THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Unpublished Opinion No. 2014-UP-235 (Filed June 18, 2014)

Rest Assured, LLC,

Respondent,

v.

South Carolina Department of
Employment and Workforce,

Petitioner

APPENDIX

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The South Carolina Court of Appeals

Rest Assured, LLC, Appellant,

v.

South Carolina Department of Employment and Workforce, Respondent.

Appellate Case No. 2013-000774

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Thornwell F. Sowell, III, Esquire
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The South Carolina Court of Appeals

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September 18, 2014

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Re: Rest Assured v. SCDEW
Appellate Case No. 2013-000774

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

Jenny A. Kitchings

CLERK

cc: Thornwell F. Sowell, III, Esquire
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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. 12-ALJ-22-0209-AP

Appellate Case Number: 2013-000774

Rest Assured, LLC, Appellant,

v.

South Carolina Department of Employment and Workforce, Respondent.

RESPONDENT'S PETITION FOR REHEARING
AND
REQUEST FOR REHEARING *EN BANC*

Respondent, the South Carolina Department of Employment and Workforce ("SCDEW"), moves this Court for rehearing of the decision in *Rest Assured, LLC v. SCDEW*, filed June 18, 2014 (Unpublished Opinion No. 2014-UP-235), and further requests that rehearing be held *en banc*.

In order to prevail on a motion for rehearing, a party must state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 221(a), SCACR. Furthermore, pursuant to Rule 219(a), SCACR, rehearing *en banc* ordinarily will not be ordered **except** when:

1. consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

2. the proceeding involves a question of exceptional importance.

SCDEW requests rehearing *en banc* for further review of this case because it involves an issue of public importance – whether SCDEW must apply existing South Carolina Supreme Court precedent for determining whether workers are employees for unemployment tax liability purposes. *See Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993) (Toal, J.). The Supreme Court in *Kilgore* found that temporary workers assigned by the employer to its clients were employees, and therefore, the employer was required to pay unemployment taxes on the wages paid to its employees.

Kilgore is binding on, and not distinguishable from, the instant case. The Court of Appeals acknowledged the precedential importance of *Kilgore* by asking questions direct about its applicability during oral argument. Despite this acknowledgment, the Court of Appeals failed to cite *Kilgore* in its *per curiam* decision. For this reason and others, more fully outlined below, SCDEW respectfully requests rehearing *en banc*.

FACTUAL and PROCEDURAL BACKGROUND

Rest Assured is a company that places in-home personal care assistants (PCAs) to care for elderly and disabled people. Rest Assured keeps its own registry of over 280 PCAs, of which 70 to 90 are used each week. (R.pp.41; 76-81). Rest Assured does not place the PCAs into its registry until they pass all background checks. (R.p.85). Rest Assured is connected to its clients by "dispatch requests" received from various government agencies, such as Medicaid, the U.S. Department of Veterans Affairs (VA), the South Carolina Department of Disabilities and Special Needs (DDSN), as well as from private paying individuals. (R.pp.117-118).

Once Rest Assured receives a dispatch request, the company assesses the client's needs and then matches two potential PCAs, based primarily on their availability, to interview with the client. (R.p.80, lines 1-7; p.85, lines 2-13; p.95, lines 8-13). The PCAs, therefore, rely completely on Rest Assured for placement into these assignments. After the interviews, the client chooses the PCA for the job. (R.p.119-120). The PCA's job duties may include bathing and grooming of the client, companionship and meal preparation for the client, as well as light housekeeping. (R.p.82, lines 1-17).

A PCA's pay rate from Rest Assured is based on what the client is paying to Rest Assured. (R.pp.96-99). In other words, Rest Assured first negotiates with the client, and then the PCA negotiates with Rest Assured for an hourly rate. The client does not directly pay the PCA. For the referrals from a governmental agency, Rest Assured sends the bill directly to the agency which in turn pays Rest Assured. (R.p.121, line 11-p.122, line 4). Rest Assured pays the PCA based on the PCA's weekly report of how many hours the PCA worked. (R.p.110). Even if the client fails to pay, Rest Assured still pays the PCA for the hours worked. (R.p.99, lines 1-8).

Rest Assured's director, Reatha Johnson, testified at the administrative hearing that she offered and encouraged training for those on her registry, but she did not require it. (R.pp.95-96; 136). When asked if she supervised the PCAs, she stated she would visit the client home every four months for "quality control." (R.p.135, line 9-p.136, line 4). **The PCAs are covered by workers compensation insurance.** (R.p.103). Rest Assured does not provide any tools or supplies to the PCAs; instead, supplies are provided either by the client or the PCA. (R.p.99, line 9-p.100, line 6). Each PCA wears a name badge with Rest Assured's logo on the badge. (R.pp.100-101).

For unemployment tax purposes, Johnson originally reported her PCAs as employees, but at some point decided to treat them as "subcontractors." (R.pp.142-143). Explaining this decision, Johnson testified at the hearing that "it just was not beneficial to me as a company to consider them employees because of their turnover rate, and they jump from agency to agency." (R.p.142, lines 11-13).

After Johnson decided to treat the PCAs as subcontractors, rather than employees, the PCAs entered into an "Independent Contractor Agreement." (R.pp.166-168). The right to terminate outlined in the written agreement stated that either Rest Assured or the PCA could terminate the contract at any time. For Rest Assured, the right to terminate could be based upon when a PCA engaged in conduct that "is harmful, detrimental, improper, or fraudulent to or for the business." (R.p.167).

In reality, however, the power to terminate a PCA from an in-home job rested predominantly with the client. (R.p.88, lines 2-10; p.124, lines 9-11). After a client "fired" a PCA, Rest Assured generally would place the PCA right back into its registry for use on other jobs. (R.p.112, lines 6-15; p.153). The only instance where Rest Assured would terminate a PCA was when the PCA took a Rest Assured client to a competing company.

This unemployment tax status determination case was triggered by Rest Assured's reclassification of the majority of its employees to "subcontractors" on its 2005 fourth quarter unemployment tax return, as well as by the filing of an unemployment claim by a former worker of Rest Assured. (R.pp.44; 73; 62-63; 127-128).

As a result, a Field Deputy investigated Rest Assured regarding its tax liability status and furnished a report. (R.pp.152-153). The Employment Security Commission (the predecessor agency to SCDEW) thereafter issued a determination on March 2, 2006, finding Rest Assured's

workers should be classified as employees with their wages subject to unemployment tax. (R.pp.49-50).

On appeal, SCDEW's Appellate Panel affirmed this determination, finding Rest Assured has the right to control, and exercises control over, its PCAs. Therefore, SCDEW determined these workers are employees for unemployment tax purposes. (R.pp.31-34).

Rest Assured appealed from SCDEW's final administrative decision to the Administrative Law Court (ALC). In a well-reasoned Order, the ALC affirmed SCDEW's decision to treat Rest Assured PCAs as employees for unemployment tax purposes. (R.pp.9-27). The ALC properly analyzed the record as a whole to discern whether substantial evidence supported the Panel's Finding. Judge Anderson considered both the written agreement between Rest Assured, as well as the evidence relating to the four-factor, common-law, "right to control" test set out by then Justice Toal of the South Carolina Supreme Court. *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 49-50 (1993) ("Under South Carolina common law, the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has the right to control the servant in the performance of his work and the manner in which it is done.")

The ALC determined that the instant case was analogous on the facts to those of *Kilgore*, a case specifically involving unemployment tax liability. The ALC found this case to be distinguishable from the Supreme Court's decision in *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 297, 676 S.E.2d 700, 701 (2009), which held that a workers' compensation claimant was an independent contractor, not an employee, for workers' compensation purposes.

Rest Assured appealed from the ALC's decision. In a *per curiam*, unpublished decision,

the Court of Appeals reversed, finding that the PCAs "were not employees but contract employees." On the dispositive issue of whether PCAs were employees, the Court of Appeals only cited *Wilkinson*, a workers' compensation case.[1] The Court of Appeals did not cite or attempt to distinguish the *Kilgore* case, which specifically found substantial evidence supported the agency's finding that workers assigned to clients by a temporary staffing agency were employees of the staffing company for unemployment tax purposes. The *per curiam* opinion did not discuss the facts of this case and did not analyze the evidence in light of the four-factor, common-law test.

SCDEW requests rehearing *en banc* for further review of this case because it involves an issue of public importance – whether SCDEW must apply the *Kilgore* precedent in determining unemployment tax liability cases.

ARGUMENT

I. The Court Overlooked and Failed to Cite Binding South Carolina Supreme Court Precedent on the Dispositive Issue in this Case of Whether Rest Assured's Personal Care Aides Are Employees for Unemployment Insurance Tax Purposes.

Under South Carolina common law, "the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has **the right to control** the servant in the performance of his work and the manner in which it is done." *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49-50 (1993) (emphasis added). The test is not whether the actual control is exercised, but rather "whether there exists the right and authority to control and direct the particular work or undertaking." *Id.* The four factors demonstrating the right of control are: (1) direct evidence of the right to, or exercise of,

[1] In a workers' compensation case, the employee vs. independent contractor issue is a jurisdictional issue, and therefore the appellate court is permitted to evaluate the facts. In contrast, in the unemployment context, the scope of review is based on the substantial evidence rule. *See infra*, section II.

control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Id.*

Any written contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight; however, "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." *Id.*

The instant case is virtually indistinguishable from the facts in *Kilgore*. In *Kilgore*, the employer was "in the business of supplying temporary workers." *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. As described by the *Kilgore* Court, the relevant facts were as follows:

> When clients contacted Kilgore with their specific employment needs, Kilgore negotiated with the client a fee for providing a worker or workers to meet the client's demands. Kilgore then contracted with the individual workers to fill the positions required by the client. According to Kilgore's president, the contract could be based on an hourly wage or on a fixed amount for the job. However, all workers were required to turn their hours in to Kilgore. Hourly workers were permitted to take "draws" on the amount they had worked. Kilgore's president testified that the contracts expressly provide that the relationship is one of an independent contractor.
>
> The clients controlled the day-to-day activities of the workers. Kilgore provided workers' compensation coverage for the workers but did not withhold any taxes from their wages.

Id. at 67, 437 S.E.2d at 49.

The PCAs, like the temporary workers in *Kilgore*, did not contract directly with the clients, but rather, Rest Assured was the only entity that directly negotiated first with the clients, and then separately with the PCAs, after they were matched to a client. Moreover, in *Kilgore*, the evidence showed that it was the clients who controlled the temporary "workers' performance and the manner in which it was done." *Id.* at 69, 437 S.E.2d at 50. Similarly, Rest Assured's owner testified that the PCAs "do basically what the client wants them to do." (R.p.94, lines 1-

5). She stated further that she bases her decision of whether to retain or terminate a PCA based on what the client wants. (R.pp.92-93).

The *Kilgore* Court specifically concluded that because the clients "had no contract with the [temporary] workers ... **their ability to exercise control over the workers' activities was derived solely from their contracts**" with the temporary agency (Kilgore) and "Kilgore's contract with the workers." *Id.* at 69, 437 S.E.2d at 50 (emphasis added). Therefore, the Court concluded the substantial evidence supported an inference that "Kilgore **possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.** *Id.* (emphasis added).

Likewise, the evidence in the instant case shows that Rest Assured clearly possessed the right to control the PCAs' work performance via Rest Assured's own contractual relationship with its clients. Relying directly on the *Kilgore* precedent, the ALC found as follows:

> It can thus be inferred that Rest Assured delegates most of its authority to its clients. It is noteworthy, however, that Rest Assured still maintains some direct control over its PCAs through the care plan and its periodic supervision of its PCAs work, thus reflecting more direct control than that exercised by the employer in *Kilgore*.

(R.pp.17-18).

It is clear from the record that substantial evidence established that Rest Assured's clients had abundant control over the way the PCAs performed their work. **Pursuant to South Carolina Supreme Court precedent, this control must be imputed to Rest Assured.** *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

The Court of Appeals *per curiam* opinion overlooked the *Kilgore* case, even though *Kilgore* is directly applicable and was relied on by both SCDEW and the ALC. Accordingly, SCDEW implores this Court to grant its request for rehearing *en banc*.

II. The Court of Appeals Impermissibly Reweighed the Facts and Exceeded the Scope of Review by Reversing the Decision Which Was Clearly Supported by Substantial Evidence in the Record, as Found By the Administrative Law Court.

By reversing the ALC's decision, the Court of Appeals exceeded the scope of review.[2] The ALC correctly determined that the record contained substantial evidence to support SCDEW's finding that Rest Assured's PCAs were employees. The Court of Appeals' reversal amounts to judicial fact-finding.

"Appellate scope of review in this action is limited to determining the existence or not of substantial evidence supporting the factual findings of Petitioner." *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995) (citing *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n,* 313 S.C. 65, 437 S.E.2d 48 (1993)). In *Smoky Mountain Secrets,* the Supreme Court reversed the Court of Appeals' decision which found delivery drivers were independent contractors, which was contrary to the Employment Security Commission's finding that these workers were employees for unemployment tax purposes. The Supreme Court held the Agency's finding that the workers were employees "was not clearly erroneous," and therefore, the Court of Appeals had "exceeded its scope of review." *Smoky Mountain Secrets,* 318 S.C. at 457, 458 S.E.2d at 430 (reversing pursuant to Rule 220, SCACR, the Court of Appeals' conclusion in *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 116, 439 S.E.2d 288, 291 (Ct. App. 1993) that the drivers were independent contractors).

Just as in *Smoky Mountain Secrets*, the Court of Appeals has in the instant case exceeded its scope of review, re-weighed the facts, and participated in judicial fact-finding,

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[2] Although Rest Assured argued in its Reply Brief that the "substantial evidence rule does not govern the standard of review over this decision," (Reply Brief, p.1), the *per curiam* opinion appears to have correctly rejected Rest Assured's suggestion that the substantial evidence rule does not apply to the instant appeal.

which is contrary to the substantial evidence standard found in the Administrative Procedures Act (APA).

Under the APA's substantial evidence rule, the appellate court may only reverse or modify an administrative decision:

> [I]f such decision is affected by errors of law, characterized by an abuse of discretion, or clearly erroneous in view of the substantial evidence on the whole record. "Substantial evidence" is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. **The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside.**

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) (emphasis added); *see also* S.C. Code Ann § 1-23-610(B).

The factual record in the instant case supports SCDEW's conclusion that Rest Assured had the right to control the PCAs, and that control was largely delegated to Rest Assured's clients. When the Court of Appeals decided the PCAs were independent contractors, it impermissibly substituted its own judgment for SCDEW's decision, and improperly reversed the ALC's decision which found SCDEW's conclusion was supported by substantial evidence in the record.

Simply because the factual record may contain evidence upon which reasonable minds might differ does not mean that the Court of Appeals is empowered to reverse SCDEW's decision. As the Court of Appeals in *Todd's Ice Cream* accurately noted:

> Where the evidence relating to whether an individual is an independent contractor or employee is conflicting or where more than one inference can be derived therefrom, the question is one of fact. This court cannot substitute its judgment for that of an administrative agency when the agency's factual findings [are] supported by substantial evidence, as is the case here, even though reasonable men might draw two inconsistent conclusions from the evidence presented.

Todd's Ice Cream, 281 S.C. at 259, 315 S.E.2d at 376 (citations omitted).

In the instant case, there is admittedly conflicting evidence on the issue of control. On the one hand, Rest Assured and all of its PCAs entered into a written "independent contractor agreement." However, there was also substantial evidence that Rest Assured initially matched the PCAs to the clients, had the right to control the PCAs, exercised quality assurance supervision over the PCAs job placements, and on the method of payment, exercised control by negotiating fees first with the clients and then with the PCAs, as well as paying the PCAs even if the clients failed to pay. This substantial evidence clearly supports a resonable determination that the PCAs were employees. Because the record on appeal contains substantial evidence supporting SCDEW's decision that the PCAs were employees, the Court of Appeals impermissibly re-weighed the facts and engaged in judicial fact-finding, thereby exceeding its scope of review.

Because the substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment, this petition for rehearing *en banc* should be granted to correct the erroneous decision issued by the Court of Appeals.

III. The *Per Curiam* Opinion of this Court Effectively Creates an Exemption for Home Health Care Workers, When Only the Legislature Should Be Determining Which Workers Are Exempt From Unemployment Insurance Coverage.

One of the arguments raised by Rest Assured on appeal is that the Legislature has determined that in-home health care providers should be treated as independent contractors and therefore be exempt from unemployment insurance coverage.

The Legislature's declaration of public policy related to unemployment provides as follows:

> Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; **this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment,** thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, **for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.**

S.C. Code Ann. § 41-27-20 (1986) (emphasis added).

Indeed, this Court has recognized that:

> With respect to the Employment Security Law, the General Assembly has clearly stated its intention that the Law protect those involuntarily unemployed against economic insecurity caused by the inability of industry to provide stable employment. As social legislation, the Employment Security Law should be construed to provide protection to as many employees as possible.

Alton Newton Evangelistic Ass'n, Inc. v. S.C. Emp. Sec. Comm'n, 284 S.C. 302, 305, 326 S.E.2d 165, 167 (Ct. App. 1985) (citing S.C. Code Ann. § 41-27-20).

Nevertheless, the Legislature has specifically exempted many categories of workers from unemployment insurance coverage. *See* S.C. Code Ann. § 41-27-260 (Supp. 2013) (section entitled "Exempted employment"). As recently as June 6, 2014, this statutory section was amended to add categories to exempted employment. 2014 S.C. Act No. 265. However, the Legislature has never exempted home health care workers from unemployment coverage. Thus, whether the PCAs in this case are determined to be employees is supposed to be based on "the usual common law rules," as directed by S.C. Code Ann. § 41-27-230(1)(b).

The effect of the Court of Appeals' *per curiam* decision is to exempt home health care workers from unemployment insurance coverage, even where their employers have the right to control their work. Any blanket exemption should be effectuated by the Legislature, via statutory amendment, and not through an unpublished *per curiam* decision.

CONCLUSION

Accordingly, for all the reasons discussed above, SCDEW requests that this Court to grant its Motion for Rehearing and Rehearing *En Banc* for further review of this case.

Respectfully submitted,

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July 3, 2014

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. 12-ALJ-22-0209-AP
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Rest Assured, LLC,

Appellant

v.

South Carolina Department of Employment and Workforce

Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Respondent SC Department of Employment and Workforce on Appellant Rest Assured, LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2014, addressed to its attorneys of record,

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THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2013-000774

Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2014-UP-235
Heard May 7, 2014 – Filed June 18, 2014

REVERSED

Thornwell F. Sowell, III, of Sowell Gray Stepp & Laffitte, LLC, of Columbia, and David Cochran Dick, Jr., of Charleston, for Appellant.

Debra Sherman Tedeschi, of Columbia, for Respondent.

PER CURIAM: Rest Assured, LLC, appeals an order by the Administrative Law Court (ALC) finding for the South Carolina Department of Employment and Workforce (SCDEW) that individuals working as personal care aides were

employees pursuant to South Carolina law. Rest Assured also challenges the ALC's refusal to allow it to supplement the record. We reverse and find the aide workers were independent contractors.

We agree with Appellant's argument that their personal care aide workers were not employees but contract workers. The contract agreement and the conduct between Appellant and its workers were similar to that of *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (stating whether independent contractor or employee status prevails depends on the issue of control and whether employer had the right to control the performance of the work). In our consideration of the record as a whole, we do not find there is substantial evidence in the record to support the ALC's decision. *See ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011) (noting that "although this court shall not substitute its judgment for that of the ALC as to findings of fact, we may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole").

We disagree with Appellant's argument that the record should be supplemented. Subsection 1-23-380(3) of the South Carolina Code (Supp. 2013) requires for additional evidence to be submitted it must be material and there must be good reasons for the failure to present the evidence. Here, Appellants presented no good reason for their five-year delay in presenting the evidence.

REVERSED.

HUFF, THOMAS, and PIEPER, JJ., concur.