

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW  
COURT

Deborah Brooks Durden, Administrative Law Judge

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Docket No. 2014-000246

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South Carolina Department of Consumer Affairs,.....Respondent,

v.

Entera Holdings, LLC and  
Entera Work Comp Solutions, LLC, .....Appellants.

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**INITIAL BRIEF OF APPELLANTS**

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David Hill Keller  
Constangy Brooks & Smith, LLP  
105 N. Spring Street Suite 105  
Greenville, South Carolina 29201

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MAY 12 2014

**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

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## Statement of the Case

This matter comes before the court upon the petition of defendant, Entera Holdings, LLC and Entera Work Comp Solutions, LLC (hereinafter Entera) regarding the dismissal of Entera's complaint and request for hearing before the Administrative Law Court.

The original letter from the Department of Consumer Affairs dated August, 21, 2013 was received by the undersigned on August 29, 2013. The 30<sup>th</sup> day after receipt was September 28, 2013, however, this was Saturday and pursuant to the rules of the Administrative Law Court, the request for hearing was not due until Monday, September 30<sup>th</sup>. On Monday, September 30<sup>th</sup> Entera filed a petition for hearing with the South Carolina Administrative Law Court.

Subsequently, the Department of Consumer Affairs (hereinafter Department) filed a petition for dismissal of the petition for hearing on the grounds that the same was not timely. In that petition the Department submitted a receipt from Federal Express that the letter in question was delivered to the Greenville, South Carolina office of Federal Express on Friday, August 23, 2013. After Entera filed its return to the motion the Department was allowed to supplement its motion with an addition receipt allegedly showing the document was received by an individual at the law offices of the undersigned who is no longer employed. However, the undersigned did not receive actual notice of the letter of the Department until August 29, 2013, as noted above.

The letter sent to Entera and the undersigned by the Department specifically states that in order to comply with the determination in the letter, it was necessary to contact the department, not the Administrative Law Court, within 30 days after receipt of the letter.

Entera actually complied with the final paragraph of the order with a formal objection on September 6, 2013, well within the 30 days mandated by the terms of the letter itself.

The matter was then assigned to the Honorable Deborah Brooks Durden, Administrative Law Judge, who dismissed the request for hearing on November 26, 2013. Entera then timely filed a motion for reconsideration which Judge Durden failed to respond to or address. Therefore, pursuant to the Rules of the Administrative Law Court her order became a final order on January 5, 2014. Entera then timely appealed to the Court of Appeals.

## **ISSUES ON APPEAL**

### **ISSUE I**

#### **SERVICE OF THE ORIGINAL DOCUMENT IN THIS MATTER HAS NEVER BEEN COMPLETED**

The South Carolina Department of Consumer Affairs purports to have served upon the parties a letter which they have deemed to be a “final agency decision.” However, pursuant to the Rules of Procedure, service has never been completed at all.

The document now on appeal, a letter dated August 21, 2013 was purportedly served on the parties by Federal Express. There is no provision in the Rules of the Administrative Law Court for such a procedure. The rules require that the matter be delivered directly into the hands of the attorney or that they be served by US Mail only. Rule 3, South Carolina Administrative Law Court Rules specifically provides for service by US Mail or service by personal delivery only.

Rule 5 specifically states “Service shall be made by delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order.

Service is deemed complete upon mailing. Service that complies with rule 5(b)(1) SCRPC, also shall satisfy this rule.” Rule 5 states that the service must be made by delivering a copy directly to the attorney or by *mailing* the same via United States Postal Service. Service is not complete until one of those two items has occurred. It is therefore submitted that the letter which purports to be a final agency determination has never properly been served and service had never been accomplished.

## ISSUE II

### THE FINAL “STAFF” DETERMINATION IS NOT A CONTESTED CASE UNDER THE ADMINISTRATIVE PROCEDURES ACT

South Carolina Code of Laws Annotated §1-23-505 defines “contested cases” before the Administrative Law Court. A contested case may only be heard by the Administrative Law Court after the agency has afforded the parties “an opportunity for hearing.” In this case no hearing has been held.

The undersigned specifically requested a meeting with the agency prior to the issuance of the agency determination and this was declined (Letter and Email). Because no hearing was ever held the Administrative Law Court actually lacked subject matter jurisdiction over the matter. Further, while the letter of August 21, 2013 maybe a “final staff decision” it is not a final “agency decision” as defined by Rule 11 South Carolina Administrative Law Court Rules. As such, the Administrative Law Court lacked subject matter jurisdiction over the entire process.

## ISSUE III

### THE LETTER OF AUGUST 21 DOES NOT CONSTITUTE A FINAL AGENCY DECISION

As noted above the letter itself does not state that it is a “final agency decision” as required by the rules. Further, the deputy director of the agency, Elliot F. Elam, Jr. added

a “caveat” to the agency decision, in which he made clear the letter was not a final agency decision if a response was made. He stated “if you fail to respond to this decision within thirty (30) days of your receipt of this letter the department will provide notice of this decision to you client company absence showing you have done so.” (Letter) The defendants, did in fact write Mr. Elam within thirty days after the date of the letter, as directed, providing him a response to the decision, to which he failed to respond (Letter). Consequently by the addition of the additional language Mr. Elam, himself, advised the parties the letter was not a “final agency decision.”(Letter) Mr. Elam altered the requirements stated earlier in the letter by stating that defendants were required to contact the agency, not the Administrative Law Court within thirty days. Therefore the Administrative Law Court lacked subject matter jurisdiction over the entire process.

#### ISSUE IV

#### THAT THE ATTORNEY FOR DEFENDANT RECEIVED ACTUAL NOTICE OF THE LETTER ON AUGUST 29, 2013

The agency has provided a Federal Express receipt showing the item was delivered to Federal Express on August 22, 2013. It indicates that it was “delivered” at 4:06 p.m. on Friday, August 23, 2013. The notice does not indicate where it was delivered or to whom it was delivered. The undersigned can merely state that he was out of the office on Friday, August 23. The undersigned’s calendar for the week of August 26<sup>th</sup> indicates numerous events, many of which were out of the office. According to the records of the undersigned actual notice of the letter was received on August 29, 2013. This would have made the appeal due on August 28, 2013 which was a Saturday. The appeal was, therefore, filed on the 30<sup>th</sup>, which was the next business day after the thirty days had run. Since actual notice was clearly received by the undersigned on August 29

and the agency failed to advise where and how the document was purportedly delivered the provisions of Rule 11 South Carolina Administrative Law Court Rules have been satisfied. Further, Rule 11 clearly contemplates the issue before the court at this time by allowing a period of ninety days for appeal.

#### **ISSUE V**

#### **AFTER ENTERA FILED IT'S RESPONSE TO THE AGENCY'S MOTION TO DISMISS, THE ADMINISTRATIVE LAW JUDGE ILLEGALLY ALLOWED THE RECORD TO BE SUPPLEMENTED**

After the filing of the Entera's response to the motion to dismiss the Administrative Law Court allowed the Department to supplement it's initial filing in the matter. There is not procedure which allows the same. Rule 19, South Carolina Administrative Law Court Rules, allows for a response but does not allow for the inclusion of additional evidence or matters. As such the department should not have been allowed to submit supplemental filings.

#### **CONCLUSION**

*It is therefore respectfully submitted* that there has been a complete failure of service in this matter and that this case should be dismissed and returned to the agency.

*It is further submitted* that the letter dated August 21, 2013 was not a final agency decision as contemplated by the rules call particularly in light of the alteration of the language by the agency in the final paragraph in this letter and, therefore Entera's letter of September 6, 2013 told all further action in the matter.

*It is further submitted* that a request for hearing was timely filed with the Administrative Law Court and if the Court does not find that the agency lacks subject

matter jurisdiction due to failure of service, the matter should be remanded to the Administrative Law Court for an actual hearing/trial.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "D. Hill Keller", written in black ink.

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David Hill Keller, Esq.

Bar # 003345

Constangy, Brooks & Smith, LLP

THE STATE OF SOUTH CAROLINA

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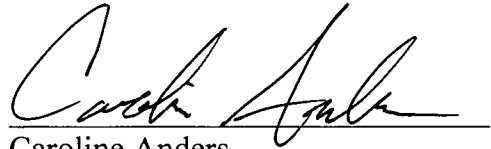
Entera Holdings, LLC and  
Entera Work Comp Solutions, LLC, .....Appellants.

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**CERTIFICATE OF SERVICE**  
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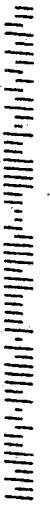
I, Caroline Anders, say that I am the legal assistant for David H. Keller, attorney for Respondents Entera Holdings, LLC and Entera Work Comp Solutions, LLC with CONSTANGY, BROOKS & SMITH, LLP in Greenville, South Carolina; and on the 7<sup>th</sup> day of May, 2014, I mailed in a sealed envelope, postage prepaid, a copy of the Initial Brief of The Appellants, Designation of Matter to be Included on the Record on Appeal with Certificate of Counsel to the following person(s) at the following address:

Elliot F. Elam, Jr., Esq.  
Deputy Director  
South Carolina Department of Consumer Affairs  
P.O. Box 5757  
Columbia, SC 29250

Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court Of Appeals  
P.O. Box 11629  
Columbia, SC 29211

A handwritten signature in black ink, appearing to read "Caroline Anders", written over a horizontal line.

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**CONSTANGY**

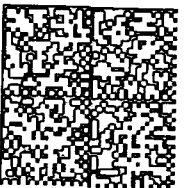
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