what the procedural posture is on the case in the ALC.

If you need any other information, please advise.

Thanks,

Del

Debra Sherman Tedeschi
Assistant General Counsel
S.C. Department of Employment and Workforce
(803) 737-2667
dtedeschi@dew.sc.gov
www.dew.sc.gov

From: Sowell, Biff [mailto:bsowell@sowellgray.com]
Sent: Monday, January 23, 2012 5:40 PM
To: Harvin Fair; Legal
Cc: Dick, David C.; Anders, Karen S.
Subject: RE: Rest Assured, LLC v. SC Department of Employment and Workforce, Docket No. 11-ALJ-22-0381-AP

Harvin:

We do not have a stamped copy of the Motion or a negotiated check. On the other hand, neither the Motion nor the check was returned to us.

Please let me know if you have additional questions.

Regards,

Biff Sowell

From: Harvin Fair [mailto:hfair@scalc.net]
Sent: Monday, January 23, 2012 3:23 PM
To: Sowell, Biff; legal@dew.sc.gov
Subject: Rest Assured, LLC v. SC Department of Employment and Workforce, Docket No. 11-ALJ-22-0381-AP

Dear Mr. Sowell,

We received your letter dated January 20, 2012 concerning the Motion for Rehearing in the above-captioned case. There is no Motion for Rehearing docketed, and there is no Motion for Rehearing in the file. Do you have a stamped or clocked copy of the Motion for Rehearing filed in September 2011? Was the check for \$50 negotiated or returned to your office? We are trying to figure out if the Court received the motion and if it did, what happened to it.

Thank you for your attention to this matter.

Sincerely,

E. Harvin Belser Fair
Judicial Law Clerk to
The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

1205 Pendleton Street, Suite 224

Columbia, SC 29201
(803) 734-6409
(803) 734-6400 fax

This email and any attached files are confidential and intended solely for the intended recipient(s). If you are not the named recipient you should not read, distribute, copy or alter this email. Any views or opinions expressed in this email are those of the author and do not represent those of the South Carolina Administrative Law Court .

This email and any attached files are confidential and intended solely for the intended recipient (s). If you are not the named recipient you should not read, distribute, copy or alter this email. Any views or opinions expressed in this email are those of the author and do not represent those of the South Carolina Administrative Law Court .

Rest Assured, LLC,

V.

Respondent.

AFFIDAVIT OF SERVICE BY
MAIL AND FILING VIA HAND-
DELIVERY


Karen S. Anders

FILED

JAN 26 2012

SC ADMIN. LAW COURT

SWORN to before me this the

26th day of January, 2012

Christene L. Skalarom (L.S.)

Nortary Public for South Carolina

My Commission Expires: 4/25/2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 11-ALJ-22-0381-AP

Rest Assured, LLC, ...Appellant,

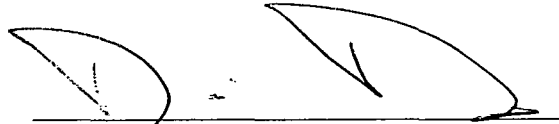
v.

South Carolina Department of Employment and Workforce, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

May 30, 2012



David C. Dick
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 11-ALJ-22-0381-AP

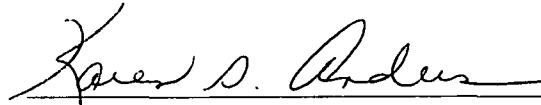
Rest Assured, LLC, ...Appellant,

v.

South Carolina Department of Employment and Workforce,.....Respondent.

PROOF OF SERVICE

I, the undersigned of Sowell Gray Stepp & Laffitte, LLC, attorneys for the Appellant, certify that I have served a copy of the Record on Appeal upon South Carolina Department of Employment and Workforce by depositing a copy in the United States Mail, postage prepaid, on May 30, 2012, addressed to its attorney of record, Debra S. Tedeschi, Esquire, Assistant General Counsel, S.C. Department of Employment and Workforce, Post Office Box 8597, Columbia, South Carolina 29202.


Karen S. Anders

May 30, 2012

RECEIVED

MAY 30 2012

SC Court of Appeals