

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Case No. 2012-ALJ-22-0209-AP
Appellate Case No. 2013-000774

S.C. Supreme Court

Rest Assured, LLC,.....Appellant,

v.

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

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,

Appellant,

v.

South Carolina Department of Employment
and Workforce,

Respondent.

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

**ORDER DENYING MOTION
FOR RECONSIDERATION**

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

BACKGROUND

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

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

On July 11, 2011, DEW filed a Notice of Special Appearance and a Motion to Dismiss the action based on improper jurisdiction of the Circuit Court to hear the appeal, arguing that the appeal should have been filed in the ALC. In response to the Motion to Dismiss, Rest Assured

April 15, 2013

filed a Motion to transfer the appeal to the ALC pursuant to Rule 204, SCACR and South Carolina law.

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

This Court issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, DEW filed a Motion to Dismiss the appeal before the ALC based on lack of jurisdiction. This Court issued an order on December 19, 2012 denying the Motion to Dismiss. The Record on Appeal was filed January 8, 2013. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

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

DISCUSSION

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

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

(Supp. 2012).

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

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

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

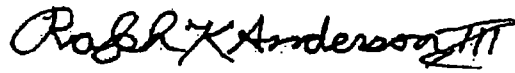
As to whether the evidence is material, Rest Assured failed to explain or even allege that the evidence it seeks to add to the record is material. In its Motion, Rest Assured asserts that the evidence is simply to support its position. That assertion does not establish materiality.

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

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

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

IT IS THEREFORE ORDERED that the Motion to Reconsider is denied.²
AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

April 15, 2013
Columbia, South Carolina

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

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

April 15, 2013
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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

BACKGROUND

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

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

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

March 14, 2013

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

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

This Court accepted the case and issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, DEW filed a Motion to Dismiss the appeal before the ALC based on lack of jurisdiction. This Court issued an order on December 19, 2012 denying the Motion to Dismiss. The Record on Appeal was filed January 8, 2013. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

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

DISCUSSION

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

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

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

(Supp. 2012).

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

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

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

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

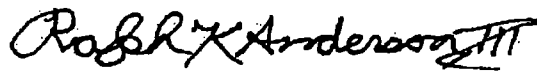
(Supp. 2012). Rest Assured has not alleged any irregularities that justify the Court remanding the case to the agency.

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

Based upon the facts of this case,

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

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

March 14, 2013
Columbia, South Carolina

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

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,

Appellant,

vs.

South Carolina Department of Employment
and Workforce

Respondent.

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

ORDER

STATEMENT OF THE CASE

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

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

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

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

March 14, 2013

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

ISSUE ON APPEAL

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

STANDARD OF REVIEW

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

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

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

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

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub

Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

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

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

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

Compliance with the Contract

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

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

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

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

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

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

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

Direct Evidence of the Right or Exercise of Control

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ DEW does not address this point in its brief.

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

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

Furnishing of Equipment

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

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

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

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

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

Method of Payment

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

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

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

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

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

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

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

¹⁵ R. pp. 45:6-9.

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

Right to Fire

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

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

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

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

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

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

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

CONCLUSION

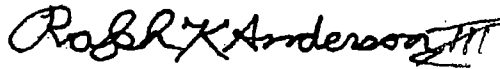
Although the facts in this case make the question of the PCAs status as employees or independent contractors a close call, I find, based on a careful weighing of all four of the factors articulated in Wilkinson, that the record contains substantial evidence supporting the Appellate

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

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

ORDER

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



Ralph K. Anderson, III
Chief Administrative Law Judge

March 14, 2013
Columbia, South Carolina

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

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

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

Rest Assured,)
Appellant,)
)
vs.)
)
SC Department of Employment and)
Workforce,)
Respondent,)
)

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

RECORD ON APPEAL

APPEAL FROM SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT
AND WORKFORCE APPELLATE
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**THE SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) **CERTIFICATION**

The South Carolina Department of Employment and Workforce, by its Legal Department, hereby certifies that the attached hereto is a true and correct copy of the Record on Appeal in the matter of Rest Assured v. SCDBW together with a true and correct copy of the original decision of the Appellate Panel therein.
12-ALJ-22-209

**THE SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**

Jessica Chesley
Jessica Chesley, Administrative Legal Assistant

Columbia, South Carolina

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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 this 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 exercises 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

Hearing Date: _____
Date Mailed: _____
Mailed By: _____

Stephen S. Kelly, Jr.

Philis Mefford

Appeal No. 2006-8

**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

Appellant: Reatha Johnson, Owner
SCES Account No. 420688

Administrative Ruling

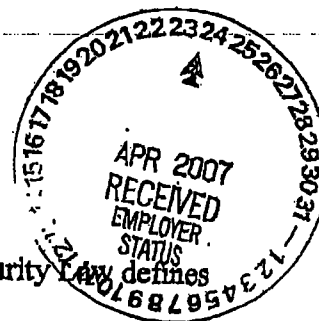
On March 2, 2006, Ms. Philis R. Mefford, Employer Status Supervisor, issued a determination to Reatha Johnson, Owner of Rest Assured, LLC (hereinafter referred to as "Rest Assured") wherein it was held that an employer-employee relationship exists between the business and certain workers classified as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



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(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:

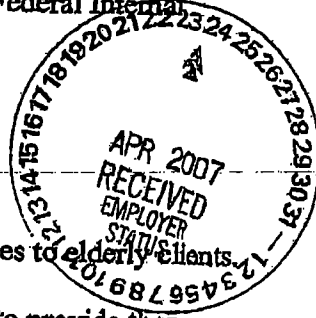
No agreement by any individual to waive, release or commute his rights to benefits or any other rights under Chapters 27 through 41 of this Title shall be valid...

§ 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



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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



Appeal No. 2006-8

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

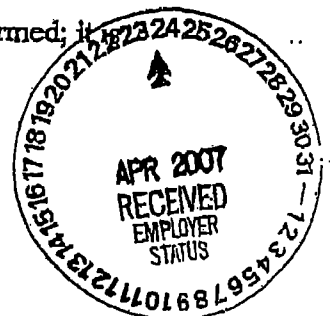
Rest Assured also asserted that each assistant is allowed to work for companies who offer the same services as Rest Assured. However, according to the Independent Contractor Agreement, the assistant agrees not to "participate directly or indirectly ... in any business or activity that is in competition 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.



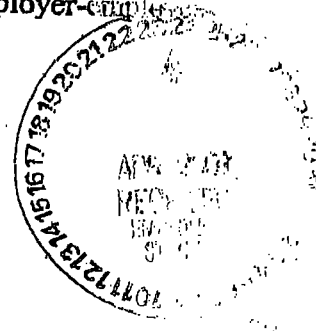
Appendix No. 1471

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 worker, 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 service 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, 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 mean 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 worker in question. Since Rest Assured's primary purpose is to provide custodial services to the client 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.



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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-Phillis Mefford



420688

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
PO Box 995

COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803) 737-3075

FAX (803) 737-2547

L3

EMPLOYER STATUS REPORT TO DETERMINE LIABILITY UNDER THE SOUTH CAROLINA
EMPLOYMENT SECURITY LAWALL INFORMATION PROVIDED WILL BE KEPT STRICTLY CONFIDENTIAL
PLEASE TYPE OR PRINT. RETURN WITHIN 10 DAYS

DO NOT WRITE IN THIS SPACE

ACCOUNT NUMBER			
105	705	02	305
LB	LE	CH	LA
400	334		
AREA	RATE	IND	OWNER
MB	7-20-05		
BY	DATE	PARENT NUMBER	

COMPLETE BOTH SIDES OF THIS APPLICATION

PLEASE PRINT OR TYPE ALL INFORMATION

1 OWNER PARTNERSHIP, OR CORPORATE CHARTER NAME <u>Reatha Johnson</u>		2 TRADE NAME (DOING BUSINESS AS) <u>Rest Assured, LLC</u>									
3 PHYSICAL LOCATION OF BUSINESS REQUIRED (NO PO BOX) <u>9400 Two Notch Rd Ste D</u> <u>Columbia, S.C. 29223</u> CITY COUNTY (REQUIRED) STATE ZIP		4 BUSINESS PHONE NUMBER <u>803-865-8113</u> DAY TIME PHONE NUMBER <u>803-865-8113</u>									
6 MAILING ADDRESS (FOR ALL CORRESPONDENCE) <u>Reatha Johnson</u> <u>Same</u> CITY COUNTY (REQUIRED) STATE ZIP		7 TYPE OF BUSINESS ☐ AGRICULTURE, FORESTRY, FISHING & HUNTING (11) ☐ MINING (21) ☐ UTILITIES (22) ☐ CONSTRUCTION (23) ☐ MANUFACTURING (31-33) ☐ WHOLESALE TRADE (41-43) ☐ RETAIL TRADE (44-46) ☐ TRANSPORTATION & WAREHOUSING (48-49) ☐ INFORMATION (51) ☐ FINANCE & INSURANCE (52) ☐ REAL ESTATE, RENTAL & LEASING (53) ☐ PROFESSIONAL, SCIENTIFIC, & TECHNICAL SERVICES (54) ☐ MANAGEMENT OF COMPANIES & ENTERPRISES (55) ☐ ADMINISTRATIVE AND SUPPORT WASTE MANAGEMENT & REMEDIATION SERVICES (56) ☐ EDUCATION SERVICES (61) ☐ HEALTH CARE AND SOCIAL ASSISTANCE (80) ☐ ARTS, ENTERTAINMENT & RECREATION (90) ☐ ACCOMMODATION & FOOD SERVICES (72) ☐ OTHER SERVICES (81) ☐ PUBLIC ADMINISTRATION (91-93)									
9 LOCATION OF RECORDS (NO PO BOX) <u>Same</u>		8 MAIN BUSINESS (I.E., RETAIL FURNITURE SALES) <u>Home Care for disabled</u>									
10 TYPE OF OWNERSHIP ☐ SOLE PROPRIETOR (ONE OWNER) ☒ LLC/LLP ☐ PARTNERSHIP (TWO OR MORE OWNERS) ☐ SC CORPORATION DATE INC ☐ FOREIGN CORPORATION (ATTACH COPY OF ARTICLES OF CERTIFICATE OF AUTHORITY) ☐ UNINCORPORATED ASSOCIATION, ENTER LEGAL NAME ☒ OTHER (EXPLAIN) <u>S corporation</u>		8a CHECK IF YOU SELL THESE PRODUCTS (FOR SOLID WASTE PURPOSES) ☐ MOTOR OIL ☐ LEAD ACID BATTERIES ☐ TIRES ☐ LARGE APPLIANCES 8b DO YOU SELL AVIATION GASOLINE? ☐ YES ☒ NO 8c DO YOU PROVIDE SERVICE TO CELLULAR AND PERSONAL COMMUNICATIONS USERS? ☐ YES ☒ NO									
11 NAME(S) OF BUSINESS OWNER, GENERAL PARTNERS, OR OFFICERS											
<table border="1"><thead><tr><th>SOCIAL SECURITY NUMBER</th><th>NAME/TITLE/GENERAL PARTNERS</th><th>HOME ADDRESS</th><th>P. EMPLOYED PERIODIC OWNER</th></tr></thead><tbody><tr><td></td><td><u>Reatha Johnson</u></td><td><u>17 Shoreline Dr (apsc 29223</u></td><td></td></tr></tbody></table>				SOCIAL SECURITY NUMBER	NAME/TITLE/GENERAL PARTNERS	HOME ADDRESS	P. EMPLOYED PERIODIC OWNER		<u>Reatha Johnson</u>	<u>17 Shoreline Dr (apsc 29223</u>	
SOCIAL SECURITY NUMBER	NAME/TITLE/GENERAL PARTNERS	HOME ADDRESS	P. EMPLOYED PERIODIC OWNER								
	<u>Reatha Johnson</u>	<u>17 Shoreline Dr (apsc 29223</u>									
ARE YOU A SC RESIDENT? ☒ YES ☐ NO HOW LONG HAVE YOU LIVED IN SC? <u>15 yrs</u> (YEARS, MONTHS)											
12 HAVE YOU A ACQUIRED ANOTHER BUSINESS? ☐ YES ☒ NO MERGED WITH ANOTHER BUSINESS? ☐ YES ☒ NO FORMED A CORPORATION OR PARTNERSHIP? ☐ YES ☒ NO MADE ANY OTHER CHANGE IN THE OWNERSHIP OF YOUR BUSINESS? ☐ YES ☒ NO B DID YOU ACQUIRE ☐ ALL OF THE SOUTH CAROLINA OPERATIONS? ☐ PART OF THE SOUTH CAROLINA OPERATIONS? PERCENTAGE ACQUIRED _____ C DATE ACQUIRED OR CHANGED _____ WAS THE BUSINESS OPERATING AT THE TIME OF ACQUISITION OR CHANGE? ☐ YES ☒ NO DATE CLOSED _____ DOES THE FORMER OWNER OR LEGAL ENTITY CONTINUE TO HAVE EMPLOYEES? ☐ YES ☒ NO											
13 FIRST DATE OF EMPLOYMENT IN SC mo/day/year <u>1-1-05</u>		14 ANTICIPATED DATE OF FIRST SC PAYROLL mo/day/year <u>1-15-05</u>									
15 ESTIMATE NUMBER OF EMPLOYEES IN SC <u>2</u>		16 IS BUSINESS WITHIN SC MUNICIPAL LIMITS? ☐ YES ☒ NO WHICH CITY?									
17 IS YOUR BUSINESS SEASONAL? ☒ YES ☐ NO IF YES, LIST MONTHS ACTIVE.		18 FORMER OWNER'S SC ESC ACCOUNT NUMBER FORMER OWNER'S SC TAX ACCOUNT NUMBER E NAME OF BUSINESS ACQUIRED ADDRESS OF FORMER OWNER RECEIVED EMPLOYER STATUS JUL 21 2003									

< COMPLETE REVERSE SIDE OF THIS FORM >

I CERTIFY THAT ALL INFORMATION ON THIS APPLICATION, INCLUDING ANY ATTACHMENTS, IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE

SIGNATURE OF OWNER, ALL PARTNERS, OR CORPORATE OFFICER
Reatha JohnsonTITLE
DirectorDATE
7-13-05

JUL 21 2003

011

18 ENTER TOTAL WAGES PAID BY YOU TO S.C. WORKERS BY CALIF. EMPLOYEE WAGES ACT

05	JANUARY THRU MARCH 31	APRIL 1 THRU JUNE 30	JULY 1 THRU SEPTEMBER 30	OCTOBER 1 THRU DECEMBER 31
	\$6,111.50	43,474.15		

19 INDICATE NUMBER OF EMPLOYEES WITHIN EACH CALENDAR WEEK (PART TIME COMMISSION SALESMAN, OFFICERS ETC.)

YEAR	JAN	FEBRUARY					MARCH					APR																
05	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
	AUG					SEPT					OCT					NOV					DEC							
	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28

JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER

20 DO YOU FILE A FUTA FORM 940 WITH THE IRS FOR THE LAST COMPLETED YEAR?

21 IS YOUR ORGANIZATION EXEMPT FROM FEDERAL INCOME TAXES UNDER SECTION 501(c)(3) OF THE IRC FOR RELIGIOUS, EDUCATIONAL OR CHARITABLE PURPOSES? ☐ YES ☒ NO

22 DOES YOUR BUSINESS CONSIST SOLELY OF AGRICULTURAL EMPLOYMENT? ☐ YES ☒ NO

23 DOES YOUR EMPLOYMENT CONSIST SOLELY OF DOMESTIC (HOUSEHOLD) WORKERS? ☐ YES ☒ NO

24 IF THE REPORTED ABOVE MADE UP OF MORE THAN ONE ESTABLISHMENT IN THE STATE? ☐ YES ☒ NO IF YES HOW

MANY ESTABLISHMENTS _____ PLEASE ENTER IN THE SECTION BELOW THE EXACT LOCATION AND THE EMPLOYMENT COUNT

FOR EACH ESTABLISHMENT COVERED BY THIS REPORT USE A SEPARATE SHEET OF PAPER IF ADDITIONAL SPACE IS NEEDED. IF A TITLE

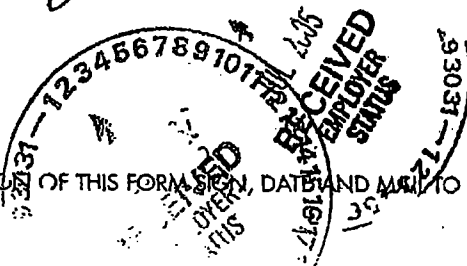
KEY FOR THE SEPARATE ESTABLISHMENT, PLEASE PROVIDE PRODUCT OF ACTIVITY INFORMATION FOR THESE (ON A SEPARATE SHEET OF PAPER)

STREET	CITY	COUNTY	ZIP CODE	EMPLOYMENT

25 CERTIFY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE AND BELIEF

07-13-05
DATE SIGNED AND SUBMITTED

Reatha Johnson
REATHA JOHNSON
DIRECTOR



1. EFFECT OF THIS FORM SIGN, DATE AND MAIL TO

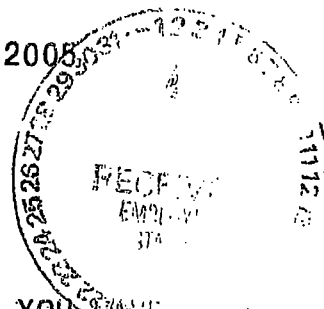
SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
EMPLOYER STATUS UNIT
POST OFFICE BOX 545
COLUMBIA, SOUTH CAROLINA 29202

SOUTH CAROLINA
EMPLOYMENT SECURITY COMMISSION

P.O. BOX 995
COLUMBIA, SC 29202

ACCOUNT NUMBER 420688 1
REST ASSURED LLC
C/O REATHA JOHNSON
9400 TWO NOTCH RD STE D
COLUMBIA SC 29223

07/22/2008



DEAR EMPLOYER

ON THE BASIS OF THE INFORMATION RECENTLY SUBMITTED, YOU HAVE BEEN DETERMINED LIABLE UNDER THE SOUTH CAROLINA EMPLOYMENT SECURITY LAW. YOUR LIABILITY ARISES FOR THE REASON THAT YOU EMPLOYED ONE OR MORE INDIVIDUALS IN EACH OF TWENTY DIFFERENT WEEKS DURING A CALENDAR YEAR OR PAID \$1,500.00 IN WAGES IN A CALENDAR QUARTER OF A CALENDAR YEAR (SEE SECTION 41-27-210 (2) OF THE LAW.)

THE ACCOUNT NUMBER SHOWN ABOVE HAS BEEN ASSIGNED TO YOUR ACCOUNT AND SHOULD BE USED ON ALL FUTURE CORRESPONDENCE.

AS A LIABLE EMPLOYER YOU ARE REQUIRED TO

- 1 FILE CONTRIBUTION AND WAGE REPORTS EACH QUARTER FOR ALL COVERED EMPLOYMENT IN SOUTH CAROLINA
- 2 PAY CONTRIBUTIONS (TAXES) EACH QUARTER AS SO DETERMINED (DETAILED INSTRUCTIONS FOR FILING CONTRIBUTIONS AND WAGE REPORTS APPEAR ON THE FORMS.)

SINCE SECTION 41-37-10 OF THE LAW ATTACHES LIABILITY FROM THE FIRST OF THE CALENDAR YEAR IN WHICH SUCH LIABILITY ARISES, THE COMMENCEMENT OF YOUR OPERATIONS WITHIN THAT CALENDAR YEAR HAVE BEEN DETERMINED LIABLE FOR REPORTING ON ALL OF YOUR COVERED EMPLOYMENT EFFECTIVE AS OF 01/01/2005.

ENCLOSED ARE FORMS NEEDED IN REPORTING FOR THE PERIOD BETWEEN THE BEGINNING OF YOUR LIABILITY AND THE COMPLETION OF THE CALENDAR QUARTER. IF REPORTS HAVE PREVIOUSLY BEEN SUBMITTED, PLEASE DISREGARD THESE FORMS. HEREAFTER, YOU WILL BE MAILED REPORTING FORMS AT THE CLOSE OF EACH CALENDAR QUARTER.

ALSO, COMMISSION REGULATION III REQUIRES THAT INFORMATIONAL POSTERS BE DISPLAYED IN CONSPICUOUS PLACES WHERE WORKERS PERFORM THEIR SERVICES. THE ORDER FORM FOR THE POSTERS IS ENCLOSED IN THIS PACKET.

THE RATE OF CONTRIBUTION APPLICABLE TO YOUR ACCOUNT IS 3.34%. IN ADDITION, YOUR ACCOUNT IS SUBJECT TO A CONTINGENCY ASSESSMENT OF .06% ON ALL TAXABLE WAGES REPORTED EACH QUARTER.

SINCERELY,

JAMES F. SINGLETON
DIVISION DIRECTOR

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
EMPLOYERS REPORT OF CHANGE

Name, Address and S.C.E.S.C. Account Number		Quarter Ending Date
0012589 REST ASSURED LLC C/O REATHA JOHNSON 9400 TWO NOTCH RD STE D COLUMBIA SC 400 29223-5946		12/31/05
420688		

**IMPORTANT:
FOR ANY CHANGES THIS
FORM MUST BE SIGNED.**

1. TYPE OF CHANGE (check appropriate block)

- ☐ CORPORATE NAME OR OFFICER(s) CHANGED BY CHARTER AMENDMENT

New Corporate Name: _____

New Corporate Officer(s): _____
(Title & Social Security Number)

- ☐ TRADE NAME CHANGED TO: _____

- ☐ BUSINESS' PHYSICAL LOCATION CHANGED TO: ☐ ADDITIONAL LOCATION

(Street) (City) (County) (State) (Zip Code)

- ☐ MAILING ADDRESS CHANGED TO: (ATTENTION: ALL SCESC CORRESPONDENCE WILL BE MAILED TO THIS ADDRESS.)

(Street/P.O. Box) (City) (County) (State) (Zip Code)

- ☐ BUSINESS CLOSED (no longer in business)

Date of Final Payroll: _____

- ☐ BUSINESS SOLD * ☐ PARTIAL ☐ TOTAL (ALL)

Date of Sale: _____

(Month/Day/Year)

(* If checked, complete ITEM #2)

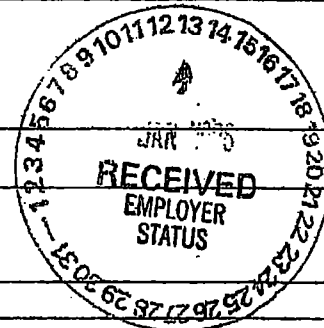
- ☐ CHANGE IN LEGAL ENTITY * (i.e., incorporated, partnership change, etc.)

Date of Change: _____

(Month/Day/Year)

(* If checked, complete ITEM #2)

- ☐ NEW TELEPHONE NUMBER: _____



If your business closed or a change in ownership or legal entity occurred during the period covered by this Contribution Report, written notice of such change must be submitted to the S.C. Employment Security Commission within 30 days from the end of the quarter during which the change occurred. SEPARATE REPORTS MUST BE FILED BY DIFFERENT OWNERSHIPS. (For each ownership, such separate report should cover only that part of the quarter for which it operated.)

2. NAME AND ADDRESS OF NEW OWNER OR LEGAL ENTITY

Name: _____ New FID Number: _____

Address: _____ Telephone Number: _____

3. ANY OTHER CHANGE, EXPLAIN (i.e., nature of business, etc.)

*As of August 26, 2005
I am utilizing subcontractors
for the majority of field
work*

I CERTIFY THAT THE ABOVE INFORMATION IS
TRUE AND CORRECT TO THE BEST OF MY
KNOWLEDGE AND BELIEF:

By: *Reatha Johnson*

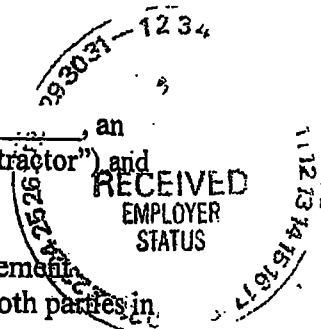
Title: *Director*

Telephone Number: *803 865-8113*

Date: *1-11-06* 014

Independent Contractor Agreement

This Agreement was made on _____ between _____, an Independent Contractor (hereinafter referred to as "Personal Care Aide Contractor") and Rest Assured, LLC (hereinafter referred to as "Company").



1. Amendments. This agreement is intended to serve as a binding agreement between both parties. Amendments to this document shall be approved by both parties in writing.

2. Services To Be Performed. Personal Care Aide Contractor agrees to perform duties as a personal care aide pursuant to dispatch requests made by Company. For purposes of this agreement, a "dispatch request" is a request by the Company to provide personal care services to a patient.

3. Time For Performance. Personal Care Aide Contractor agrees to complete dispatch orders as requested by Company. If a dispatch request cannot be completed, the Personal Care Aide Contractor shall contact Reatha Johnson, or another designee of Company, directly.

4. Compensation. In consideration for the Personal Care Aide Contractor's performance of his duties, Company agrees to pay Personal Care Aide Contractor as follows: Each _____, Personal Care Aide Contractor shall be paid _____ per hour. This payment shall constitute the Personal Care Aide Contractor's sole compensation for the performance of services under this Agreement.

5. Withholding, Taxes and Benefits. The Personal Care Aide Contractor shall be responsible for withholding, accruing and paying all income, social security and other taxes and amounts required by law. The Personal Care Aide Contractor shall also be responsible for all statutory insurance and other benefits required by law for the Personal Care Aide Contractor and the Staff and all other benefits promised to the Staff by the Personal Care Aide Contractor, if any. The Personal Care Aide Contractor shall provide Company with a completed W-9 form.

6. Method of Performing the Services. The Personal Care Aide Contractor will determine the method, details and means of performing the Services upon receiving the care plan for the patient.

7. Operating Costs and Expenses. Personal Care Aide Contractor shall provide all supplies needed to perform the services and shall provide all transportation to the home of a patient. Company shall not be responsible for any transportation required by the Personal Care Aide Contractor.

8. Workers Compensation Coverage. For purposes of South Carolina workers compensation law only, Personal Care Aide Contractor shall be deemed the statutory employee of Company. Company agrees to provide worker's compensation insurance for

Personal Care Aide Contractor as statutory employee. Except and to the extent that Company provides Worker's Compensation insurance, Personal Care Aide Contractor shall indemnify and hold Company harmless for any other injury to the person or property of Personal Care Aide Contractor and for any other loss suffered by Contractor in performing duties under this contract.

9. Qualifications. The Personal Care Aide Contractor shall at all times maintain any licenses required by law. Personal Care Aide Contractor shall demonstrate proof of his or her competency to Company. Personal Care Aide Contractor shall provide Company with proof of at least 10 hours of professional training each year.

10. Right to Terminate. If a Personal Care Aide Contractor engages in conduct that is harmful, detrimental, improper, or fraudulent to or for the business of the Company, the Company may terminate this contract immediately, at the discretion of the Company. If there is monetary value to the damages or fraud involved in the termination of the agreement, then the Company may deduct such monies from any monies owed to the Personal Care Aide Contractor. If the Personal Care Aide Contractor is unable to perform their assigned duties or for any reason fails to provide services for a period of more than seven consecutive days, the Company may terminate this agreement. The Personal Care Aide Contractor may terminate this agreement at any time prior to completion.

11. Change in Business. If the Company has a change of status which would effect its ability to complete its duties under this agreement, including but not limited to, a sale or merger of the company, a change in business services, or relocation to another state, the Company shall provide the Personal Care Aide Contractor with at least 30 days written notice of the change:

12. Agreement Not To Compete With The Company.

A. The Personal Care Aide Contractor agrees not participate directly or indirectly, in any capacity, in any business or activity that is in competition with the Company with respect to a patient served by the Company

B. The Personal Care Aide Contractor shall not, directly or indirectly, in any capacity, solicit or accept business from, provide consulting services of any kind to, or perform any of the services offered by the Company for, any of the Company's customers or prospects with whom the Contractor had business dealings in the year next preceding the termination of its contract.

13. Term of Contract. This contract shall expire 180 days after the effective date, but may be renewed for such additional terms as the parties may agree.



I am aware that as a subcontractor, I decide my own days and hours for work, however there is no guarantee of set work hours per week.

For Rest Assured, LLC:

Print Name: _____

Signature: _____

Its: _____

Date: _____

Witness: _____

Personal Care Aide Contractor

Print Name: _____

Signature: _____

Date: _____

Witness: _____



Definition: Subcontractor (statutory nonemployee)

Expectation: By accepting assignment(s) as a subcontractor, it is under the assumption of Rest Assured that you are your own business representative. Your schedule and hours worked are determined by you. Rest Assured withholds no taxes. We will provide you with a Form 1099 at end of year. We do have an accountant on staff for simple tax and payroll questions you may have. Please be aware of your tax and business responsibilities.

Prerequisites:

Prior to contractual agreement, you must present a completed application, an updated copy of a PPD Test taken at least within the past six months, a sled report, and references.

Termination of Contract:

Termination of the six-month contract may be initiated by either party. Rest Assured retains the right to terminate contracts for substandard services to a client. Rest Assured is aware that subcontractors work for a variety of agencies and/or clients. Please see Contract portion regarding the "noncompete" clause.

Availability of Work:

Please understand the availability of work is dependent upon the amount, needs and desires of clients dispatched to Rest Assured, LLC. There is **no guarantee** of hours or set times. For this reason we advise you as a subcontractor, to not be solely dependent upon Rest Assured, LLC as your sole source of income. The majority of jobs dispatched are temporary and subject to change without notice or control by Rest Assured, LLC.



COMMISSIONERS
J William McLeod
Becky D Richardson
McKinley Washington Jr

EXECUTIVE DIRECTOR
Roosevelt T Halley
803 737 2617



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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 provide 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

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

2007
VFD

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: 803-254-6609

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

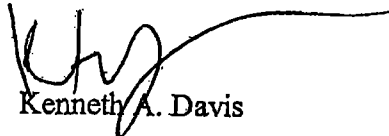
Re: Rest Assured, LLC Account 420688-1 Employer-Employee Relationship
Certified Nursing Assistant

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



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

EXECUTIVE DIRECTOR
Roosevelt T. Halley
803.737.2617



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

April 6, 2006

(803) 737-2520

Fax: (803) 737-0287

Kenneth A. Davis, Esquire
Boykin, Davis, Hawkins & Caldwell, LLC
PO Box 11844
Columbia, SC 29211

In Re: ADM 2006-8
Account #: 420688-1

Dear Sir:

This acknowledges your appeal dated April 3, 2006, which we are accepting as a request for an administrative hearing.

A hearing on this matter will be scheduled as soon as possible. Official notice, at least seven (7) days in advance, will be furnished to you setting forth the date, place, and hour and other details connected with the hearing.

Any questions regarding this matter should be directed to Lower Authority Appeals, (803) 737-2520.

Sincerely,

Ronnie H. Hoover
Chief Administrative Hearing Officer

RHH: sas

PC: Cheryl Clay – Field Deputy
H. William Funderburk – Legal
Jim Singleton – UI Accounting
Field Service
Allen Larson – Deputy Executive Director
Rest Assured LLC
File

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
Lower Authority Appeals
631 Hampton St
Columbia, SC 29202

NOTICE OF HEARING BEFORE APPEAL TRIBUNAL (IN-PERSON)

EMPLOYER'S NAME: Rest Assured LLC
ADDRESS: 9400 Two Notch Road
Suite D
Columbia, SC 29223

EMPLOYER ACCOUNT NO - 420688

HEARING DATE AND TIME: July 10, 2006 AT 1:30 PM EST

BEFORE: Chauntel Bland

HEARING LOCATION: SCESC 701 Hampton Street, Columbia, SC

IMPORTANT: If you have appealed and fail to appear within ten (10) minutes after the scheduled time for the hearing to begin, your appeal may be dismissed. Failure to participate may result in your interest being abandoned.

REPORT TO THE RECEPTIONIST PROMPTLY

THE HEARING WILL NOT BE POSTPONED EXCEPT FOR AN EMERGENCY. Contact a representative of the Commission at (803) 737-2520, AT ONCE, if you cannot be present at the time scheduled and wish to request a postponement of the hearing. Also, if you require any special needs, such as an interpreter, please contact us prior to the hearing.

ISSUES

Whether certain workers are employees

EVIDENCE: This hearing is your only chance to testify and present evidence. Sworn testimony is required from witnesses with first-hand knowledge. Documents, such as business records (for example: timesheets, employer's policies or handbook, warnings) can be considered and must be submitted with an original and two copies. The original will be returned. No testimony or evidence will be considered from witnesses who are not present.

SUBPOENAS: If a witness is reluctant to appear, you may apply for a subpoena through the Commission's local office or the Appeal Tribunal at (803) 737-2520.

LEGAL REPRESENTATION: An attorney licensed to practice in South Carolina may represent you; corporations must be represented by an attorney. It is your responsibility to obtain representation prior to the hearing. Fees charged to represent claimants are limited by the Commission.

THIS NOTICE SUPERSEDES ANY PREVIOUS HEARING NOTICE YOU MAY HAVE RECEIVED. IF THE DATE ON THIS NOTICE IS LATER THAN THE DATE ON ANY OTHER NOTICE, YOU SHOULD ASSUME THAT THE PREVIOUS HEARING HAS BEEN POSTPONED AND FOLLOW THE INSTRUCTIONS ON THIS NOTICE.

MAILING DATE: 6/13/06

GENERAL INFORMATION ON THE S.C. EMPLOYMENT SECURITY LAW IS ON THE BACK OF THIS NOTICE mg

Cc: ~~X-File~~ X-Employer X-Local Office X-Attorney X-Legal X-Singleton X-Field Service X-Larson

- INFORMATION -

Section 41-27-230 (1) (b) 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 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 are received while performing services, which constitute employment and are included in a written statement furnished to the employer.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND
WORKFORCE

Post Office Box 995
Columbia, South Carolina 29202

TRANSCRIPT OF TESTIMONY

BEFORE

Chauntel Bland, Administrative Hearing Officer

Rest Assured LLC

#2006-8

DATE OF HEARING:

September 12, 2006

PLACE:

South Carolina Department of Employment
and Workforce
700 Taylor Street
Columbia, South Carolina

Appearances:
For Appellant

Aretha Johnson, Director
Robin M. Albertson, Accountant
Kenneth Davis, Esq.

For South Carolina Department
Of Employment & Workforce

Cheryl Clay, Field Deputy

1 HEARING OFFICER: This is a hearing on Appeal Number Admin 2006-8 in the
2 case -- in the case of employer Rest Assured LLC. The employer appealed the
3 determination that was issued on March 2, 2006 whereby Phyllis Medford held the
4 -- held that the employer has...has an employer/employee relationship with his
5 workers. The issue in this case is whether an employer/employee relationship
6 exists with the workers of Rest Assured LLC. This hearing is being conducted on
7 September 12, 2006 in Columbia, South Carolina before Chauntel Bland, an
8 Administrative Hearing Officer with the South Carolina Employment Security
9 Commission. Present in this hearing is...the employer is present with two
10 witnesses, with those witnesses being Aretha Johnson, who is a director for the
11 employer, and Robin M. Albertson, who is an accountant for the employer.
12 Representing Rest Assured LLC in this hearing is Attorney Kenneth Davis. Also
13 present in this hearing is Cheryl...Cheryl Clay, who is a Field Deputy for the
14 Agency. All testimony must be taken under oath or affirmation. I will initially ask
15 questions, both -- both -- you'll have the opportunity -- I'll first initially I'll ask --
16 questions and then you'll be able to ask questions of your witnesses. Also in this
17 hearing I will begin with the Field Deputy, and she will answer my questions.
18 Also present in this hearing is Ronnie Hoover, who is the Chief Administrative
19 Hearing Officer for the Agency. You'll be notified of a decision as soon as
20 possible, it will be mailed to your address of record. And for Rest Assured we

1 have 9400 Two Notch Road, Suite D, Columbia, South Carolina 29223, is that
2 correct?

3 MS. JOHNSON: Actually not. We recently moved.

4 HEARING OFFICER: Okay. What's the new address?

5 MS. JOHNSON: 26 Office Park Court.

6 HEARING OFFICER: Okay.

7 MS. JOHNSON: Suite 202, Columbia 29223.

8 HEARING OFFICER: Have you filled out any sort of change of address form
9 with the Agency?

10 MS. JOHNSON: Not yet.

11 HEARING OFFICER: You might want to take care of that before too long. And
12 for you Mr. Davis we have PO Box 11844, Columbia, South Carolina 29211, is
13 that correct?

14 MR. DAVIS: That's correct, sir.

15 HEARING OFFICER: Okay.

16 MR. DAVIS: Just one administrative matter; we have a witness, her office
17 manager, who -- who in fact -- who in fact have pneumonia. We don't necessarily
18 want to continue the hearing or anything, but we may ask that you hold the record
19 open for additional testimony, you know --

20 HEARING OFFICER: Okay.

1 MR. HOOVER: Is she here today?

2 MR. DAVIS: She's not here; pneumonia.

3 MR. HOOVER: Can she -- do you think she can testify by phone, or is she not
4 able to even --

5 MS. JOHNSON: That wouldn't bother her.

6 MR. HOOVER: Okay.

7 MS. JOHNSON: She was already disabled.

8 MR. HOOVER: So she's got pneumonia and can't talk and just not able to
9 participate then, is that correct?

10 MR. DAVIS: Right. [UNCLEAR].

11 MR. HOOVER: Is she under subpoena or is she your witness?

12 MR. DAVIS: She was under subpoena for the last hearing you all subpoenaed for
13 this hearing.

14 HEARING OFFICER: Is that Ms. Cronick (phonetic) Ronnie Cronick?

15 MR. DAVIS: Right.

16 MR. HOOVER: Ms. Cronick?

17 MR. DAVIS: Right.

18 MR. HOOVER: Do we have anyone here under subpoena for today's hearing?

19 HEARING OFFICER: Ms. Aretha Johnson.

20 MR. HOOVER: Just Ms. Johnson?

1 HEARING OFFICER: Yes.

2 MR. HOOVER: I'll tell you what, my name is Ronnie Hoover and I apologize but
3 I'm Chief of Appeals, this is Mr. Bland's second Administrative Hearing, they're a
4 little bit different. He's very -- very capable of Benefit Hearings but
5 Administrative or Tax Status cases are -- take a little additional training and -- and
6 experience that he has not gained yet. So that's the reason I'm sitting in.

7 MR. DAVIS: Sure, that's fine.

8 MR. HOOVER: And as a general rule I'm not involved but I have -- I have a
9 desire to make sure that we cover this with as much quality and as much
10 development as we can so that we don't have to reconvene at a later date. What
11 I'm going to do is go -- allow you to go forward with your presentation. If we find
12 it necessary to reconvene and bring this person in, you may on your own motion at
13 the end of the hearing ask that we do that. I'll let you determine that.

14 MR. DAVIS: Yes, sir.

15 MR. HOOVER: ~~We'll entertain that motion at that time. And if we do reconvene~~
16 it will be for the purpose of just getting that one person's testimony and then any
17 cross -- and direct or cross examination that would be necessary, okay?

18 MR. DAVIS: Okay.

19 MR. HOOVER: But we will make that determination at the end of the hearing,
20 okay? Is that fair enough?

1 MR. DAVIS: Yes, sir.

2 MR. HOOVER: All right. Thank you.

3 HEARING OFFICER: All right. Any more questions, Mr. Davis, as far as the
4 procedures of this hearing are concerned?

5 MR. DAVIS: And Ms. Albertson is not necessarily a witness that we're going to
6 present today. Is there any issue with -- she does accounting work for Ms. Johnson
7 but she's not necessarily going to be a witness.

8 MR. HOOVER: She's certainly -- that's okay with me if she just sits in; that's fine
9 if that's what you want to do. If you -- if you need to be -- to go somewhere to
10 leave at some point in time, that's -- that's fine as well. I don't know that we'll
11 specifically have any questions for you.

12 MS. ALBERTSON: Okay. Yes, sir. I'm here for the duration.

13 MR. HOOVER: Okay. Very good. I will make one other correction; we also
14 have Field Service present in the hearing so any address changes that you would
15 need to make, you can affect that by speaking with her after the hearing and she'll
16 take care of any of those changes that you get proper notice when you file.

17 HEARING OFFICER: All right. Anything else? Ms. Clay, any questions?

18 MS. CLAY: No.

1 HEARING OFFICER: Okay. I'll swear you all in, raise your right hands. Do you
2 swear or affirm that the testimony that you will give will be truth, the whole truth,
3 and nothing but the truth so help you God? Ms. Johnson?

4 MS. JOHNSON: I do

5 HEARING OFFICER: Ms. Albertson?

6 MS. ALBERTSON: I do.

7 HEARING OFFICER: And Ms. Clay?

8 MS. CLAY: I do.

9 HEARING OFFICER: Let the record reflect that all witnesses have been sworn in.
10 The document I have before me is the determination that was issued by Ms. Phyllis
11 Medford. Okay, any objections as far as making this determination by Ms.
12 Medford part of the record?

13 MR. DAVIS: No objection.

14 HEARING OFFICER: Well then as an administrative matter I will label this
15 document as Agency Exhibit Number One. We will now begin with Ms. Clay. So
16 at this time, Ms. Clay, if you could state your name for the record, your position
17 with the Agency, and spell your last name.

18 MS. CLAY: My name is Cheryl Givens Clay. I am a Field Deputy -- Columbia
19 Field Deputy with the Employment Security Commission.

20 HEARING OFFICER: And spell your last name.

1 MS. CLAY: C-L-A-Y.

2 HEARING OFFICER: Okay. You conducted an investigation concerning Rest
3 Assured LLC, is that correct?

4 MS. CLAY: That is correct.

5 HEARING OFFICER: And what prompted this investigation of Rest Assured?

6 MS. CLAY: There is an issue as to if the individuals that were C -- I mean,
7 PCA's, if those individuals were independent contractors.

8 HEARING OFFICER: Okay. And what brought -- what brought about this
9 concern? Was there any particular event that brought about this investigation?

10 MS. CLAY: I'm not absolutely sure that any particular event, it was sent to me
11 and noticed on one of her [UNCLEAR, both speaking]

12 MR. HOOVER: One of her -- now when you say --

13 MS. CLAY: One of -- one of Rest Assured quarterly tax returns.

14 HEARING OFFICER: Okay.

15 MS. CLAY: That there had been employee's at one time prior -- and I'm not sure
16 which quarterly returns started out with zero employees, and so we needed to find
17 out why she had several employees and then all of a sudden she didn't have any, or
18 that many of them.

1 HEARING OFFICER: Okay. So if I understand you correctly, on one of Rest

2 Assureds quarterly reports there was a showing of zero employees for Rest

3 Assured and previously there had been more --

4 MS. CLAY: Several --

5 HEARING OFFICER: -- several?

6 MS. CLAY: -- employees.

7 HEARING OFFICER: Okay. Now is this -- is this in contrast with the previous

8 quarterly report with Rest Assured, and you were just trying to resolve that

9 discrepancy?

10 MS. CLAY: Right. It was sent to me to find out why all of a sudden there were

11 less employees than had been -- a lot less employees than had previously been.

12 HEARING OFFICER: And around what quarter was this?

13 MS. CLAY: I'm not absolutely sure --

14 HEARING OFFICER: Was it in --

15 MS. CLAY: -- what quarter because it was in 2005, I believe.

16 HEARING OFFICER: Okay. And what was the scope of your investigation, what

17 did your investigation consist of?

18 MS. CLAY: The investigation consisted of having an interview with Aretha

19 Johnson, the Director.

20 HEARING OFFICER: Okay.

1 MS. CLAY: And getting some information to her as to the status of the
2 individuals that were not considered independent contractors that were prior
3 considered employees.

4 HEARING OFFICER: Okay. Now what -- now what brought about this change in
5 class -- classification between independent contractors and employees?

6 MS. CLAY: I don't know. That was the information that I was getting from Ms.
7 Johnson -- Ms. Aretha Johnson.

8 HEARING OFFICER: Okay. All right. And what were the results of your
9 investigation?

10 MS. CLAY: The information that I took from Ms. Johnson was the status of the
11 individuals that were classified as independent contractors. And the information
12 that I got from her is --

13 HEARING OFFICER: Now did -- did you get like an affidavit from Miss --

14 MS. CLAY: I got a statement signed -- yes, from --

15 HEARING OFFICER: Okay.

16 MS. CLAY: -- Ms. Aretha Johnson if you need a copy.

17 HEARING OFFICER: And is this -- is this the statement that you're referring to?

18 MS. CLAY: It is, yes.

1 HEARING OFFICER: Okay. Before you continue I'll hand this to you, Mr.

2 Davis, and you can state whether or not you have any objection as far as making
3 that particular document part of the record.

4 MR. DAVIS: I'll enter an objection on the basis this was a statement taken against
5 their interest, you know, without giving her the opportunity to obtain the advice of
6 counsel.

7 HEARING OFFICER: Okay.

8 MR. DAVIS: And it was a statement that was -- this statement may or may not be
9 prejudicial to her presentation of the case. And it was a statement taken by your
10 Agency person on your letterhead written --

11 HEARING OFFICER: Okay. So what's the basis of your objection?

12 MR. DAVIS: It's more prejudicial than probative.

13 HEARING OFFICER: Okay. Okay.

14 MR. DAVIS: [UNCLEAR, both speaking]

~~15 HEARING OFFICER: So you're saying that prejudicial value substantially out~~
16 weighs the probative value of this particular document?

17 MR. DAVIS: Right.

18 HEARING OFFICER: Okay. I will note your objection for the record, Mr. Davis,
19 however I will allow this document to come in as employ -- excuse me, Agency
20 Exhibit Number Two.

1 MR. HOOVER: This is Ronnie Hoover. Could we get some clarification on the
2 notations that are in red, Mr. Davis? Do you have a copy of this affidavit?

3 MR. DAVIS: I have a copy of it. See, the problem I have with --

4 MR. HOOVER: Well, before you -- I'm not speaking to your objection. If you'll
5 note the one that we're introducing as Agency Exhibit One has some notations --

6 MR. DAVIS: [UNCLEAR, both speaking]

7 MR. HOOVER: -- you have those --

8 MR. DAVIS: I have notations, yes, sir.

9 MR. HOOVER: Do you know who made those, Ms. Clay?

10 MS. CLAY: Yes, I do.

11 MR. HOOVER: You do? And whose handwriting is that?

12 MS. CLAY: Aretha Johnson.

13 MR. HOOVER: Ms. Johnson, and where is she?

14 MS. CLAY: Ms. Johnson --

~~15 MR. HOOVER: Ms. Johnson made those notations in red?~~

16 MS. CLAY: Exactly.

17 MR. HOOVER: And on the second page I believe there are some additional notes,
18 is that correct?

19 MS. CLAY: It is.

20 MR. HOOVER: And do you have those Mr. Davis, on your copy?

1 MR. DAVIS: I have those also.

2 MR. HOOVER: All right. I just want to make sure there's no objection to those
3 being a part of that exhibit as well. They appear to be accurate to the ones that you
4 have?

5 MR. DAVIS: Right. That's consistent with what I have.

6 MR. HOOVER: All right, sir. Thank you very much. You will take that back as
7 Agency Exhibit One. I just want to make sure that that was clear. If you'll go
8 ahead with your address to your involvement in the investigation, what you
9 discovered, what you did.

10 MS. CLAY: What I did, actually, what I did was I took the information --

11 MR. HOOVER: Excuse me just a moment. Mr. Davis?

12 MR. DAVIS: [UNCLEAR] have a brief conference about the document just in
13 case --

14 MR. HOOVER: Do you want to step outside and do that? We're not gonna go off
15 record, we'll let you step outside and take care of that, okay? (Mr. Davis steps out
16 of room)

17 MR. DAVIS: (Returns) No objection as to identification.

18 HEARING OFFICER: I see. Now Ms. Clay, did you present your findings to
19 anyone?

20 MS. CLAY: I presented my findings to Phyllis Medford.

1 HEARING OFFICER: Okay. And now did you make the decision concerning the
2 determination whether there's an employee or employer relationship?

3 MS. CLAY: I did not. As I said, Phyllis Medford, employee status supervisor
4 made that decision.

5 HEARING OFFICER: Anything else you'd like to add, Ms. Clay?

6 MS. CLAY: I was just going to say that the information that I took from Ms.
7 Johnson is the information that is presented in Exhibit Two.

8 HEARING OFFICER: Okay. Mr. Davis, do you have any questions for Ms.
9 Clay?

10 MR. DAVIS: This document was based upon certain standard questions that you
11 asked?

12 MS. CLAY: Yes.

13 MR. DAVIS: And --and employee -- employers?

14 MS. CLAY: Exactly what I was trying to do was -- basically what I was doing
15 was getting the information as to the -- regarding the working status of the
16 individuals that was considered independent contractors.

17 MR. DAVIS: Okay. But -- but this is typewritten -- this is [UNCLEAR] correct?

18 MS. CLAY: It is.

19 MR. DAVIS: All right. And --

20 MS. CLAY: Under the direction of the Agency.

1 MR. DAVIS: Right. And while it might reflect accurately what she said because
2 she signed it indicating that this is accurate, there might be matters that are relevant
3 which may not be covered because it wasn't in your field manual, is that correct?

4 MS. CLAY: I -- I'm not sure --

5 HEARING OFFICER: I'm sorry, could you -- could you repeat the question?

6 MR. DAVIS: There might be matters which were relevant to the [UNCLEAR]
7 inquiry which may not be addressed in this document because those questions
8 weren't in your field manual.

9 MS. CLAY: I would have no way of knowing what those --

10 MR. HOOVER: Mr. Davis. We'll take administrative notice that there are other
11 items that may not be in that affidavit and we will agree to that, and that's the
12 purpose of this hearing. In fact, we're going to use that for probative value here
13 today, and your client has the opportunity to correct if there's anything wrong in
14 that affidavit. Of course, she'll have to explain why she signed it if that's true but,
~~15 no, we will agree to that, take administrative notice that there may be other items~~

16 not included there, and they may not have been asked, okay?

17 MR. DAVIS: Sure.

18 MR. HOOVER: Does that answer your question?

19 MR. DAVIS: Yes.

1 MR. HOOVER: And I'm not trying to get out of this but I would like for us to
2 really get on to the meat of the matter here.

3 MR. DAVIS: Sure.

4 MR. HOOVER: Anything further you would like to ask Ms. Clay, go ahead
5 please.

6 MR. DAVIS: [UNCLEAR] support your findings; you didn't make a specific
7 recommendation regarding employee status?

8 MS. CLAY: Not at all. I did not.

9 MR. DAVIS: No further questions.

10 HEARING OFFICER: That being the case, at this time Ms. Johnson if you could
11 state your name for the record, your position with Rest Assured, and spell your last
12 name.

13 MS. JOHNSON: Aretha Johnson, I'm the Director; J-O-H-N-S-O-N.

14 HEARING OFFICER: Okay. Ms. Johnson, right now I'm reviewing the affidavit
15 and there are certain questions that this affidavit brings to mind. First of all --

16 MR. DAVIS: I just -- I want to object to the fact that the affidavit is not sworn --
17 it's not a sworn statement or anything. It's more of a statement as opposed to an
18 affidavit.

19 HEARING OFFICER: Okay. Well, I'll -- well then I'll just change the
20 phraseology. Well, let's just get to the --

1 MR. HOOVER: First of all, and this is Ronnie Hoover again; Ms. Johnson, would
2 you identify this document please, and tell us if you've ever seen it, and describe
3 what you -- what you think it portrays.

4 MS. JOHNSON: It's -- when Ms. Clay came, I portray it as a generalized
5 description of what I do, non specific -- not very explicit and in depth [UNCLEAR,
6 both speaking]

7 MR. HOOVER: Does that cover every situation that you have --

8 MS. JOHNSON: Oh, no, certainly not.

9 MR. HOOVER: -- as they pertain to the workers at Rest Assured?

10 MS. JOHNSON: Certainly not.

11 MR. HOOVER: Is that your signature on page two?

12 MS. JOHNSON: Yes, it is.

13 MR. HOOVER: Did you, in fact, read that document before signing it?

14 MS. JOHNSON: Yes. I read it briefly, I overlooked it. I did not -- I think, Ms.

15 Clay, you were there for a period of maybe an hour or so in which everything was

16 talked about and a general, basically, yes this is what -- what we did.

17 MR. HOOVER: Did you understand the purpose of Ms. Clay coming to see you?

18 MS. JOHNSON: Really, quite honestly, I didn't know --

19 MR. HOOVER: I want you to be honest.

20 MS. JOHNSON: Yes.

1 MR. HOOVER: We're not trying to catch you in anything.

2 MS. JOHNSON: Yeah, I didn't know the -- the very important nature of the
3 beginning of what would ensue after Ms. Clay, and without seeking legal counsel I
4 would have certainly spoken with Kenneth before Ms. Clay came just to
5 understand the importance of --

6 MR. HOOVER: Were you in contract with Mr. Davis at the time this statement
7 was given?

8 MS. JOHNSON: Yes.

9 MR. HOOVER: All right.

10 MS. JOHNSON: He was my -- my lawyer.

11 MR. HOOVER: Yes.

12 MS. JOHNSON: But I had no idea that it was gonna escalate to --

13 MR. HOOVER: Did Ms. Clay give you notice that she was coming?

14 MS. JOHNSON: She did, yes.

15 MR. HOOVER: Did she tell you why she was coming?

16 MS. JOHNSON: Yes. She said that -- I can't quite remember why she was
17 coming, but with the last hearing that we had this -- go over all decisions that last
18 hearing saying that this worker was an employer of --

19 MR. HOOVER: You're referring to a regular unemployment hearing?

20 MS. JOHNSON: Yeah, an unemployment hearing.

1 MR. HOOVER: Okay. I understand.

2 MS. JOHNSON: We -- we requested that we -- we had got a hearing, I can't
3 remember the Hearing Officer, but he asked us if we would like to request just to --
4 so that I can establish what I truly do. And I also sent information via my tax
5 document where it says, "If there are any generalized change," I put there that I'm
6 no longer employer/employee status, that I've gone to contractual status. I put that
7 on my actual tax return where I had the number of employees to inform the
8 Commission that I had, indeed, changed my status.

9 HEARING OFFICER: Yes.

10 MS. JOHNSON: So that may have been what prompted it as well. And with the
11 last hearing with the contractor saying that she was an employee, you know, it was
12 kind of like I can't have the Employment Commission considering me as an
13 employer, you know, having gone through, you know, everything that I've gone
14 through with these contractors.

15 ~~MR. HOOVER: So it's my understanding then that while some of these comments~~
16 may in fact be accurate, they may be incomplete and there's some other things that
17 you would have liked to have been said as well?

18 MS. JOHNSON: Yes.

19 MR. HOOVER: Is that accurate?

1 MS. JOHNSON: Yes. Knowing -- knowing what the outcome of it would have
2 been, yes, I would have liked to --

3 MR. HOOVER: All right. Do you mind if we use that as a guide then at least to
4 go through and give you a chance to respond to these again?

5 MS. JOHNSON: Sure.

6 MR. HOOVER: Mr. Davis, do you have any objection to that?

7 MR. DAVIS: No, to that.

8 MR. HOOVER: Mr. Bland, why don't we do that then, okay? And one other
9 thing, these -- these notes, are these your handwriting?

10 MS. JOHNSON: Yes.

11 MR. HOOVER: Are these things that you additionally wanted to add to this?

12 MS. JOHNSON: Yes -- yes.

13 MR. HOOVER: Okay. So you'll have a chance to at least add some things prior
14 to today's hearing too, is that correct?

15 MS. JOHNSON: Well -- well those were added initially. I didn't add

16 [UNCLEAR, both speaking]

17 MR. HOOVER: They were done at the time you signed it?

18 MS. JOHNSON: Yes.

19 MR. HOOVER: Okay. That's what I'm saying, other than what Ms. Clay typed
20 up, you added some things in handwritten form, is that correct?

1 MS. JOHNSON: Right -- right.

2 MR. HOOVER: Okay. All right. Mr. Bland, proceed.

3 HEARING OFFICER: Okay. The first statement you made is -- is that Rest

4 Assured negotiates a fee with their clients, correct?

5 MS. JOHNSON: For private pay clients. Yes, I -- I will negotiate a fee.

6 HEARING OFFICER: All right. Now -- now are you the only person authorized
7 to negotiate this fee with the clients?

8 MS. JOHNSON: Yes.

9 HEARING OFFICER: Okay. Do -- are the CNA's allowed to negotiate this fee?

10 MS. JOHNSON: No.

11 HEARING OFFICER: Okay.

12 MS. JOHNSON: They can negotiate their pay.

13 HEARING OFFICER: Negotiate their pay?

14 MS. JOHNSON: You know, as far as what the agency will pay them as a

15 ~~contractor. They come with a whole host of experiences with different agencies~~

16 and they -- they negotiate their -- their fee, you know, with me.

17 HEARING OFFICER: Now when you say, "Their pay," you mean they negotiate
18 their pay with the employer not with the client, is that what you're referring to?

19 MS. JOHNSON: Yeah, with -- with the contractor, they will negotiate their pay
20 with me as the contractor.

1 HEARING OFFICER: Okay. Let's see, and -- let's see. Now -- now how is --
2 how are these -- now what's the nature of these negotiations, how are the
3 negotiations paid?

4 MS. JOHNSON: Well, based on their experiences with other contractual jobs that
5 they --

6 HEARING OFFICER: I'm -- I'm referring to the -- to the client -- to you and the
7 client; how are these negotiations -- what's the nature of these negotiations?

8 MS. JOHNSON: Oh. It's based on the -- the type of work, the amount of work,
9 the hours of work that needs to be done.

10 HEARING OFFICER: Okay. All right. Is there any -- now is there any sort of
11 standard that stipulates the amount of care that's to be given to the clients?

12 MS. JOHNSON: I provide what's called, "Custodial type care."

13 HEARING OFFICER: Okay.

14 MS. JOHNSON: Which is care that any lay person can do; light housekeeping,
15 meal preparation.

16 HEARING OFFICER: Okay.

17 MS. JOHNSON: Putting on their clothes, bathing, combing their hair.

18 HEARING OFFICER: Okay.

19 MS. JOHNSON: Which, generally, and CNA certified nurse assistant, or nurse
20 assistant, or lay person can be [UNCLEAR, both speaking].

1 HEARING OFFICER: Okay. I see. All right. And I think you've already
2 answered this but is the -- I assume the CNA is not involved in any of the
3 negotiations with the client -- with the client?

4 MS. JOHNSON: No -- no.

5 MR. HOOVER: Could I interject a question here; and I apologize again for having
6 to do this. I just want to make sure we do this right the first time and not have to
7 reconvene. But I understand that these are CNA's, they're certified nursing
8 assistants, is that correct?

9 MS. JOHNSON: Some of them are CNA's and I mention that because, you know,
10 we're talking about their level of expertise. Yes, CNA's do come with more
11 experience than say a personal care assistant, or just a nurse assistant.

12 MR. HOOVER: But what you were describing just a moment ago sounded more
13 like domestic help than it did a certified nursing assistant. And am I correct that a
14 CNA has to be certified by state law?

~~15 MS. JOHNSON: Yes. Yeah, they're certified --~~

16 MR. HOOVER: So if they're gonna be --

17 MS. JOHNSON: -- with some type of registry.

18 MR. HOOVER: If they're gonna do any kind of hands on care to a patient, they
19 have to be -- they have to be a CNA, is that right?

20 MS. JOHNSON: No -- no.

1 MR. HOOVER: They don't?

2 MS. JOHNSON: Certainly not. I'd say 70 percent of my staff are not CNA's.

3 MR. HOOVER: What determines whether or not you need a CNA as opposed to
4 someone without credentials?

5 MS. JOHNSON: Actually, with the -- the sub contractor's are looking for work,
6 they -- CNA's don't care, they don't give a hoopla about, you know, the level of
7 expertise. They just know, "I'll be making nine dollars an hour, you know, that's
8 what I'd like to make." If they can negotiate that rate with me they don't care if
9 they're sweeping the floors as a CNA. Most of them have primary jobs at
10 hospitals. We have centers, that sort of thing, so when they come to me they know
11 that the job is temporary. They know that they're choosing their own hours, that
12 they're choosing their own days of work if they need some extra money to pay that
13 light bill once a month.

14 MR. HOOVER: But my question is are these ambulatory or terminal patients or
15 people -- sometimes they can live for a long period of time, they just need someone
16 to come in and care for them a while.

17 MS. JOHNSON: That's the nature of what I do.

18 MR. HOOVER: It's all of that, is that right? It would be sometimes all of those
19 things?

1 MS. JOHNSON: Yes. Sometimes they're terminal, but when I go in to negotiate
2 the fee and say it is someone that's -- that's terminal --

3 MR. HOOVER: Yes.

4 MS. JOHNSON: -- that perhaps need a little more care than just domestic, I have a
5 registry of over 280 aides that I can choose from which -- which makes -- makes
6 my business profitable because my registry is so large. I can certainly choose an
7 aide that's commensurate with the -- the expectations of that -- that particular
8 client.

9 MR. HOOVER: So you can tailor -- you've got someone tailored to meet that --

10 MS. JOHNSON: Right.

11 MR. HOOVER: -- that requirement of that client?

12 MS. JOHNSON: Right. Almost 100 percent which -- which --

13 MR. HOOVER: So that we'll understand, and there's so many jobs that we deal
14 with that we can't possible understand them all.

~~15 MS. JOHNSON: Right.~~

16 MR. HOOVER: Can you tell us though why you would need a person to be
17 certified -- a certified nursing assistant, as opposed to just hiring someone who
18 doesn't have that certification?

19 MS. JOHNSON: I don't need a certified nurse assistant. The sub contractors are
20 looking for work and they --

1 MR. HOOVER: Not the sub contractor. I'm talking about your client. When they
2 contact you does that dictate what type of person you're gonna have to assign to
3 them?

4 MS. JOHNSON: No. They -- they give me a list of their needs. When I do the
5 assessment they give me a list of their needs and I basically go through my registry
6 to see who matches. They don't specifically say, "I -- I want a CNA. I want
7 someone that can bathe --"

8 MR. HOOVER: I know. But does the care -- the type of care they need dictate
9 whether or not you send -- let me put it this way; are there some clients that will
10 contact you and they will say, "I need this, and this, this," and what it appears what
11 they need is a registered nurse almost, or an LPN working in their home as
12 opposed to a domestic or just a helper?

13 MS. JOHNSON: Within my scope of practice, which is what I chose to do, is
14 custodial care simply because I don't want that level of care.

15 MR. HOOVER: So they don't necessarily have to be CNA's then?

16 MS. JOHNSON: Right, they don't -- I don't have to have a CNA.

17 MR. HOOVER: Okay, I understand. And I -- and I apologize for letting me
18 interject that but we were under the -- I think we were laboring under the thought
19 that you had some that were CNA's and some, most of in fact, were CNA's. But
20 what you're saying is actually most of them are not CNA's?

1 MS. JOHNSON: Are not CNA's, no.

2 MR. HOOVER: How many -- how many different workers do you have at this
3 time? Not those that you have a bank of applications of but how many CNA's --
4 excuse me, how many workers are you using at this present time?

5 MS. JOHNSON: Oh, around 80.

6 MR. HOOVER: So that would be about 80 clients that you have as well?

7 MS. JOHNSON: [INAUDIBLE] (Speaks to Ms. Albertson)

8 MS. ALBERTSON: It varies week to week, sometimes from 70 to 90 or
9 somewhere in between.

10 MS. JOHNSON: Okay.

11 MS. ALBERTSON: And, yes, she does have that many --

12 MR. HOOVER: All right.

13 MS. ALBERTSON: -- patients or clients, however you want to call them, that
14 need the individual [UNCLEAR, both speaking]

~~15 MS. JOHNSON: Yeah, 70 -- 70 to 90.~~

16 MR. HOOVER: So you match up them -- they would be matched with the same
17 number of clients then, pretty much, is that correct?

18 MS. ALBERTSON: Um-hum.

19 MR. HOOVER: For the record that was the accountant that was assisting her with
20 that answer. Thank you very much. We'll turn it over now.

1 HEARING OFFICER: Okay. Just so it's clear in my mind, the type of care that
2 you offer you say is domestically related, correct?

3 MS. JOHNSON: No, I didn't say it was domestically related, I said it's -- it's --

4 MR. HOOVER: Custodial.

5 MS. JOHNSON: Yeah, custodial.

6 HEARING OFFICER: But the custodial care requires domestic duties such as
7 cleaning?

8 MS. JOHNSON: Well, that -- that's part of it. It's companionship.

9 HEARING OFFICER: Okay.

10 MS. JOHNSON: You know, I send them in there. Yes, they can -- you know, if
11 Miss Hattie needs her -- her floor swept and her clothes hung out, yes, they'll go
12 and do that type of thing.

13 HEARING OFFICER: Okay. But what's the scope of the care that you offer to
14 clients?

15 MS. JOHNSON: ~~Bathing, grooming, some light -- light housekeeping, some meal~~
16 preparation, companionship. They escort them to, you know, doctor's offices that
17 type of things.

18 HEARING OFFICER: But based on the scope of the care you offer, a CNA is not
19 necessarily required to perform -- perform all of those particular duties? No?

20 MS. JOHNSON: No -- no.

1 HEARING OFFICER: Okay. So, okay -- All right.

2 MR. HOOVER: Can you give us an example of how a client would contract with
3 you, the service that they need, what would they -- give us an example of what a
4 client would tell you.

5 MS. JOHNSON: Usually the client has a primary care giver that is responsible
6 [UNCLEAR] usually they're disabled elderly. And the primary care giver is the
7 one -- sometimes the client themselves will call us and they'll say, "Well, my
8 mom, I have to work during the day, my mom needs someone to help get her up,
9 put her in the chair, bathe her. Maybe at 11 o'clock she'll need a light breakfast or
10 a light snack, companionship. She likes to be rolled outside on the porch, or for
11 instance she'll have a doctor's appointment, you can help accompany her to the
12 doctor's appointment; if you could fold the basket of clothes." And, basically,
13 that's it.

14 HEARING OFFICER: Okay. And now in your statement you also say that the --
15 ~~that your workers are free to choose the hours and days they can work, correct?~~

16 MS. JOHNSON: Right.

17 HEARING OFFICER: Okay. How are -- how are your workers -- how are their
18 schedules determined?

19 MS. JOHNSON: It's when I get a request dispatch for me; I have what I call a
20 client care liaison that is in charge of this 250 contractor registry. And she'll mill

1 through -- they -- when they initially come in and contract with me they put down
2 the days, the hours, and as I said most of them have primary employment days of
3 the week, the hours that they're available to work.

4 MR. HOOVER: Who is, "She," who is she that would contact or look through this
5 list of workers?

6 MS. JOHNSON: The client care liaison.

7 MR. HOOVER: You -- is that someone --

8 MS. JOHNSON: That's a staff -- one of my employees.

9 MR. HOOVER: Is that someone you consider an employee?

10 MS. JOHNSON: Yes.

11 MR. HOOVER: They're not an independent contractor?

12 MS. JOHNSON: No, they're in my office. I have three?

13 MS. ALBERTSON: Three; Foxworth, Coley (phonetic) -- Foxworth --

14 MS. JOHNSON: Wilson.

15 MS. ALBERTSON: -- Wilson and --

16 MS. JOHNSON: [INAUDIBLE]

17 MS. ALBERTSON: [UNCLEAR] the office manager.

18 MS. JOHNSON: In the office and another one [UNCLEAR].

19 MS. ALBERTSON: Okay.

20 MR. HOOVER: And are you covered as a well -- are you covered as well?

1 MS. ALBERTSON: Yeah, I'm an employee.

2 MR. HOOVER: Okay. Now, in order to continue so that -- that we keep some
3 continuity here, you've given us an example of how a client would ask for your
4 services. Now, take that to the next step where this coordinator is contacting
5 someone to provide that. Tell me what happens?

6 MS. JOHNSON: Yeah, the client care liaison, she is very talented with it, she's
7 been doing it a long time. She has her -- her registry and her way of doing things
8 that she has it divided up into times of days, area of the states where the contractors
9 are located, the times of days -- days of the week and that sort of thing. Once --
10 and then I mentioned that they're on the registry because they've already gotten a
11 SLED check, TB test, background checks already, all the folks in this registry.
12 And so she can just pick once she -- she gets a few that she feels suitable for
13 whatever the request was, she'll send them out to interview.

14 HEARING OFFICER: Okay.

15 ~~MR. HOOVER: So you say this is a reliable very -- this person is very~~
16 knowledgeable and is a vital part of your organization, is that correct?

17 MS. JOHNSON: Right. She -- she's mainly concerned with the scheduling.

18 MR. HOOVER: And does she do a good job of dispatching?

19 MS. JOHNSON: Yes...yes.

20 HEARING OFFICER: Okay.

1 MR. HOOVER: Do you hear that Mr. Davis? That usually means they'll get rid
2 of you, they'll get rid of accountants. They don't touch these coordinators who
3 keep this business --

4 MR. DAVIS: Yes, sir.

5 MR. HOOVER: Thank you, ma'am. That gives me an idea. I'll turn this back
6 over to Mr. Bland.

7 HEARING OFFICER: Okay. Now the schedule; based on the needs of the client,
8 the CNA is required to work according -- according to the schedule that the client
9 gives to this liaison?

10 MS. JOHNSON: Um-hum.

11 HEARING OFFICER: Okay. You have to say, "Yes," or "No," just for the
12 record.

13 MS. JOHNSON: Oh, yes.

14 HEARING OFFICER: Okay. Now -- now if the worker is somehow unable to
15 come to -- come to the client at the time that the client needs them, are there any
16 consequences for the worker?

17 MS. JOHNSON: You mean --

18 HEARING OFFICER: I.e. termination, disciplinary action, anything of that sort
19 that the -- if the worker says, "I'm sorry, I can't come at 3 o'clock when Miss
20 Hattie needs me." Are there any sort of consequences for the -- for the worker?

1 MS. JOHNSON: Well, that's -- normally I have to say this, usually when I put that
2 aide into the home, they build a rapport.

3 HEARING OFFICER: Okay.

4 MS. JOHNSON: [UNCLEAR] with the patient.

5 HEARING OFFICER: Yes.

6 MS. JOHNSON: Or -- or the primary care giver. And I have some instances
7 where the care giver and the client are -- are so attached to this aide --

8 HEARING OFFICER: Yes, I'm listening.

9 MS. JOHNSON: [UNCLEAR, both speaking] I don't -- I don't care what they do,
10 you know, I'm -- I'm keeping them so, you know, they -- they will keep the client.

11 HEARING OFFICER: Okay.

12 MS. JOHNSON: You know, I -- I don't -- I come maybe every four months or so
13 where I'll make a phone call to see. Unless I hear back from the client or that

14 caregiver then I -- I assume everything is going fine. Now, yes, I have had several

15 clients, which I have documents, where they said, "I don't want this -- this aide any

16 more. She's not working out the first three days, get rid of her. I need another

17 client; find me someone else." You know, so you know having so many clients I

18 don't know what goes on in the home, I have to rely solely on that -- that primary

19 care giver or that client to relay to the agency whether this aide is doing well or

20 not.

1 HEARING OFFICER: Okay.

2 MS. JOHNSON: And it happens. I've had to tell the aide several times, "The
3 client doesn't want you any more. You know, they fired you, they had put it in
4 writing that they don't want you." Matter of fact, I have some papers from the
5 Employment Security Commission where they come down here and said, "My
6 client asked for another aide and they didn't put me on another job," because I
7 don't have another job that fits your schedule that you've given to us, you know, to
8 -- to fill. You know, so I have those documents where, you know, it's -- it's just so
9 frustrating because that -- that client will say, "Okay," and there's a vast number of
10 reasons why they don't want the aide.

11 HEARING OFFICER: Yes.

12 MR. HOOVER: You'd be surprised, or maybe not, some of the reasons why they -
13 - they don't want this particular aide. And -- and I have to tell the aide, you know.

14 MR. HOOVER: We've asked a couple questions about two items on the Agency

15 Exhibit Two. What I'd like to do is this; this is gonna become so long --

16 MS. JOHNSON: Yeah --

17 MR. HOOVER: -- that you're gonna lose your train of thought and there will be a
18 number of questions, Mr. Davis, that you're gonna want to interject as well.

19 MR. DAVIS: Right.

1 MR. HOOVER: If you don't mind, could we step away from our procedure just a
2 little bit, instead of presenting everything -- asking all of our questions and then
3 turning it over to you, can we take these items line by line and then allow you to
4 insert questions that are cross with each item? Will that -- would that help you?

5 MR. DAVIS: [UNCLEAR] the whole presentation.

6 MR. HOOVER: Would you rather wait till the end?

7 MR. DAVIS: Yeah.

8 MR. HOOVER: That's fine. I wanted to make sure though that -- that you had
9 that opportunity.

10 HEARING OFFICER: Okay.

11 MR. HOOVER: All right. One other question here with these two items then
12 we'll move on, do you get a contract from the client for the services that they
13 expect you to render?

14 MS. JOHNSON: No. I don't -- I don't get a contract. It's sort of like a written
15 care plan.

16 MR. HOOVER: Do you have an example of that today?

17 MS. JOHNSON: No, I don't have --

18 MR. HOOVER: Do you --

19 MS. JOHNSON: [UNCLEAR]

20 MR. HOOVER: Do you have a written care plan for each individual client?

1 MS. JOHNSON: Yes. I'll -- I'll run out there when I go and do that assessment
2 that I initially do, and I'll write out basically the example that I gave earlier for the
3 needs that they -- she wants for her mom.

4 MR. HOOVER: Do you have a contract with the individual worker that will be
5 providing help to that client?

6 MS. JOHNSON: Yes, I have a --

7 MR. HOOVER: Do you have a copy of that today?

8 MR. DAVIS: Yes. That's [UNCLEAR] standard contract that she uses.

9 MR. HOOVER: Do you have a copy of --

10 HEARING OFFICER: Yes.

11 MR. HOOVER: Did you provide Ms. Clay before?

12 MS. JOHNSON: Yes, but since Ms. Clay left, in order for me to, you know, to --
13 and I want it to be considered, you know, my status changed from employee to
14 employer, so I changed my [UNCLEAR] contract to try to come in to what the
15 state considers as compliancy [UNCLEAR, both speaking] status.

16 MR. HOOVER: So this has -- this has been modified from the one that you
17 presented to her?

18 MS. JOHNSON: I think so, is it?

19 MR. DAVIS: Right, yeah -- yeah.

20 HEARING OFFICER: Okay.

1 MR. DAVIS: Well, [UNCLEAR] that's the one that she had [UNCLEAR] to her
2 at the time.

3 MR. HOOVER: It appears to be one and the same.

4 HEARING OFFICER: Right -- right. What I have before me is a three page
5 document. The first page has the heading, "Independent Contractor Agreement,"
6 and this document will be labeled as Employer's Exhibit Number One. Now, Ms.
7 Johnson, I was looking at the -- I was just kind of cursorily looking over this
8 contract and in Clause Ten it says, "Right to terminate," and it says, "If a personal
9 care aide contractor engages in contact that is harmful, detrimental, improper or
10 fraudulent to or for the business of the company, the company may terminate this
11 contract immediately at the discretion of the comp -- at the discretion of --

12 MS. JOHNSON: [INAUDIBLE]

13 MR. DAVIS: That's the standard -- that's the standard.

14 HEARING OFFICER: Yes. So, do you want to comment on that particular clause
15 or --?

16 MS. JOHNSON: Right. The new contract that I -- I've given [UNCLEAR]
17 because realistically, even though it's worded that way, and that's why I was
18 saying when Ms. Clay came, it would have been a lot more explicit in explaining
19 to her how this actually ensues with the hiring and the firing.

20 HEARING OFFICER: Okay.

1 MS. JOHNSON: Usually, like I said, with me coming -- I come in at four to five
2 months to check. This is not supervision unless I hear back from my clients --

3 HEARING OFFICER: Okay.

4 MS. JOHNSON: -- regarding this contractor then, you know, usually it just goes
5 on and on.

6 HEARING OFFICER: So --

7 MS. JOHNSON: So, actually what I'd like to insert in there, you know, and
8 what's been inserted that I faxed to you to -- to change in the contract was that the
9 -- the client -- the client will determine, you know, whether they may stay or go.
10 And basically that's what's been happening over and over again. If the people that
11 will come and audit, you see 99.9 percent of the time to this agency the client will
12 say, "She -- she's coming late every day, you know. So, I don't want her any
13 more."

14 HEARING OFFICER: So you base your decision on whether to -- to retain or to
15 ~~terminate the worker based on what the client says?~~

16 MS. JOHNSON: Right. And I changed the contract because that was when I got
17 the letter back, that was one of the big things they say that made me an employer.
18 Then as I thought about it, even though that -- that's there, yes, I actually tell the
19 contractor, you know, "Ms. Wilson doesn't want you any more." It has -- it has

1 nothing to do with what Rest Assured that I told you, "Yes, you have to go. You
2 know, and Ms. Wilson -- per Ms. Wilson's request."

3 HEARING OFFICER: I see. Now can the worker change the contract of services
4 with the client?

5 MS. JOHNSON: Can --

6 HEARING OFFICER: I think -- I think you mentioned that earlier there's this
7 written patient care agreement with the client that --

8 MS. JOHNSON: Yeah, I get that initial assessment initially, and then four months
9 later unless -- unless they -- they contact me, contact the office directly and say,
10 "Well, you know, can -- can she --" because transportation is a -- is a fragile issue,
11 you know, with riding clients in the car, unless they -- they call me back and say,
12 "Can I have this, you know, get liability?" You know, that's an issue. Unless they
13 call me back and whatever initially takes place contingents --

14 HEARING OFFICER: Okay.

~~15 MS. JOHNSON: -- and once the contractor gets in there they -- they take it and~~
16 run with it.

17 HEARING OFFICER: Well, I guess my question is can the worker unilaterally
18 change the patient care plan without --

19 MS. JOHNSON: [UNCLEAR, both speaking] they do it all the time but among
20 themselves after they get in there.

1 HEARING OFFICER: Are they authorized to change the patient care plan without
2 your authority?

3 MS. JOHNSON: With the contracts, they know that they're there for custodial
4 reasons and they get in there and they do basically what the client wants to them to
5 do in their scope of practice.

6 HEARING OFFICER: Okay.

7 MS. JOHNSON: And, yes, they do -- to answer your question, yes, they do
8 change it according to their clients needs.

9 HEARING OFFICER: And they're allowed to do so if they determine that the
10 client's needs may vary from the patient care plan?

11 MS. JOHNSON: It can because, as I said previously, with them delivering only
12 custodial care, they can -- they can add light housekeeping --

13 HEARING OFFICER: Okay.

14 MS. JOHNSON: -- if they -- if they -- if need be.

15 HEARING OFFICER: Okay. I see. All right. Are there -- are there any sort of
16 changes that a worker would not be permitted to make in the patient care plan?

17 MS. JOHNSON: Anything that is skill that requires a supervision of a registered
18 nurse, like say she has a wound and maybe the bandage needs to be changed,
19 that's considered a skilled care and they cannot do that.

20 HEARING OFFICER: Okay.

1 MS. JOHNSON: They're not allowed to do that.

2 HEARING OFFICER: So anything requiring the skill of a medical care profession
3 they can't --

4 MS. JOHNSON: Right.

5 HEARING OFFICER: -- change that aspect of the patient care plan?

6 MS. JOHNSON: No. They -- they -- they're not allowed to do that.

7 HEARING OFFICER: Okay. That's what -- that's what I need to know. Okay.

8 Let's see. Also, and as far as the schedule, you're saying the schedule -- the
9 schedule of the client's is matched according to the -- the scheduling needs of the

10 particular worker?

11 MS. JOHNSON: Right. Say we have someone Monday, Wednesday and Friday;
12 9 to 11, we'll choose someone who's given us that request as their time that they're
13 available to work.

14 HEARING OFFICER: Okay. Now moving on. Let's see, also now is there any
15 training offered to any of the workers?

16 MS. JOHNSON: I give them the option to, you know, as an outside source
17 because I think that's just very important to continually to get some type of
18 training. You know, if you were working in a home care business, I like them to
19 have the option of getting training, you know. I can offer it as an option being a
20 registered nurse, you know. I can, you know, show them, you know [UNCLEAR]

1 you know, transporting the client from a wheelchair to a bed, that sort of thing. Or
2 they can also do [UNCLEAR] that sort of thing. I would like to see them have
3 some training, that simple because, you know, I've got a very good reputation right
4 now. It's been a very good business and I have a good -- good and reliable aides
5 and I -- I just want to continue to grow.

6 HEARING OFFICER: Now if you see some of the workers that have -- if you
7 observed that some of the workers don't have a sufficient level of training, do you
8 require that they get trained from some source?

9 MS. JOHNSON: Well, if -- if they come in if they are not [UNCLEAR] will go in
10 the registry, you know. You have to have -- most of my workers have prior
11 experience, they come with a whole host of experiences in rehabs and hospitals
12 and that sort of thing [UNCLEAR, both speaking]

13 HEARING OFFICER: So -- so you're saying if they don't have the training then
14 they won't go in your registry, correct?

15 ~~MS. JOHNSON: Right.~~

16 HEARING OFFICER: Okay. Let's see. All right. Now, what -- what about pay?
17 You say you negotiate a fee with the client's and that sort of thing. How does that
18 fee that you have with the client, how does that correlate to the pay of your
19 workers?

1 MS. JOHNSON: My fee ranges from 13 to 15 dollars an hour [UNCLEAR] and
2 out of that the contractor will negotiate according to what they think they are worth
3 with me, and we come to an agreement --

4 HEARING OFFICER: So if he --

5 MS. JOHNSON: -- of what this job is worth.

6 HEARING OFFICER: So -- so based on that if you -- if you negotiate a fee of 15
7 dollars with the client and the worker wants to -- you and the worker are able to
8 agree to nine dollars an hour, you would get six dollars -- you would get six dollars
9 of that?

10 MS. JOHNSON: Yes.

11 HEARING OFFICER: Okay. Now --

12 MR. HOOVER: Do you have situations where a client is only paying 13 dollars to
13 you for their care but you've got a worker that's tending to them that you're paying
14 14 dollars, are you paying more than the contract allows?

15 MS. JOHNSON: No.

16 MR. HOOVER: Do you always allow the contractor to determine how much you
17 can afford for the aide?

18 MS. JOHNSON: Yes. And -- and if this [UNCLEAR] were to say, "Look, you
19 know, I just need someone to sit with my grandma while she's in the bed," you
20 know, of course, that's 13 dollars an hour. So, therefore, you're not exerting much

1 at all but just sitting in a chair watching grandma. You know, so of course that's
2 gonna be like nine -- 8.50 to just sit. So, you know, it's ludicrous to think that I'm
3 gonna pay you 14 dollars an hour, and I would have already negotiated.

4 MR. HOOVER: Do you have care -- care providers, though, that have changed
5 from one client to another client?

6 MS. JOHNSON: Yes.

7 MR. HOOVER: And have you had to renegotiate their pay based on the fact that
8 that client may not be paying as much or maybe paying more?

9 MS. JOHNSON: Right.

10 MR. HOOVER: Okay. So it's renegotiated every time they change clients?

11 MS. JOHNSON: Right. If -- it's commensurate with the job itself.

12 MR. HOOVER: The client dictates or the -- this contract [UNCLEAR, both
13 speaking] verbal contract dictates how much you can pay your --

14 MS. JOHNSON: Right.

15 MR. HOOVER: -- assistant or aide in this?

16 MS. JOHNSON: Um-hum.

17 MR. HOOVER: And who handles the money from the client?

18 MS. JOHNSON: The -- the client mails it directly to our agency made out to Rest
19 Assured.

1 HEARING OFFICER: If the client does not pay is there any sort of risk of loss for
2 the -- the worker? In other words if the employ -- the client doesn't pay their 15
3 dollars an hour, will the worker still be paid their nine dollars an hour?

4 MS. JOHNSON: Yes. As, you know, I haven't actually had -- had that situation
5 to -- to arise yet, but I would -- I would certainly, you know, if they worked out the
6 company would take a loss and just go ahead and pay that --

7 HEARING OFFICER: Okay.

8 MS. JOHNSON: -- that aide.

9 HEARING OFFICER: I see. All right. Let's see what else. Now you say -- now
10 what about any sort of material -- is any sort of equipment provided to any of your
11 workers, like are there any tools they are required to bring to the clients' homes?

12 MS. JOHNSON: None, it's just all provided by the client or the contractor has
13 their hand wash, and gloves, and cups and that sort of thing.

14 HEARING OFFICER: Well, if the client may need some sort of special type of
15 equipment such as, I don't know --

16 MR. HOOVER: If you have dressings, medicinal things, would you provide
17 those?

18 MS. JOHNSON: No.

19 MR. HOOVER: How about the -- the what do you call it? The gloves, the --

20 MS. JOHNSON: No.

1 MR. HOOVER: -- the what do you call those things? You know what I'm talking
2 about.

3 MS. JOHNSON: The sterile gloves?

4 MR. HOOVER: Sterile gloves, who provides those?

5 MS. JOHNSON: Either the client or the contractor themselves has their own set of
6 supplies.

7 MR. HOOVER: Do you provide uniforms or anything for these workers --

8 MS. JOHNSON: No.

9 MR. HOOVER: -- these CNA's?

10 MS. JOHNSON: No.

11 MR. HOOVER: And are they required to wear any kind of logo showing them or
12 recognizing them as Rest Assured personnel?

13 MS. JOHNSON: They have a name badge that has their name on it. And that
14 came from experience that you have to identify yourself when you're in a persons
15 home. I've had --

16 MR. HOOVER: Is it similar to the one that you're wearing here?

17 MS. JOHNSON: It has their name on it.

18 MR. HOOVER: Does it have Rest Assured LLC --

19 MS. JOHNSON: No.

20 MR. HOOVER: -- printed on there as well?

1 MS. JOHNSON: No. (To Ms. Albertson) Who did those name badges?

2 MS. ALBERTSON: [UNCLEAR]

3 MS. JOHNSON: I think it does have angels on it.

4 MR. HOOVER: Who provides --

5 MS. JOHNSON: [UNCLEAR, both speaking]

6 MR. HOOVER: And the angel, is that a symbol for Rest Assured?

7 MS. JOHNSON: Yes.

8 MR. HOOVER: And who pays for that badge?

9 MS. JOHNSON: We do.

10 MR. HOOVER: You do?

11 MS. JOHNSON: Um-hum.

12 MR. HOOVER: Now if the transport of a client, if someone is needing

13 transporting to the hospital or escort, who provides the car, the gasoline and that
14 sort of thing?

15 MS. JOHNSON: We -- we have it in our policy that we will not take any liability
16 as we do not want them to transport any client at all.

17 MR. HOOVER: So you're not transporting any [UNCLEAR, both speaking]?

18 MS. JOHNSON: No -- no. You see, and like I said, they get very attached to
19 these clients and no doubt some of them are taking their own car and taking them

1 to the grocery store. I've heard that happen it's just that they care so much about
2 them that, "Yeah, I'll take her to the grocery store and back."

3 MR. HOOVER: Have you had any incidents where there's been some liability --

4 MS. JOHNSON: No.

5 MR. HOOVER: -- as a result of an accident from on of these trips?

6 MS. JOHNSON: No -- no.

7 MR. HOOVER: And do you -- have you had to enforce telling a person, "You
8 can't do this because it violates our -- our agreement to them that we will provide
9 only these services?"

10 MS. JOHNSON: Yes.

11 MR. HOOVER: Did you actually tell a worker they could no longer transport?

12 MS. JOHNSON: I told it's not within the policy, you know, that it's not within our
13 policy to transport clients because the liability.

14 MR. HOOVER: Would your insurance be involved in that matter if something
15 were to occur?

16 MS. JOHNSON: I -- I have liability insurance, and it does not cover -- it does not
17 cover transportation of a client in a personal vehicle.

18 MR. HOOVER: Does it cover -- extend to the person's home, any worker that you
19 have going in there under contract to provide services?

1 MS. JOHNSON: I have to have liab -- just because the nature of -- of what I do, I
2 have to have liability insurance in -- in case a contractor is -- say she put you from
3 a bed to a wheelchair, and she falls, I -- I -- it's almost ludicrous not to have
4 [UNCLEAR, both speaking]

5 MR. HOOVER: Have you had any claims regarding that?

6 MS. JOHNSON: No.

7 MR. HOOVER: You have none?

8 MS. JOHNSON: Not yet.

9 MR. HOOVER: And do you have these workers covered for workers
10 compensation?

11 MS. JOHNSON: Yes. Do -- do I, under some sort of --?

12 MR. HOOVER: Well, if you don't know you don't need to -- you don't need to --
13 you just say you know or you don't know. Do you know if they're covered for
14 workers compensation should they become injured on the job?

15 MS. JOHNSON: Yes.

16 MR. HOOVER: They are? Have you had to pay any medical expense for any of
17 these workers that might have been injured, hurt, twisted an ankle, whatever

18 [UNCLEAR]?

19 MS. JOHNSON: Um-hum. I've had one incident where a -- she was -- it was a
20 combative client, and she got hit on her face, and it was like a hundred dollar

1 claim. I told her to go to doctor's care because she said her eye was hurting, and
2 she went to doctor's care and it was a hundred dollar claim.

3 MR. HOOVER: And who paid for that?

4 MS. JOHNSON: The workers comp.

5 MR. HOOVER: The workers comp did?

6 MS. JOHNSON: Um-hum. [UNCLEAR]

7 HEARING OFFICER: Okay. You said that you're required to have liability
8 insurance based on the nature of what you do, correct?

9 MS. JOHNSON: Yeah, I -- I'd like to have it; I have to have it.

10 HEARING OFFICER: Okay. Well, if a client --

11 MS. JOHNSON: [UNCLEAR, both speaking] to have it.

12 HEARING OFFICER: Yes. Now if a client does fall in the home, is the -- is the
13 worker required to inform Rest Assured about this particular incident -- about such
14 an incident?

15 MS. JOHNSON: Yes. They would need to inform us if --

16 HEARING OFFICER: Okay. And earlier you said you -- as far as transportation
17 is concerned, if you were to find out somehow that one of your workers did
18 transport one of your clients, would there be any consequences for the worker for
19 transporting any of the clients?

1 MS. JOHNSON: Basically I tell them, you know, if they're a good worker and the
2 client adores them, no, there's no repercussions. I just -- I just let them know and I
3 have to further work on that.

4 HEARING OFFICER: Okay. All right. Let's see what else. Now -- now are any
5 of the workers allowed to work with any other sort of businesses that perform the
6 same type of service that you do?

7 MS. JOHNSON: Yes. Most of them have several --

8 HEARING OFFICER: Okay. Now on your contract in Clause Twelve it says, it
9 has the heading, "Agreement Not to Compete with Company," and I'll just
10 specifically refer to Subset A of Clause Twelve, it says; "The personal --" let me
11 repeat myself; "The personal care aide contractor agrees not to participate directly
12 or indirectly in any capacity, any business or activity that is in competition with the
13 company with respect to a patient served by the company." Now, how do you
14 reconcile this particular clause with the fact that you allow some of your workers
15 to compete with -- to work for competing companies?

16 MR. DAVIS: I think [UNCLEAR] this point; we'll stick with what it says. It's a -
17 - it's a limited non-compete clause that says they can't compete for the patient.

18 MR. HOOVER: Well, you can't testify for her --

19 MR. DAVIS: Right.

1 MR. HOOVER: -- but you can draw an objection. But she has -- you presented
2 this as your limited contract and she made a statement that she, in fact, allows them
3 to work [UNCLEAR] all she has to do is explain that.

4 MR. DAVIS: [UNCLEAR, both speaking]

5 MS. JOHNSON: I can explain it.

6 MR. DAVIS: I object to [UNCLEAR] what the contract says. I mean --

7 HEARING OFFICER: Well, I read it verbatim what the contract says.

8 MR. DAVIS: The contract says -- the contract says that they cannot [UNCLEAR,
9 both speaking] compete cause, it's a limited non-compete clause.

10 MR. HOOVER: You can ask that in your cross. However, she must -- your
11 objection is noted, however, she still has the right to explain if there's any conflict
12 in what she just said and what this contract is stipulating.

13 MR. DAVIS: [UNCLEAR] his question was intentionally misleading. You said
14 the document said something it doesn't say.

15 HEARING OFFICER: Okay. Well, I'll allow you to read from the --

16 MR. DAVIS: No -- no, I know the document -- I know the document says -- the
17 document said that they cannot compete with respect to a particular patient. And
18 his -- his characterization of that was different.

19 MR. HOOVER: Well, your -- your point is well taken. However, I'm noting it but
20 would all -- would almost overrule it because it is no characterization. He's

1 reading it verbatim. He's trying to gain some understanding of why this says one
2 thing and she's saying something else.

3 MR. DAVIS: [UNCLEAR] that's the whole point.

4 HEARING OFFICER: [UNCLEAR, both speaking] That's what we're trying to
5 find out.

6 MR. DAVIS: He didn't ask the question, he made the statement [UNCLEAR]
7 something else.

8 MR. HOOVER: This is not -- this question in and of itself is not binding as to
9 whether or not there is an employee/employer relationship.

10 MR. DAVIS: [UNCLEAR]

11 MR. HOOVER: So I think we're probably quibbling over a small item. Your
12 objection is noted but it is a proper question and you need to respond. Can they
13 work for someone else or not?

14 MS. JOHNSON: With -- with that statement and -- and I have to explain the base
15 of this business. I will get a dispatch request for care for a client. Contractors
16 flown out there, as I said earlier, they develop a relationship that primary care giver
17 and the patient. They said, "Okay, this agency down the street here, as a
18 subcontractor I can go there and make 12 dollars an hours. You want to go with
19 me?" I adore you; you've been with me for six months. Yes, I will take this client
20 from Rest Assured and go to Visiting Angels. That is what I will not -- you do not

1 have a right in your contract to take my client that I've got, and take it to another
2 agency.

3 HEARING OFFICER: Okay.

4 MS. JOHNSON: That's what that clause is saying.

5 MR. HOOVER: But you do have workers that are working with several, or at least

6 --

7 MS. JOHNSON: Agencies.

8 MR. HOOVER: [UNCLEAR, both speaking] providers?

9 MS. JOHNSON: Yes, other agencies --

10 MR. HOOVER: Simultaneously while they're working with you?

11 MS. JOHNSON: Right. Yes. You're working with Rest Assured, go to Visiting

12 Angels while we get their client, don't take Rest Assureds client and take it to

13 Visiting Angels, don't compete with my client with Visiting Angels.

14 MR. HOOVER: Have you had that happen?

15 MS. JOHNSON: Yeah.

16 MR. HOOVER: And what did you do as a result?

17 MS. JOHNSON: It's nothing I can do about it. There's nothing I can do about it.

18 But I told Kenneth I specifically wanted something in their subcontract, which a

19 contract's a contract, nothing it's just a written thing, we sign it the morning that it

20 takes to involve to say, "You took my client and ran with it." It's not worth it. It's

1 just a scare tactic to say, "Please do not take Rest Assureds client that you've
2 contracted with us and take that contract and give it to another contractor."

3 MR. HOOVER: I understand your concern. What did you do with the worker that
4 did, in fact, take this client away and took it to another provider?

5 MS. JOHNSON: Just -- just not -- I prefer not to work with them again.

6 MR. HOOVER: Did you take them out of your, that --

7 MS. JOHNSON: Registry? Yes.

8 MR. HOOVER: -- registry?

9 MS. JOHNSON: Yes. And -- and they're so shamed faced, you know, they don't
10 want to come back anyway to save face.

11 MR. HOOVER: Were they providing work for another client as well besides that
12 one with you?

13 MS. JOHNSON: Usually the ones that will do that will -- don't have other clients.
14 I had some that were taking three clients that they had with Rest Assured, and
15 that's what prompted me to talk with Kenneth to say, "What can I put in my
16 contract to prevent these contractors from taking my clients?" And -- and on the
17 same token I had some that brought their clients to -- to my agency, you know. So,
18 you know, it's -- it's unethical from a business standpoint but, you know, I'm
19 certainly not gonna turn you around being a growing business, you know. So
20 that's the beast of the business and that's the only thing I can do about it.

1 HEARING OFFICER: Okay. Let's see. Okay. Now, are any of your workers
2 required to fill out any type of forms like, I think, are they required to fill out any
3 forms for like Medicaid or anything like that?

4 MS. JOHNSON: You mean Medicaid forms? No.

5 HEARING OFFICER: Okay -- okay.

6 MR. HOOVER: Do you require them to fill out any type of manifest to show daily
7 that they went into that home, or weekly they went into that home and they
8 provided that care and that's your -- that's accountability to show that they were, in
9 fact, there?

10 MS. JOHNSON: Right. There's a client care sheet that they're required to turn in
11 weekly, that the client needs to sign to say, "Yes, indeed, they deliver, you know,
12 grooming." It's like a flow sheet where you just check off the things that you've
13 done.

14 MR. HOOVER: And are they paid based on the hours or what they represent?

15 MS. JOHNSON: Right.

16 MR. HOOVER: Do you have a copy of that to present here today?

17 MS. JOHNSON: I do not.

18 MR. HOOVER: Is that standard for pretty much every client though?

19 MS. JOHNSON: Yes.

20 MR. HOOVER: Okay. And are they paid if they don't present that sheet?

1 MS. JOHNSON: No.

2 HEARING OFFICER: All right.

3 MR. HOOVER: Would you tell us -- I think we only have about two other
4 questions here; can you tell us the pay structure and how you do that, is it by
5 check, do you withhold taxes, do they get holidays, you know, that sort of thing?
6 Can you comment on that?

7 MS. JOHNSON: No, I do not withhold taxes; they are paid once a week on
8 Friday's. The office is closed for six paid holidays, six paid holidays for my
9 employees. They have the option to work or not work; it's up to them as to
10 whether they want to work the holiday. They can work it out with their client.
11 They can be off but we do not pay them anything above and over what they're
12 negotiated hourly rate [UNCLEAR, both speaking]

13 MR. HOOVER: In other words, it has to be on that sheet before they are paid?
14 You don't pay them that holiday, is that correct?

15 MS. JOHNSON: If -- if they work that holiday per their choice, I will pay them
16 the negotiated rate.

17 MR. HOOVER: Yeah, but that's on the sheet too isn't it?

18 MS. JOHNSON: Yes, that's on the sheet. Yes.

19 MR. HOOVER: That's what -- okay.

20 MS. JOHNSON: Yeah, it's on the sheet.

1 MR. HOOVER: You then -- they're provided a 1099 at the end of the year?

2 MS. JOHNSON: Yes.

3 MR. HOOVER: So that check would be just for the gross amount, ten dollars an
4 hour for so many hours, is that right?

5 MS. JOHNSON: Right.

6 HEARING OFFICER: Okay. Okay, have you ever had to discharge anyone for
7 any reason?

8 MS. JOHNSON: Like I said, that's -- it's based on the care that they provided the
9 client per that client's request.

10 HEARING OFFICER: But have you ever terminated anyone based --

11 MS. JOHNSON: They are put back on the registry, you know. And I let them
12 know, you know, "Your job [UNCLEAR] with Mr. Wilson has ended per his
13 request. But I'll put you on the registry." And that's what I was trying to reiterate
14 on that paper, "Yes, if -- if Mr. Wilson doesn't want you we'll try desperately to
15 find you something else if we can."

16 MR. HOOVER: I think for our purposes though I understand that the client is the
17 driving force behind sometimes whether or not to continue to work there. What
18 we're trying to determine is have you, aside from what the client wanted, ever
19 dismiss someone from your roles? You mentioned a while ago people that take

1 clients to another business, you won't put them back in your -- in your index,
2 okay?

3 MS. JOHNSON: Right.

4 MR. HOOVER: Have there been other people that the client is okay with but
5 you've dismissed them for any other reason?

6 MS. JOHNSON: Not that I can think of.

7 MR. HOOVER: That's all you have to say. If you don't know, you don't know.

8 MS. JOHNSON: Um-hum.

9 HEARING OFFICER: Okay. You said something earlier, you said that some of
10 the employees if they are on the registry, or the index, or however you call it, you
11 said that they -- they have background checks and that sort of thing before they're
12 placed on the registry. So do they have to have those necessary background checks
13 before they are actually put on the registry?

14 MS. JOHNSON: Yes.

15 HEARING OFFICER: Okay. And just give me just a second.

16 MR. HOOVER: (Speaks to Mr. Bland)

17 HEARING OFFICER: Okay. All right. Now is -- now are any of your workers
18 required to get any sort of insurance or any of that sort of thing, like malpractice
19 insurance?

20 MS. JOHNSON: Some of them -- some of them have it but --

1 HEARING OFFICER: Do you require that they have this insurance?

2 MS. JOHNSON: I don't because I -- I -- my program mimics the same program as
3 the South Carolina Department of Disability and Special Needs. This whole idea
4 came up with the program that they have for independent, self-employed,
5 contractors from DDSN, where -- matter of fact, I have one [UNCLEAR] that
6 shared with the South Carolina Department of Disability and Special Needs. We
7 have a eight hour shift, I give them four hours -- she does four hours for me from 8
8 to 12, and from 12 to 4 she does for the DDSN.

9 HEARING OFFICER: Yes.

10 MS. JOHNSON: And no liability insurance. I have -- matter of fact, I have two
11 others that work for the South Carolina Department of Disability and Special Need.
12 By virtue of them, you know, and I'm trying to indicate that this is a common
13 industry practice, both for the state as well as myself, as far as self-employed
14 contractors they don't require any liability insurance. We share the same aide.

15 HEARING OFFICER: Yes.

16 MS. JOHNSON: Matter of fact, I have paperwork in here where they sign the
17 contract it says; "You are a self employed worker. See your accountant regarding
18 tax liabilities for what you're going to be responsible for."

19 MR. HOOVER: So this worker is doing the same thing for you in the same
20 manner that they're working for --

1 MS. JOHNSON: Right.

2 MR. HOOVER: -- for Special Needs, is that right?

3 MS. JOHNSON: Right.

4 MR. HOOVER: Do you know for sure that they're not having taxes withheld --

5 MS. JOHNSON: No.

6 MR. HOOVER: -- or that they are not directed by the Department of -- what is it?

7 HEARING OFFICER: The Department of Special -- Disability and Special
8 Needs.

9 MR. HOOVER: Special Needs, do you know that for sure?

10 MS. JOHNSON: I know that for sure. I have documentation here.

11 MR. HOOVER: I assume you'll be presenting that Mr. Davis [UNCLEAR]?

12 MS. JOHNSON: Yes, I have documentation here. We're in the same client's
13 home, and it's not just this one client, we are in the same client's home providing
14 the same custodial type services. She's staying four hours for me, Rest Assured;
15 the other four hours are being paid for the South Carolina Department of Disability
16 and Special Needs. Not only that but Medicaid Community Long Term Care has
17 independent contractors as well. It's a common industry practice where they do
18 not take out taxes.

19 HEARING OFFICER: Okay.

1 MS. JOHNSON: And the documentation [UNCLEAR] it says, you know, "You
2 can sign this paper but we are not your employee. You will have to see an
3 accountant regarding your taxes." She's given me all of her credentials, you know.
4 She -- she doesn't have any insurance, she didn't have any vested interest as a -- as
5 a business woman or business lady. They just go -- they filter in through the South
6 Carolina Department of Disability Special Needs, Medicaid and [UNCLEAR] as
7 independent contractors.

8 HEARING OFFICER: Yes. Okay.

9 MS. JOHNSON: Without liability insurance, without workers comp carried on
10 them independently, but they're called self-employed subcontractors, and self
11 employees. .

12 HEARING OFFICER: Now --

13 MS. JOHNSON: And that's what my program was mimicked after, theirs.

14 HEARING OFFICER: Yes. Now do any of your workers have to be licensed by
15 either the city, or the county, or any -- any other authority?

16 MS. JOHNSON: No.

17 HEARING OFFICER: Okay. All right. Any --

18 MR. DAVIS: I [UNCLEAR] that question as to -- requires a legal conclusion that
19 she doesn't -- she -- she's not with the city of Columbia or Richland County, that's
20 a determination for someone else to make.

1 HEARING OFFICER: Well, my question was, "Do you know if they have to have
2 a license from the city or county in order to work for you?" I don't think that
3 requires --

4 MR. DAVIS: That's a different question. That's a different -- the original
5 question was, "Do they have to?" Now your question is, "Do you know if they
6 have to?" And, "Do you know if they have to --" I want her to answer that
7 question.

8 HEARING OFFICER: Okay. I'm sorry. If you can answer that question Ms.
9 Johnson, do you know if any of your workers have to get any licensing from the
10 city, or the county, or any other government authority?

11 MS. JOHNSON: You mean to work for me?

12 HEARING OFFICER: Do -- do you require them to get any sort of licensing from
13 --

14 MS. JOHNSON: No -- no.

15 HEARING OFFICER: Okay. That's -- that's what I -- okay. All right. Mr.
16 Davis, any questions for Ms. Johnson?

17 MR. DAVIS: Sure. What's the general nature of the business of Rest Assured
18 LLC?

19 MS. JOHNSON: We provide home care services for the elderly and disabled
20 adults and children.

1 MR. DAVIS: And how do you find your, "Clients?"

2 MS. JOHNSON: I get dispatch requests from various sources.

3 MR. DAVIS: What are those sources?

4 MS. JOHNSON: The VA, private pay.

5 HEARING OFFICER: Well, what's private pay?

6 MS. JOHNSON: Out of pocket.

7 HEARING OFFICER: Oh, okay.

8 MS. JOHNSON: Out of pocket.

9 MR. DAVIS: And --

10 MS. JOHNSON: And Medicaid, DDSN.

11 MR. DAVIS: And so you find a list of people who are -- who need these services?

12 MS. JOHNSON: Yes.

13 MR. DAVIS: Okay. And then how do you find people who can provide services?

14 MS. JOHNSON: Through the registry I -- I have a 250 count registry.

15 MR. DAVIS: Yeah, how -- how do you get that registry from one to 250? Where
16 do those people come from?

17 MS. JOHNSON: Well, word of mouth, word gets around with -- with contractors.

18 You know, Rest Assured may be paying a higher rate or walk-ins sometimes; it's
19 actually word of mouth.

1 MR. DAVIS: Okay. And the ultimate goal of Rest Assured is to do what between
2 the contractors and the patients?

3 MS. JOHNSON: The ultimate goal --

4 MR. DAVIS: Right.

5 MS. JOHNSON: -- of Rest Assured is just to -- just to take care of the client.

6 MR. DAVIS: Okay. Does it match -- does it match the people available for work
7 with people that need services?

8 MS. JOHNSON: Yes.

9 MR. DAVIS: Does for any particular client does Rest Assured conduct any
10 interviews with --?

11 MS. JOHNSON: Yes. When I -- when I get a request I send the clients to the
12 patients home and they interview. I usually have at least two contractors that can
13 go and talk with the --

14 MR. DAVIS: Okay. Are you present for that appointment?

15 MS. JOHNSON: No.

16 MR. DAVIS: And so the contractor sits with the patient, and the patient picks?

17 MS. JOHNSON: Yes.

18 MR. DAVIS: Okay. And do you have any influence on that decision? Aside from
19 sending the list, do you exercise any -- any control with the patient as to the
20 selection of the person?

1 MS. JOHNSON: No. Like I said, I try to send at least two -- at least two that they
2 can choose from.

3 MR. DAVIS: Okay. And how does that relationship normally end between the
4 client and the contractor?

5 MS. JOHNSON: Usually the client sometimes expires, and if it's a very good
6 relationship they just keep them. Sometimes the client expires or maybe her car
7 broke down and she's not able to get there, and the client will tell you, "Well, I
8 can't put up with this, I need another -- find me someone else."

9 MR. DAVIS: Okay. And who would the actual payment come from? In some
10 cases it comes from -- from the client themselves?

11 MS. JOHNSON: Yes.

12 MR. DAVIS: Are there other times where there are state agencies or federal
13 agencies involved?

14 MS. JOHNSON: Yes -- yes.

15 MR. DAVIS: Are you licensed with the Department of Health and Human
16 Services under Community Long Term Care?

17 MS. JOHNSON: Yes.

18 MR. DAVIS: Okay. Are you licensed with the Department of Disabilities and
19 Special Needs also?

20 MS. JOHNSON: Yes.

1 MR. DAVIS: Anybody else? Does the VA require any type of particular license?

2 MS. JOHNSON: No. No, they just contract.

3 MR. DAVIS: Okay. And then various private insurers who make a direct
4 payment and such?

5 MS. JOHNSON: Well, the private pay clients.

6 MR. DAVIS: Okay. Out of pocket or through private insurance?

7 MS. JOHNSON: It's out of pocket.

8 MR. DAVIS: Okay.

9 MS. JOHNSON: It's out of pocket.

10 MR. DAVIS: Okay. And --

11 MR. HOOVER: Would you mind if you expand on that question a little bit about
12 the billing process for Rest Assured with the clients, especially when there are
13 other agencies involved and that sort of thing?

14 MR. DAVIS: Okay.

15 MR. HOOVER: So would you mind doing that, please, sir?

16 MR. DAVIS: Sure. Now, do you send the bill directly to the client or do you send
17 it to the agency?

18 MS. JOHNSON: It's sent to the agency.

19 MR. DAVIS: And then the agency sends the payment back to --?

20 MS. JOHNSON: Rest Assured.

1 MR. DAVIS: Okay. And then Rest Assured distributes any payment to anybody -
2 - any contractor who may have performed some work on behalf of that patient
3 during the time period?

4 MS. JOHNSON: Yes.

5 MR. DAVIS: Are there circumstances where there are more than one contractor
6 serving a particular patient?

7 MS. JOHNSON: More than one contractor? Well, if perhaps if like I said, the car
8 broke down and the child is sick, yes, we would put another back up contractor in
9 there.

10 MR. DAVIS: Okay. But that's only -- that's more like in case of an emergency
11 type circumstance?

12 MS. JOHNSON: Right.

13 MR. DAVIS: Okay. Do you treat the weekly -- you get a weekly report from the
14 contractor showing work that they performed?

15 MS. JOHNSON: Yes.

16 MR. DAVIS: And do you treat [UNCLEAR]?

17 MS. JOHNSON: Services.

18 MR. DAVIS: Okay. And you pay according to that invoice?

19 MS. JOHNSON: Yes.

1 MR. DAVIS: Okay. And you maintain some workers' compensation coverage on
2 some of the contractors, [UNCLEAR]?

3 MS. JOHNSON: Yes.

4 MR. DAVIS: Is it your belief that because you have more than four -- because you
5 have more than four contractors, do you have some belief that you may be viewed
6 as a statutory employer about to change because you provide coverage as a matter
7 of protecting against being a statutory employer?

8 MS. JOHNSON: Yes.

9 MR. DAVIS: Okay. So it's more -- so workers comp is more of a protection to
10 you from being declared an employee by the state rather than any belief that you
11 are an actual employer?

12 MS. JOHNSON: Right -- yes.

13 HEARING OFFICER: Do you want to submit those documents for the record?

14 MR. DAVIS: I have a list of about 20 documents that determines -- I can do them
15 all in one document, or I can do them all individually, whatever your preference.

16 MR. HOOVER: And you're redacted the -- what names off of these, or what?

17 MR. DAVIS: Yes, social security numbers redacted, yeah. We've taken out
18 names and social security numbers.

19 HEARING OFFICER: Okay.

20 MR. HOOVER: What do they represent?

1 MR. DAVIS: They represent service termination notices from the various -- from
2 agencies which -- which provide payment and such [UNCLEAR] as Employer's
3 Exhibit Number Two.

4 HEARING OFFICER: Okay. Let me count the pages. And as far as this service
5 termination notice is concerned, was does it concern?

6 MS. JOHNSON: It has the reason for termination. There's a lot on that page so if
7 I could just point out I had --

8 HEARING OFFICER: Is this something that's issued to the worker? Is this --?

9 MS. JOHNSON: It's -- it's sent to us as the reason why, you know, its client's
10 request; the reason for termination is the objective we wanted you to see this at the
11 reason for termination is always the client's request.

12 HEARING OFFICER: Okay. Let me enter these documents into the record.

13 What I have before me is a 17 page document. The first page has the heading,
14 "Community Long Term Care, Service Termination Notice," and it is dated for
15 February 13, 2006. And this document will be labeled as Employer's Exhibit
16 Number Two. Continue Mr. Davis.

17 MR. DAVIS: Okay. This document is 17 individual notices --

18 HEARING OFFICER: Well --

19 MR. DAVIS: -- after the leading notice.

20 HEARING OFFICER: Okay.

- 1 MR. DAVIS: Okay. And then a copy to Ms. Johnson --
- 2 HEARING OFFICER: Okay. Is this the same document?
- 3 MR. DAVIS: Right. Yeah, I wanted to make sure.
- 4 HEARING OFFICER: Okay.
- 5 MR. DAVIS: [UNCLEAR]
- 6 HEARING OFFICER: All right.
- 7 MR. DAVIS: Do you recognize this notice?
- 8 MS. JOHNSON: Yes.
- 9 MR. DAVIS: And what is it?
- 10 MS. JOHNSON: It's a service termination notice.
- 11 MR. DAVIS: And who does it come from?
- 12 MS. JOHNSON: This -- these are from a Medicaid provider.
- 13 MR. DAVIS: And is it addressed -- who is it addressed to?
- 14 MS. JOHNSON: Rest Assured.
- 15 MR. DAVIS: And what's the reason given for termination on -- on the first
- 16 notice?
- 17 MS. JOHNSON: Client's request.
- 18 MR. DAVIS: And [UNCLEAR] stipulate that they all state --
- 19 MR. HOOVER: These are the originals?

1 MR. DAVIS: Well, these are the ones that she got, I mean, this is what -- this is
2 what she got.

3 MS. JOHNSON: They're copies of the original.

4 MR. HOOVER: These are just copies of those?

5 MR. DAVIS: Right.

6 MR. HOOVER: Oh, no, we'll stipulate that they're one and the same. Do you
7 need to look at them Mr. Bland?

8 HEARING OFFICER: No.

9 MR. HOOVER: He has the [UNCLEAR].

10 HEARING OFFICER: Yeah.

11 MR. DAVIS: We stipulate that all 17 paid clients request or --

12 MR. HOOVER: Mr. Bland, do you want to do it?

13 HEARING OFFICER: Yes, I'll -- I'll stipulate to that.

14 MR. DAVIS: Okay. No further questions [UNCLEAR]. Now, you maintain a
15 registry of -- of employees, correct?

16 MS. JOHNSON: Yes.

17 MR. DAVIS: And do you recognize this document?

18 MS. JOHNSON: Yes.

19 HEARING OFFICER: Okay.

20 MR. DAVIS: Is -- is that your registry?

1 MS. JOHNSON: Yes, that's part of it.

2 MR. DAVIS: Okay. And is that maintained in your office?

3 MS. JOHNSON: Yes.

4 MR. DAVIS: And on that registry have you identified the people on the registry
5 who -- who you interviewed and know to have other employment?

6 MS. JOHNSON: Yes.

7 MR. DAVIS: And does this notation accurately reflect the list of people who have
8 other employment?

9 MS. JOHNSON: Yes. This -- this one is actually about [UNCLEAR]

10 MR. DAVIS: [UNCLEAR]

11 MS. JOHNSON: But it was accurate at the time, yes.

12 HEARING OFFICER: Okay. All right. What I have before me is a 21 page
13 document. It has the heading, "Aides for Provider," and this document will be
14 labeled as Employer's Exhibit Number Three. Continue.

15 MR. DAVIS: Okay. And so would you say that a good many of your employers --
16 of the contractors have other employment relationships or contractual
17 relationships?

18 MS. JOHNSON: Yes.

19 MR. DAVIS: Okay. And have you had any type of claims against you for
20 unemployment insurance?

1 MS. JOHNSON: Yes.

2 MR. DAVIS: And what was the result of the first one?

3 MS. JOHNSON: The first one -- the first one was -- was when she -- when the
4 other client -- when the client chose someone else.

5 MR. DAVIS: Okay. At that time did you raise the independent contractor issue in
6 the -- in that proceeding?

7 MS. JOHNSON: Yes.

8 MR. DAVIS: Is it your understanding that this investigation flowed from -- from
9 that hearing?

10 MS. JOHNSON: Yes.

11 MR. DAVIS: Okay. Had you done any type of survey of the industry to see what
12 the industry practice is for classification of -- of employees versus independent
13 contractors?

14 MS. JOHNSON: Yes.

15 MR. DAVIS: And what -- what did you find?

16 MS. JOHNSON: Well, I wanted to investigate authorities that were -- were doing
17 the subcontractor, independent contractor relationship. And I found, again, South
18 Carolina Department of Disability and Special Needs, Medicaid, Community Long
19 Term Care and also Babcock Center. And fliers were given to several of the
20 contractors that worked for me to come and work for South Carolina Department

1 of Disability and Special Needs as a self employed contractor, which I do have a
2 copy of the flier that several of my contractors have. And some of them did opt to
3 work for South Carolina Department of Disability and Special Needs as
4 subcontractor.

5 HEARING OFFICER: Okay.

6 MS. JOHNSON: But that -- that was where I got --

7 MR. DAVIS: Were you -- administrative notice of this flier from Community
8 Long Term Care which identifies --

9 MS. JOHNSON: Actually that's from the South Carolina Department of Disability
10 and Special Needs.

11 MR. DAVIS: Right.

12 HEARING OFFICER: Okay. And what do you want me to stipulate?

13 MR. DAVIS: Just take administrative notice of it that it does -- it does state that --
14 it does acknowledge category of -- category of worker recognized by that agency
15 as independent [UNCLEAR], and that we offer it for the point to showing that
16 she's kind of following industry practice.

17 HEARING OFFICER: Okay. Now who generated that particular document, what
18 --?

19 MR. DAVIS: The Department of Disabilities and Special Needs.

1 HEARING OFFICER: Okay. And you want me to take administrative notice that

2 --

3 MR. DAVIS: Of -- of it's existence.

4 HEARING OFFICER: Okay.

5 MS. JOHNSON: As a industry practice for subcontractors and self employees of
6 aides.

7 HEARING OFFICER: Okay.

8 MR. HOOVER: Is it specifically -- help us Mr. Davis, is it specifically typed on
9 here that this will be an independent relationship?

10 MS. JOHNSON: See, on the first page -- I have mine here. On the first page, this
11 page here --

12 HEARING OFFICER: Yes.

13 MS. JOHNSON: -- it has the -- the very first topic there individual [UNCLEAR]
14 companion provider.

15 MR. DAVIS: Is a self employed individual.

16 MR. HOOVER: All right. So you're referring to page two. And can we keep
17 this?

18 MR. DAVIS: Right. It's a copy. That's your copy.

19 MR. HOOVER: Okay.

20 HEARING OFFICER: All right. And --

- 1 MR. DAVIS: [UNCLEAR]
- 2 MR. HOOVER: We can stipulate [UNCLEAR, both speaking]
- 3 MS. JOHNSON: This is the original.
- 4 HEARING OFFICER: Okay. I will so stipulate. All right, go on.
- 5 MS. JOHNSON: That's the industry, I wanted to --
- 6 HEARING OFFICER: Okay. And let me enter this as an exhibit. What I have
- 7 before me is a two page document, it -- on the first page it has the heading,
- 8 "Become an individual attendant companion provider," and this document will be
- 9 labeled as Employer's Exhibit Number Four. Continue.
- 10 MR. DAVIS: Okay. And so when you sought to classify the people as
- 11 independent contractor status, you sought to follow the example of the
- 12 government?
- 13 MS. JOHNSON: Right. And this is a copy of another self employee contractor
- 14 aide for the South Carolina Department of Health and Human Services, and has
- 15 their own provider ID number.
- 16 MR. HOOVER: This your original in here?
- 17 MS. JOHNSON: No.
- 18 MR. DAVIS: Copy -- copy.
- 19 HEARING OFFICER: Okay. All right.
- 20 MS. JOHNSON: An addition of the --

1 HEARING OFFICER: All right. Let me enter this document into the record.

2 What I have before me is a one page document. It has the heading, "South
3 Carolina Department of Health and Human Services, Bureau of Health Services,"
4 and it is dated for September 8, 2005. And this document will be labeled as
5 Employer's Exhibit Number Five. Continue.

6 MR. DAVIS: Is Ollie Gibson on the registry?

7 MS. JOHNSON: Yes, she's on the registry. She's inactive right now but --

8 HEARING OFFICER: Who -- who is Ollie McGibson?

9 MS. JOHNSON: That's --

10 MR. DAVIS: [UNCLEAR]

11 HEARING OFFICER: Yeah, what's her --?

12 MS. JOHNSON: She's one of the contractors that's on the registry.

13 HEARING OFFICER: Okay.

14 MS. JOHNSON: But right now I think she's working as a subcontractor for the
15 state.

16 HEARING OFFICER: Continue.

17 MR. DAVIS: Okay. Are there any other examples of people who are on the
18 registry?

19 MS. JOHNSON: As --

20 MR. DAVIS: Who are independent contractor agreements with the state?

1 MS. JOHNSON: Yes. As I stated earlier, I have one contractor [UNCLEAR]
2 which we share the same client with the South Carolina Department of Disability
3 and Special Needs. And she provided me with her contract that she signed for the
4 South Carolina Department of Disability and Special Needs, which is what I
5 amended my contract off of.

6 MR. HOOVER: Do you have that Mr. Davis?

7 MR. DAVIS: Right. Well, that was page two and it's on record just to get -- just
8 to get the page one from it.

9 HEARING OFFICER: Okay.

10 MR. HOOVER: This is page two of that contract she had?

11 MR. DAVIS: The contract agreement and it's the [UNCLEAR] language of the
12 independent contractor [UNCLEAR] the agency.

13 MR. HOOVER: We will allow the record to remain open. Will you fax that to us
14 if we provide you a number?

15 MR. DAVIS: Right. Yes, sir.

16 MR. HOOVER: Fax it to Mr. Bland's attention at 803-737-0287.

17 MR. DAVIS: Okay.

18 MS. JOHNSON: It has all the state terminology in there but I imagine you do need
19 a seal or something stipulating that it's a part of -- yeah, it doesn't have any --

20 MR. DAVIS: It may be better if [UNCLEAR, both speaking].

- 1 MR. HOOVER: If you'll just provide us with the first page --
- 2 MS. JOHNSON: Okay.
- 3 MR. DAVIS: Okay. You're not worried about her -- about the agency signature
- 4 on it?
- 5 MR. HOOVER: No. Your point is well taken as to why you're presenting this. It
- 6 doesn't have to have a seal or anything.
- 7 MR. DAVIS: Okay. [UNCLEAR]
- 8 HEARING OFFICER: Okay. Let me enter this. What I have before me is a one
- 9 page document; it has the heading, "Certified Care Giver Acknowledgement and
- 10 Understanding." It is dated for May 12, 2006. This document will be labeled as
- 11 Employer's Exhibit Number Six.
- 12 MS. JOHNSON: [INAUDIBLE]
- 13 HEARING OFFICER: Okay.
- 14 MR. DAVIS: And you talked -- you talked about Visiting Angels?
- 15 MS. JOHNSON: Yes.
- 16 HEARING OFFICER: Visiting Angels? That -- what type of facility is that?
- 17 MS. JOHNSON: That's a home care agency --
- 18 HEARING OFFICER: Okay.
- 19 MS. JOHNSON: -- like myself.

1 MR. DAVIS: And -- and [UNCLEAR] how do they classify the employees from
2 your understanding?

3 MS. JOHNSON: It's subcontractors.

4 MR. DAVIS: What about Palmetto Referral?

5 MS. JOHNSON: Yes, subcontractors.

6 MR. DAVIS: Florence Nursing Services.

7 MR. HOOVER: Mr. Davis, we get the point [UNCLEAR, both speaking] ask her.

8 MS. JOHNSON: Okay.

9 MR. DAVIS: Okay. Do you supervise the work of the contractors in the home?

10 MS. JOHNSON: I -- just for my business state I -- I do come every four months to

11 --

12 MR. DAVIS: Is that for quality control?

13 MS. JOHNSON: Yes, more of a quality control than to ensure that, you know,
14 they're satisfied with [INAUDIBLE] as a representative of Rest Assured, because
15 that's who they initially contacted was Rest Assured for services.

16 MR. DAVIS: Okay.

17 HEARING OFFICER: So you contact the clients every four months just to make
18 sure that --

19 MS. JOHNSON: [UNCLEAR, both speaking]

1 HEARING OFFICER: Okay. Just to make sure that the quality of services is up
2 to standard?

3 MS. JOHNSON: Yeah, that they are satisfied, and it's PR and marketing and all
4 that.

5 MR. DAVIS: And any training provided the contractor, any kind of mandatory
6 training?

7 MS. JOHNSON: No, I don't have any mandatory training but I do push that they
8 get training --

9 MR. DAVIS: Okay.

10 MS. JOHNSON: -- by some -- some means.

11 MR. DAVIS: But you encourage them you don't require them?

12 MS. JOHNSON: No, I don't -- I don't require them.

13 MR. DAVIS: I mean, but you sometimes provide training at your office?

14 MS. JOHNSON: Yeah, occasionally but very rarely.

15 MR. DAVIS: Right, but that's optional, the contractor?

16 MS. JOHNSON: Um-hum.

17 MR. DAVIS: Okay.

18 MR. HOOVER: Could I ask if you actually ever go to the job with someone who
19 may be new and having to move a patient to wash whatever or to [UNCLEAR]
20 her?

1 MS. JOHNSON: No, I've never done that.

2 MR. HOOVER: Never done that? All right. Thank you. I'm sorry, Mr. Davis.

3 Go ahead.

4 MR. DAVIS: And you have some employees that work in your office on site at
5 your head office, is that correct?

6 MS. JOHNSON: Yes.

7 MR. DAVIS: And those people you view as being employees?

8 MS. JOHNSON: Yes.

9 MR. DAVIS: Clearly?

10 MS. JOHNSON: Yes.

11 MR. DAVIS: And you do the withholding?

12 MS. JOHNSON: Yes.

13 MR. DAVIS: Okay. And you supervise their work?

14 MS. JOHNSON: Yes.

15 MR. DAVIS: And you hire and fire them?

16 MS. JOHNSON: Yes.

17 MR. DAVIS: Okay. And what's the primary reason that [UNCLEAR] is that to
18 promote any type of deficiencies or --?

19 MS. JOHNSON: Well, a payment is made to me --

1 MR. DAVIS: Right, to Rest Assured as opposed directly between -- directly to the
2 contractor from the patient.

3 MS. JOHNSON: Because the contract is between myself and --

4 MR. DAVIS: The patient?

5 MS. JOHNSON: Yeah.

6 MR. DAVIS: Okay.

7 MS. JOHNSON: Um-hum.

8 MR. DAVIS: Okay. And with the nature of the relationship, who can -- the nature
9 of the relationship between the provider and the patients is controlled by whom?

10 MS. JOHNSON: The nature of the relationship between the --?

11 MR. DAVIS: Provider and the patient is controlled by whom?

12 MS. JOHNSON: The -- the contractor.

13 MR. DAVIS: Okay, the contractor. Okay. And you said earlier you indicated that
14 you initially when you take a new patient you got an assessment --

15 MS. JOHNSON: Yes.

16 MR. DAVIS: -- an assessment, a care plan?

17 MS. JOHNSON: Yes.

18 MR. DAVIS: But that [UNCLEAR] the patient signs it?

19 MS. JOHNSON: No, he doesn't sign it.

1 MR. DAVIS: It's more of a -- it's more of an assessment of what the patients
2 needs are?

3 MS. JOHNSON: Yes.

4 MR. DAVIS: Okay. So it's not an actual agreement between you and the patient,
5 it's more of an assessment?

6 MS. JOHNSON: Yes.

7 MR. DAVIS: Right. Then you provide that to the contractor?

8 MS. JOHNSON: Exactly.

9 MR. DAVIS: Right. And it's your understanding the contractor will follow it to
10 the best of his needs, but it's not an actual contractual relationship?

11 MS. JOHNSON: Exactly.

12 MR. DAVIS: Okay. And the contractor is [UNCLEAR] at with the patient as the
13 contractor and the patient, you know, sees fit?

14 MS. JOHNSON: Yes, that happens.

15 MR. DAVIS: All right. And you don't provide skilled nursing; you have to have a
16 certificate of needs to provide that --

17 MS. JOHNSON: Yes.

18 MR. DAVIS: -- is your understanding?

19 MS. JOHNSON: Yes.

20 MR. DAVIS: So that's why you don't get into providing skilled services?

1 MS. JOHNSON: Right.

2 MR. DAVIS: Okay. And in response to the initial determination that you were an
3 employer, you kept your type as current pending the outcome of this --

4 MS. JOHNSON: Yes.

5 MR. DAVIS: -- of this hearing?

6 MS. JOHNSON: Yes, after the -- the audit.

7 MR. DAVIS: Right. But -- but you did that to be in compliance with -- with the
8 authorities but you still maintain your belief that your people are contractors and
9 the fact that you paid your taxes was -- they made you pay them under protest?

10 MS. JOHNSON: Yes.

11 MR. DAVIS: I have no further questions.

12 HEARING OFFICER: Okay. Now, Ms. Johnson, with the other witness that was
13 subpoenaed, well, was subpoenaed in the previous -- previously scheduled hearing,
14 Ms. Cronick, would she be able to affirm what you're telling me today?

15 MS. JOHNSON: Yes.

16 HEARING OFFICER: Okay. Hearing no further questions, Miss -- I'm sorry, Ms.
17 Albertson, if you could state your name for the record, your position with the
18 employer, and spell your last name.

19 MR. HOOVER: Were you going to put her as a witness?

1 MR. DAVIS: [UNCLEAR, both speaking] as a witness, we just had her for -- in
2 case of clarification.

3 MR. HOOVER: She's custodian of the records and that sort of thing, is that
4 correct?

5 MS. JOHNSON: Yes.

6 MR. DAVIS: Right.

7 HEARING OFFICER: Okay.

8 MS. ALBERTSON: I'm an independent accountant.

9 MR. HOOVER: All right.

10 MS. ALBERTSON: I have my own business, my own business license, etcetera --
11 etcetera.

12 MR. HOOVER: All right.

13 HEARING OFFICER: Okay.

14 MR. HOOVER: Miss -- Ms. Johnson, we have asked you a number of questions
15 and you've been on your heels answering those most of the time. Let us pause
16 here for just a moment and, of course, with -- with the approval of Mr. Davis; is
17 there anything that we have not asked you, or he has not asked you, maybe you did
18 not get a chance to finish that you would like to tell us at this time? I can hardly
19 think of anything myself, but I know this is labor some but it must be done, so.

20 MS. JOHNSON: I can't think of anything.

1 MR. HOOVER: My understanding is that at one point in time you were reporting
2 these individuals as employees, is that correct?

3 MS. JOHNSON: Yes.

4 MR. HOOVER: And then you stopped until this claim came along and they have
5 been put back in, is that right?

6 MS. JOHNSON: Right.

7 MR. HOOVER: Am I to understand that based on your findings, or your
8 discovery that these other government facilities, and other private agencies were
9 not reporting these workers, you determined that you, in fact, should not be
10 reporting as well?

11 MS. JOHNSON: That and as well as the turn over of the workers and their needs,
12 it -- it just was not beneficial to me as a company to consider them employees
13 because of their turn over rate, and they jump from agency to agency. And there is
14 no guarantee in this nature of business that I'm in, it's solely determined by the
15 needs of the client. And, yes, it may be that, you know, I wanted someone to take
16 care of R-A-M for three weeks while I'm on vacation, and then it ends. And those
17 are -- that's typically the scenario that -- that I get, you know, it's -- it's temporary.
18 And after being in the business for, you know, nine months or so, you know, I
19 readjusted this and I fully wanted to be in compliance with the state and do this the
20 right way. And I consulted legal and an accountant services to see how I can

1 transition as well as better be able to -- to meet my need, the company needs and --
2 and the contractors needs as well. So I -- I sent out literature, you know, for all the
3 folks that -- that wanted to convert to a subcontractor status. Yes, I had some
4 beliefs that, you know, I prefer taxes to be taken out for so many reasons and -- and
5 they as consenting and well informed adults, I even had an accountant on staff to
6 talk with them just as [UNCLEAR] about their -- their tax obligations to turn over
7 to -- to being a subcontractor.

8 MR. HOOVER: So all of this is kind of a learning process. But did anything
9 structurally change between your operation the way you first started and -- and
10 how you're doing it now, aside from moving everyone to a contract status?

11 MS. JOHNSON: Well initially, yes, I provided gloves, and -- and some equipment
12 and -- and an employer of a quarter type thing, with bonuses and that type of thing,
13 and all of -- all of that ceased.

14 MR. HOOVER: Okay. As far as your relationship with the client, verbally
15 contracting with them, assessing their needs, and then finding a provider, all that's
16 basically the same?

17 MS. JOHNSON: That's the same. Yeah, that's the same.

18 MR. HOOVER: Okay. Mr. Davis, our intent was in asking whether or not this
19 witness who has the flu, and I appreciate you not bringing this person too. If their
20 testimony is going to be essentially the same reaffirming what you said, I don't see

1 a need to -- to have another hearing to have that. Now if you still want to object on
2 record, we'll do that but --

3 MR. DAVIS: I think we got out everything we need to get out today, I think. I
4 mean [UNCLEAR, both speaking]

5 MR. HOOVER: Our ruling will be today then, that we will not reconvene to -- to
6 have this person's testimony.

7 MR. DAVIS: [UNCLEAR]

8 MS. JOHNSON: Yeah, that's why she was very passionate about -- but yeah, I
9 agree -- I agree. That's fine.

10 MR. HOOVER: Was it going to be her presentation that, "No, I'm an independent
11 contractor. I am not an employee?"

12 MS. JOHNSON: Actually, she was the office manager.

13 MR. HOOVER: Oh, she is?

14 MS. JOHNSON: And she saw the involvement of Rest Assured and the sticklers
15 we got into which, you know, prompted us to reorganize.

16 MR. HOOVER: So this is actually an employee?

17 MR. DAVIS: But it isn't a pure employee.

18 MR. HOOVER: Okay. All right. It sounds like that coordinator that you were
19 talking about a moment ago.

20 MR. DAVIS: Right.

1 MR. HOOVER: You need to go back to Ms. Clay.

2 HEARING OFFICER: Ms. Clay, do you have anything you'd like to add before
3 we close?

4 MS. CLAY: No. I didn't have anything I wanted to add. I guess I just want to
5 clarify something in this statement.

6 HEARING OFFICER: What statement are we referring to?

7 MS. CLAY: Exhibit Number Two.

8 HEARING OFFICER: Agency Exhibit Number --

9 MS. CLAY: Agency Exhibit Number Two.

10 HEARING OFFICER: Okay.

11 MR. DAVIS: In the paragraph, one -- two -- in the fifth paragraph down, I got that
12 she, meaning Aretha Johnson, stated that although she offers training to those who
13 do not have adequate training, she mostly contracts the CNA's with adequate
14 training.

15 HEARING OFFICER: Okay. And --

16 MS. CLAY: And as I remember listening to the testimony she was saying that she
17 did not offer any training because she hires -- or she contracts with everyone that
18 already has adequate training.

19 HEARING OFFICER: Okay.

1 MS. JOHNSON: Well [UNCLEAR] training, you know, because it's just
2 imperative that, you know, that they have on --

3 MS. CLAY: Yeah. My question is do you offer any training, as stated here, do
4 you offer any training to those that do not have adequate training?

5 MS. JOHNSON: I can't -- yes, and as I -- as I've said, you know, I can offer, you
6 know, show them how to transfer from a bed to a wheelchair and that sort of thing.
7 But I've never had to go in a home or anything like that and show someone how to
8 do training. But I give them that option to say, "Okay, I can offer some training --"

9 MR. HOOVER: Presently the way you are set up, do you pay for any training that
10 is done by an outside provider --

11 MS. JOHNSON: No.

12 MR. HOOVER: -- to that worker?

13 MS. JOHNSON: No.

14 MR. HOOVER: Okay.

15 HEARING OFFICER: All right. Anything else Ms. Clay?

16 MS. CLAY: No, that's it. I just wanted to clarify that.

17 HEARING OFFICER: Mr. Davis, anything you'd like to add before we close?

18 MR. DAVIS: Just that original statement, that wasn't your complete statement,
19 you know, that's correct, I bet you could identify a number of issues that they --
20 that weren't collected in that original statement. It wasn't your intention to

1 mislead anybody, you just didn't fully understand what you were -- were
2 explaining.

3 MS. JOHNSON: Right. And I needed to be a lot more explicit --

4 MR. DAVIS: Right.

5 MS. JOHNSON: -- in some of the entries --

6 MR. DAVIS: Okay.

7 MS. JOHNSON: -- that Ms. Clay asked.

8 MR. DAVIS: All right. But that initial statement was more just kind of
9 accounting to what she asked you as opposed to explaining your whole business.

10 MS. JOHNSON: Yes.

11 HEARING OFFICER: All right. Anything else Mr. Davis?

12 MR. DAVIS: No further questions.

13 HEARING OFFICER: All right. Hearing no further testimony, I have no more
14 questions. So what I will do at this time is I'll check our digital recorder to make

15 sure we have a good recording and then after I do that I will let you all go. I

16 declare this hearing closed.

17 **HEARING CLOSED.**

STATE OF NEW JERSEY)

COUNTY OF: MIDDLESEX)

This is to certify that the above is a true and correct transcript of recorded testimony transcribed to the best of my ability.

Lois Szirko

SWORN to before me this the

____ day of _____, 2010

_____(LS)

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

EXECUTIVE DIRECTOR
Roosevelt T. Halley
803.737.2617



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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 if the 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 provide 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
A#: 1 (2035)
FILE NO: ADM 2006-8

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

EXECUTIVE DIRECTOR
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903.737.2617



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EXHIBIT

A# 1 (2 pgs.)

FILE NO. ADM-2006-00

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

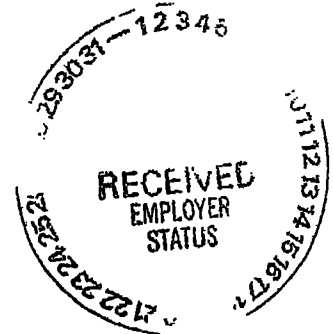
cc: Jack Sanders, Division Director Field Service
Cheryl Clay, Field Deputy

UI-4

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

January 31, 2006

Rest Assured LLC
9400 Two Notch Road
Columbia, SC 29223



Reatha Johnson, Director

PCA (personal care assistant)

Rest Assured, LLC is in the business of supplying CNA's (Certified Nursing Assistants) to clients for home care nursing assistants. *NA + companions*

Ms Reatha Johnson negotiates with the client a fee to be paid by the client for CNA's services.

Clients inform Rest Assured, LLC of the job and skills requirement and day time and hours in which they will need a CNA's assistants.

According to Ms Reatha Johnson, the CNA's is free to choose the hours and days which they can work. Ms Johnson stated that she place CNA's on a job that fit their individual schedule and match the schedule of the client.

EXHIBIT
A#: 2 (2832)

FILE NO: ADM 2006-2

Ms Reatha Johnson stated that she offers some training or the CNA's are allowed to get verifiable training from another certifiable source. She stated that although she offers training to those who do not have adequate training, she mostly contract with CNA's with adequate training. Applications are completed by each CNA to determine the adequacy of their training.

Ms Reatha Johnson stated she pay CNA's approximately \$8.00 per hour and most of the CNA's are part-time individuals. Ms Johnson stated that the CNA's are not supervised while performing their duties in a client's home, but she has the right to remove a CNA from a client if the client reports that the CNA performs substandard work or if the client is not satisfied with the CNA. She stated that the quality of the CNA work depends on the reputation of Rest Assured, LLC.

Ms Reatha Johnson stated that periodically she will consult with long-term clients to discuss their satisfaction of work performed by a CNA.

Ms Reatha Johnson stated that she does not pay for any travel expense to or from job sites by CNA's. She does not furnish any tools, equipment, or materials necessary to complete the work. She does not pay overtime or holiday pay.

According to Ms Johnson the CNA's performing work for Rest Assured, LLC are not invested in Rest Assured, LLC. CNA's do not realize any profit above the ordinary compensations for services or loss as a result of the work performed. She state the CNA's are allowed to contract with different agencies while contracting with Rest Assured, LLC, but they are not allowed to negotiate with a client of Rest Assured, LLC for another agency. CNA's have the right to stop working for Rest Assured, LLC at any time without incurring legal liability.

Reatha P. Johnson
Employer's Signature

1-31-06
Date

Cheryl J. Clay
Cheryl J. Clay, Field Deputy

1-31-2006
Date



1. The PCA is placed with a client that is comparable to the skills of the PCA.
2. If the PCA is removed from a job, Rest Assured will investigate and place the PCA with another client if appropriate and work is available.
3. The vast majority of contractors are students seasonal workers or stay at home moms whose schedules are subject to change without notice as with

Thompson Shannon

AIDE ID: 07284287

other employment

Personal Care II
Personal Care I
Companion

Miller Christina

AIDE ID: 07284339

other employment

Personal Care II
Personal Care I
Companion

Barber Dorothy

AIDE ID: 07284341

other employment

Personal Care II
Personal Care I
Companion

Sterling Lashawnda

AIDE ID: 07284345

other employment

Personal Care II
Personal Care I
Companion

Owens Ann

AIDE ID: 07284436

Personal Care II
Personal Care I
Companion

Earle Shamari

AIDE ID: 07284464

other employment

Personal Care II
Personal Care I
Companion

Goodson Ollie

AIDE ID: 07284507

other employment

Personal Care II
Personal Care I
Companion

Dreher Melonie

AIDE ID: 07284541

Personal Care II
Personal Care I
Companion

Kirkley Vernell

AIDE ID: 07284569

Personal Care II
Companion

Thimoleon Terrence

AIDE ID: 07284584

other employment

Personal Care II
Personal Care I
Companion

Shuler Doris

AIDE ID: 07284609

Personal Care II
Personal Care I
Companion

Vanhook Sharon

AIDE ID: 07284628

other employment

Personal Care II
Personal Care I

Reath
Sharon

Companion

George Patsy

AIDE ID:

07284692

→ other employment

Personal Care II

Personal Care I

Companion

Perdue Heather

AIDE ID:

07284699

→ other employment

Personal Care II

Personal Care I

Companion

Berry Atvera

AIDE ID:

07284735

→ other employment

Personal Care II

Personal Care I

Companion

White Charlene

AIDE ID:

07284761

→ other employment

Personal Care II

Wider Lashonda

AIDE ID:

07284793

→ other employment

Personal Care II

Personal Care I

Burrell Mary L

AIDE ID:

07284878

Personal Care II

Personal Care I

Companion

Troy Helen E

AIDE ID:

07284884

Personal Care II

Personal Care I

Randolph Sharon

AIDE ID:

07284915

Personal Care II

Personal Care I

Companion - Agency

Chaney Queen

AIDE ID:

07284921

→ other employment

Personal Care II

Personal Care I

Companion

Ketter Felisha

AIDE ID:

07285138

Personal Care II

Personal Care I

Companion

Duncan Crystal

AIDE ID:

07285143

→ other employment

Personal Care II

Personal Care I

Companion

Gray Sabrina

AIDE ID:

07285168

Personal Care II

Personal Care I

Companion

Haltiwanger Annette

AIDE ID:

07285175

→ other employment

Personal Care II

Personal Care I

Companion
Williams Charlene
Personal Care II
Personal Care I
Companion

AIDE ID: 07285186

Satterwhite Bertha
Personal Care II
Personal Care I
Companion

AIDE ID: 07285201 → other employment

Portee Dale
Personal Care II
Personal Care I
Companion

AIDE ID: 07285215 → other employment

Benn Veronica
Personal Care II
Personal Care I
Companion

AIDE ID: 07285241 → other employment

Capers Rosemary
Personal Care II
Personal Care I
Companion - Agency

AIDE ID: 07285257

Ford Shamika
Personal Care II
Companion

AIDE ID: 07285273 → other employment

Allen Shawtee'
Personal Care II
Personal Care I
Companion

AIDE ID: 07285354 → other employment

Griffin Amicka
Personal Care II
Personal Care I
Companion

AIDE ID: 07285379

Edmonds Joyce
Personal Care II
Personal Care I

AIDE ID: 07285408 → other employment

Horton Mary
Personal Care II
Personal Care I
Companion

AIDE ID: 07285442

Watts Sonya
Personal Care II
Companion

AIDE ID: 07285520 → other employment

Wright Wimsty
Personal Care II
Personal Care I
Companion

AIDE ID: 07285521

Wilson Terry
Personal Care II

AIDE ID: 07285561 → ofc manager

Buskey Barbara AIDE ID: 07285572

Personal Care II
Personal Care I
Companion

Goodwin Joan

AIDE ID: 07285699

→ other employment

Personal Care II
Personal Care I
Companion

Means Ryan

AIDE ID: 07285739

→ other employment

Personal Care II
Personal Care I
Companion

Myers Sabion

AIDE ID: 07285747

Personal Care II
Personal Care I
Companion

Owens Tracey

AIDE ID: 07285783

Personal Care II
Personal Care I
Companion

Long Wanda

AIDE ID: 07285885

→ other employment

Personal Care II
Personal Care I
Companion

Vo Dung

AIDE ID: 07285897

→ other employment

Personal Care II
Personal Care I
Companion

Bell Claire

AIDE ID: 07285901

→ other employment

Personal Care II
Personal Care I
Companion

Abdul-Hamid Khadeeja

AIDE ID: 07285959

→ other employment

Personal Care II
Personal Care I
Companion - Agency

Trapp Rosa

AIDE ID: 07285973

→ other employment

Personal Care II
Personal Care I
Companion

Leaphart Nicole

AIDE ID: 07285990

→ other employment

Personal Care II
Personal Care I
Companion

Harks Patsy

AIDE ID: 07286067

→ other employment

Personal Care II
Personal Care I
Companion

Paul Johnson

Wider Peggy

AIDE ID: 07286074

Personal Care II

Haynes Octavia

AIDE ID: 07286090

→ other employment

Personal Care II

Personal Care I

Companion

Winston Lettie

AIDE ID: 07286134

→ other employment

Personal Care II

Personal Care I

Companion

Cosom Jackie

AIDE ID: 07286156

→ other employment

Personal Care II

Personal Care I

Companion

Tucker Naeemah

AIDE ID: 07286232

→ other employment

Personal Care II

Personal Care I

Companion

Blocken Joanne

AIDE ID: 07286239

→ other employment

Personal Care II

Personal Care I

Companion

Bethel Trina

AIDE ID: 07286270

→ other employment

Personal Care II

Personal Care I

Companion

Taylor Shirley

AIDE ID: 07286403

Personal Care II

Personal Care I

Companion

Robinson Cynthia

AIDE ID: 07286418

→ other employment

Personal Care II

Personal Care I

Companion

Higgins Ella

AIDE ID: 07286431

→ other employment

Personal Care II

Personal Care I

Companion

Lake Loretta

AIDE ID: 07286439

Personal Care II

Personal Care I

Companion - Agency

Davis Constance

AIDE ID: 07286456

→ other employment

Personal Care II

Personal Care I

Companion

Nazery Debora

AIDE ID: 07286471

→ other employment

Personal Care II

Personal Care
Companion
Egister Tomyka

AIDE ID: 07286498

→ other employment

Personal Care II
Personal Care I

Dukes Jessica

AIDE ID: 07286505

→ other employment

Personal Care II
Personal Care I
Companion

Robinson Ruby

AIDE ID: 07286571

Personal Care II
Personal Care I
Companion

Wesley Monique

AIDE ID: 07286604

→ other employment

Personal Care II
Personal Care I
Companion

Cunningham Valarie

AIDE ID: 07286619

→ other employment

Personal Care II
Personal Care I
Companion

Coleman Lakeisha

AIDE ID: 07286640

→ other employment

Personal Care II

Martin Shamira

AIDE ID: 07286755

→ other employment

Personal Care II
Personal Care I
Companion

Morris Julian

AIDE ID: 07286859

→ other employment

Personal Care II
Personal Care I
Companion

Richardson Arabella

AIDE ID: 07286877

Personal Care II
Personal Care I
Companion

Gardner Laverne

AIDE ID: 07286956

Personal Care II
Personal Care I
Companion - Agency

Jeffery Rainey

AIDE ID: 07287014

→ other employment

Personal Care II
Personal Care I
Companion

Jacobs Ruth

AIDE ID: 07287045

→ other employment

Personal Care II
Personal Care I
Companion

Cox Joe

AIDE ID: 07287072

→ other employment

Knotts Quèsheda

Personal Care II
Personal Care I
Companion

AIDE ID: 07287080

→ other employment

Griffin Helen

Personal Care II
Personal Care I
Companion

AIDE ID: 07287095

→ other employment

Brown LaQuatta

Personal Care II
Personal Care I
Companion

AIDE ID: 07287307

→ other employment

Shepard Berneta

Personal Care II
Personal Care I
Companion

AIDE ID: 07287336

Carson Jaqueline

Personal Care II
Personal Care I
Companion

AIDE ID: 07287350

→ other employment

Bell Marthalean

Personal Care II
Personal Care I
Companion

AIDE ID: 07287378

→ other employment

Jackson Sharon

Personal Care II
Personal Care I
Companion

AIDE ID: 07287458

→ other employment

Simons Bettie

Personal Care II
Personal Care I
Companion

AIDE ID: 07287534

Means Ryan

Personal Care II
Personal Care I
Companion

AIDE ID: 07287539

→ other employment

Eleazer Sharonda

Personal Care II
Personal Care I
Companion

AIDE ID: 07287701

→ other employment

Hewitt Monique

Personal Care II
Personal Care I
Companion

AIDE ID: 07287714

→ other employment

Talavera Tasha

Personal Care II

AIDE ID: 07287761

→ other employment

Personal Care II

Duncan Janet

AIDE ID: 07287861

→ other employment

Personal Care II

Personal Care I

Companion

Hannah Frenchie

AIDE ID: 07287907 → other employment

Personal Care II

Personal Care I

Companion

McCray LaDera

AIDE ID: 07287920 → other employment

Personal Care II

Personal Care I

- Companion

Gomez Jessica

AIDE ID: 07287950 → other employment

Personal Care II

Personal Care I

Companion

Moore Vivian

AIDE ID: 07288002 → other employment

Personal Care II

Personal Care I

Companion

Joye Monica

AIDE ID: 07288103 → other employment

Personal Care II

Personal Care I

Companion

Jones Karl M

AIDE ID: 07288111

Personal Care II

Personal Care I

Companion

Vinson Chrystal

AIDE ID: 07288180 → other employment

Personal Care II

Personal Care I

Companion

Jebbison Suzette

AIDE ID: 07288188 → other employment

Personal Care II

Personal Care I

- Companion

Hudson Melonie

AIDE ID: 07288189 → other employment

- Personal Care II

Personal Care I

Companion

Robinson Pamela

AIDE ID: 07288202

Personal Care II

Personal Care I

Companion

Wilson Nitiya

AIDE ID: 07288232

Personal Care II

Personal Care I

Companion

Capers Leonie

AIDE ID: 07288257 → other employment

Personal Care II
Personal Care I
Companion

Brown Thomasena

AIDE ID: 07288300 → other employment

Personal Care II
Personal Care I
Companion

Goodson Erin

AIDE ID: 07288343 → other employment

Personal Care II
Personal Care I
Companion

Bright Deanna

AIDE ID: 07288396 → other employment

Personal Care II
Personal Care I
Companion

McNeal Chrishanna

AIDE ID: 07288411 → other employment

Personal Care II
Personal Care I
Companion

Kroening Leonie C

AIDE ID: 07288416 → otc mgr.

Personal Care II
Personal Care I
Companion

Tillman Shandon

AIDE ID: 07288419 → other employment

Personal Care II
Personal Care I
Companion

Wood Alisa

AIDE ID: 07288421 → other employment

Personal Care II
Personal Care I
Companion

Thompson Veretta

AIDE ID: 07288500 → other employment

Personal Care II
Personal Care I
Companion

Gary Janietha

AIDE ID: 07288520 → other employment

Personal Care II
Personal Care I
Companion

Matthews Nyja

AIDE ID: 07288525 → other employment

Personal Care II
Personal Care I
Companion

Mitchell Latoria

AIDE ID: 07288544

Personal Care II
Personal Care I
Companion

~~Burgess Stephanie~~
~~Personal Care II~~
~~Personal Care I~~
~~Companion~~
~~AIDE ID: 07288627~~ → ~~other employment~~

Eleazer Ronda AIDE ID: 07288676 → other employment

Personal Care II
Personal Care I
Companion

Johnson Sandra AIDE ID: 07288757 → other employment

Personal Care II
Personal Care I
Companion

Williams Sandaria AIDE ID: 07288762 → other employment

Personal Care II
Personal Care I
Companion

Bennett Rolanda AIDE ID: 07288774 → other employment

Personal Care II
Personal Care I
Companion

Fredrick Delois AIDE ID: 07288828

Personal Care I

Williams Amanda AIDE ID: 07288942 → other employment

Personal Care II
Personal Care I
Companion

Singletary Shirley AIDE ID: 07288945 → other employment

Personal Care II
Personal Care I
Companion

Moody Calvin AIDE ID: 07289059

Personal Care II

Francios Febenise AIDE ID: 07289131 → other employment

Personal Care II
Personal Care I
Companion

Highley Yvette AIDE ID: 07289136 → other employment

Personal Care II

Rodgers Deborah AIDE ID: 07289141 → other employment

Personal Care II
Personal Care I
Companion

Madison Linda AIDE ID: 07289233 → other employment

Personal Care II
Personal Care I
Companion

Anderson Alma AIDE ID: 07289275 → other employment

Personal Care II

Sanders Kimberly

Personal Care II
Personal Care I
Companion

AIDE ID: 07289286 → other employment

Calvin Beatrice

AIDE ID: 07289301 → other employment

Personal Care II
Personal Care I
Companion

James Jennifer

AIDE ID: 07289370

Personal Care II
Personal Care I
Companion

Lynch Belinda

AIDE ID: 07289389 → other employment

Personal Care II
Personal Care I
Companion

Capers Ora

AIDE ID: 07289417 → other employment

Personal Care II
Personal Care I
Companion

Bonepart Sharon

AIDE ID: 07289465

Personal Care II
Personal Care I
Companion

Bethea Ericka

AIDE ID: 07289551 → other employment

Personal Care II
Personal Care I
Companion

Brown Shermel

AIDE ID: 07289625 → other employment

Personal Care II
Personal Care I
Companion

Samuel Lafabia

AIDE ID: 07289633 → other employment

Personal Care II
Personal Care I

Tran Minh

AIDE ID: 07289650

Personal Care II
Personal Care I
Companion

Johnson Reatha

AIDE ID: 07289664 → Director

RN

Cannon Betty

AIDE ID: 07289710 → other employment

Personal Care II
Personal Care I
Companion

Gate James

AIDE ID: 07289740 → other employment

Lake Wendy

AIDE ID: 07289788

→ other employment

Personal Care II
Personal Care I
Companion

Hallman Cynthia

AIDE ID: 07289801

→ other employment

Personal Care II
Personal Care I
Companion

Singleary Tabatha

AIDE ID: 07289804

→ other employment

Personal Care II
Personal Care I

Knapper Deborah

AIDE ID: 07289949

→ other employment

Personal Care II
Personal Care I
Companion

TOTAL AIDES: 257

Independent Contractor Agreement

This Agreement was made on _____ between _____, an Independent Contractor (hereinafter referred to as "Personal Care Aide Contractor") and Rest Assured, LLC (hereinafter referred to as "Company").

1. Amendments. This agreement is intended to serve as a binding agreement between both parties. Amendments to this document shall be approved by both parties in writing.

2. Services To Be Performed. Personal Care Aide Contractor agrees to perform duties as a personal care aide pursuant to dispatch requests made by Company. For purposes of this agreement, a "dispatch request" is a request by the Company to provide personal care services to a patient.

3. Time For Performance. Personal Care Aide Contractor agrees to complete dispatch orders as requested by Company. If a dispatch request cannot be completed, the Personal Care Aide Contractor shall contact Reatha Johnson, or another designee of Company, directly.

4. Compensation. In consideration for the Personal Care Aide Contractor's performance of his duties, Company agrees to pay Personal Care Aide Contractor as follows: Each _____, Personal Care Aide Contractor shall be paid _____ per hour. This payment shall constitute the Personal Care Aide Contractor's sole compensation for the performance of services under this Agreement.

5. Withholding, Taxes and Benefits. The Personal Care Aide Contractor shall be responsible for withholding, accruing and paying all income, social security and other taxes and amounts required by law. The Personal Care Aide Contractor shall also be responsible for all statutory insurance and other benefits required by law for the Personal Care Aide Contractor and the Staff and all other benefits promised to the Staff by the Personal Care Aide Contractor, if any. The Personal Care Aide Contractor shall provide Company with a completed W-9 form.

6. Method of Performing the Services. The Personal Care Aide Contractor will determine the method, details and means of performing the Services upon receiving the care plan for the patient.

7. Operating Costs and Expenses. Personal Care Aide Contractor shall provide all supplies needed to perform the services and shall provide all transportation to the home of a patient. Company shall not be responsible for any transportation required by the Personal Care Aide Contractor.

8. Workers Compensation Coverage. For purposes of South Carolina workers compensation law only, Personal Care Aide Contractor shall be deemed the statutory employee of Company. Company agrees to provide worker's compensation insurance for

EXHIBIT
E# 1 (3935)
FILE NO: ADM 2006-3

Personal Care Aide Contractor as statutory employee. Except and to the extent that Company provides Worker's Compensation insurance, Personal Care Aide Contractor shall indemnify and hold Company harmless for any other injury to the person or property of Personal Care Aide Contractor and for any other loss suffered by Contractor in performing duties under this contract.

9. Qualifications. The Personal Care Aide Contractor shall at all times maintain any licenses required by law. Personal Care Aide Contractor shall demonstrate proof of his or her competency to Company. Personal Care Aide Contractor shall provide Company with proof of at least 10 hours of professional training each year.

10. Right to Terminate. If a Personal Care Aide Contractor engages in conduct that is harmful, detrimental, improper, or fraudulent to or for the business of the Company, the Company may terminate this contract immediately, at the discretion of the Company. If there is monetary value to the damages or fraud involved in the termination of the agreement, then the Company may deduct such monies from any monies owed to the Personal Care Aide Contractor. If the Personal Care Aide Contractor is unable to perform their assigned duties or for any reason fails to provide services for a period of more than seven consecutive days, the Company may terminate this agreement. The Personal Care Aide Contractor may terminate this agreement at any time prior to completion.

11. Change in Business. If the Company has a change of status which would effect its ability to complete its duties under this agreement, including but not limited to, a sale or merger of the company, a change in business services, or relocation to another state, the Company shall provide the Personal Care Aide Contractor with at least 30 days written notice of the change.

12. Agreement Not To Compete With The Company.

A. The Personal Care Aide Contractor agrees not participate directly or indirectly, in any capacity, in any business or activity that is in competition with the Company with respect to a patient served by the Company

B. The Personal Care Aide Contractor shall not, directly or indirectly, in any capacity, solicit or accept business from, provide consulting services of any kind to, or perform any of the services offered by the Company for, any of the Company's customers or prospects with whom the Contractor had business dealings in the year next preceding the termination of its contract.

13. Term of Contract. This contract shall expire 180 days after the effective date, but may be renewed for such additional terms as the parties may agree.

For Rest Assured, LLC:

Print Name: _____

Signature: _____

Its: _____

Date: _____

Witness: _____

Personal Care Aide Contractor

Print Name: _____

Signature: _____

Date: _____

Witness: _____

**Community Long Term Care
Service Termination Notice**

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Clto
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

CLTC PROCEDURE
CODE: T1019

Service(s) Authorized: Personal Care II

Authorized Start Date: 1/10/06

Authorized End Date: 2/13/06
(if applicable)

Reason for Termination: client's request

Total Units Authorized: 10 Sun Mon 2 Tue 2 Wed 2 Thur 2 Fri 2 Sat

Unit Cost: \$12.80

Time of Day: ☒ Morning ☐ Afternoon ☐ Evening

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Male	
ADDRESS				
CLTC CLIENT NO. 0534603	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 791-3523	SECONDARY PHONE (803) 791-3524	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Spouse		HOME TELEPHONE (803) 791-3523	WORK TELEPHONE	

Physician: DR. LYLES

Directions to client's home:

5/8/02 TAKE 321 TOWARD GASTON, MAKE LT ONTO BALL PARK RD THEN RT ONTO AT THE END OF RD. ON RT
SIDE 2 STORY HOUSE.

Case Manager's Name: Martha C. Blankenship

Date: 02/13/2006

Sent: Faxed

Date: _____ Initials: _____

☐ PROVIDER ☐ BILLING CLERK ☐ FILE

SCDHHS FORM 175-B JUL 94

EXHIBIT
E# 2 (17 pgs)
FILE NO: A-01m 2001

Community Long Term Care

~~Service Termination Notice~~

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

CLTC PROCEDURE
CODE: T1019

Authorized Start Date: 11/10/05

Authorized End Date: 2/24/06
(if applicable)

Reason for Termination: ~~Personal Care Request~~

Total Units Authorized: 4 Sun Mon Tue 2 Wed Thur 2 Fri Sat
Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

Unit Cost: \$12.80

CLIENT INFORMATION				
NAME ~~Patricia Easterling~~		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0539813	SOCIAL SEC NO. <del> </del>	MEDICAID NO. <del> </del>	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 755-9418	SECONDARY PHONE (803) 896-5133	THIRD PHONE (803) 920-5308		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Child/In-Law		HOME TELEPHONE (803) 896-5133	WORK TELEPHONE	

Physician: Dr. Russell Williams

Directions to client's home:

11/24/2004 Take a Rt onto Parklane. Continue on Parklane to Decker. Then take 77 South ramp to . From Columbia Airport travel 302 toward Edmunds. Continue on 302 toward Pellon. Right before the Exxon (pass Fire Dept.) on the Rt take a Rt onto Bolling Springs Rd. The Rd is right behind the Exxon station. Cross over # 6 Hwy. Continue straight for 2-3 miles. Then take a Lt onto Founder Rd. After this take a Rt onto Longview Street. Client's home is on the corner house on the Rt. It has a fence around it. Client has several friendly big

Case Manager's Name: Paulette Freeman

Date: 02/24/2006

Sent: Faxed Date: Initials: ☐ PROVIDER ☐ BILLING CLERK ☐ FILE

SCDHHS FORM 175-B JUL 94

Community Long Term Care**~~Service Termination Notice~~****PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia CLTC
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

CLTC PROCEDURE
CODE: T1019

Authorized Start Date: 1/16/06

Authorized End Date: 5/12/06
(if applicable)

Reason for Termination: Personal Request

Total Units Authorized: 8 Sun Mon 4 Tue Wed Thur 4 Fri Sat

Unit Cost: \$12.80

Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0540541	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 32	
PRIMARY PHONE (803) 407-8487	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Child/In-Law		HOME TELEPHONE (803) 407-8487	WORK TELEPHONE	

Physician: Sarah Shumacher

Directions to client's home:

Il. on Parklane, Il. on 277, rt. on I-20 to Augusta, rt. on Broad River Rd., pass Harblson Blvd., take rt. fork, rt. on Kingsway, Il. on
Bradstone, rt. on Somerton Cl.

Case Manager's Name: Sally Lucas

Date: 05/15/2006

Sent: Faxed

Date: _____ Initials: _____

☐ PROVIDER

☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

Community Long Term Care**~~Service Termination Notice~~****PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

CLTC PROCEDURE
CODE: S5130

Service(s) Authorized: Personal Care I (Home mgmt)

Authorized Start Date: 11/14/05

Authorized End Date: 1/31/06
(If applicable)

Reason for Termination: ~~per client request~~

Total Units Authorized: 5 Sun Mon 1 Tue 1 Wed 1 Thur 1 Fri 1 Sat Unit Cost: \$10.10

CLIENT INFORMATION

NAME ~~XXXXXXXXXX~~		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0531940	SOCIAL SEC NO. ~~XXXXXXXXXX~~	MEDICAID NO. ~~XXXXXXXXXX~~	ELIGIBILITY TYPE 30	
PRIMARY PHONE (803) 561-9166	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Self	HOME TELEPHONE (803) 561-9166		WORK TELEPHONE	

Physician: DR GREEN NEAL

Directions to client's home:

Exit at Broad River, go to Rushes, right at rushes and then left on Kathleen (Columbia High School). Client is in a duplex that is yellow with brown trim.

Case Manager's Name: Tracy Kelley Date: 02/01/2006

Sent: ☒ Faxed

Date: _____ Initials: _____

☐ PROVIDER

☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

Continued on back of
this form

PROVIDER VERIFIED
ELIGIBILITY MONTH

1001 S. HILL ST. #102
COLUMBIA, MO 65201

1001 S. HILL ST. #102
COLUMBIA, MO 65201

AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICES
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF:

1. PHYSICIAN SERVICES DATE: 10/1/81
2. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
3. PHYSICIAN NURSE SERVICES DATE: 10/1/81

4. PHYSICIAN SERVICES DATE: 10/1/81
5. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
6. PHYSICIAN NURSE SERVICES DATE: 10/1/81

7. PHYSICIAN SERVICES DATE: 10/1/81
8. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
9. PHYSICIAN NURSE SERVICES DATE: 10/1/81
10. PHYSICIAN SERVICES DATE: 10/1/81
11. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
12. PHYSICIAN NURSE SERVICES DATE: 10/1/81

13. PHYSICIAN SERVICES DATE: 10/1/81
14. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
15. PHYSICIAN NURSE SERVICES DATE: 10/1/81

16. PHYSICIAN SERVICES DATE: 10/1/81
17. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
18. PHYSICIAN NURSE SERVICES DATE: 10/1/81

19. PHYSICIAN SERVICES DATE: 10/1/81
20. PHYSICIAN ASSISTANT SERVICES DATE: 10/1/81
21. PHYSICIAN NURSE SERVICES DATE: 10/1/81

3 contractors effected

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS
Head and Spinal Cord Injury Waiver

~~NOTICE OF TERMINATION OF SERVICE~~

Please Type or Print

DATE FORM IS COMPLETED: 8/28/2006

PROVIDER: Rest Assured

RE: [REDACTED]
Recipient's Name

9/23/1956

Date of Birth

Medicaid #: [REDACTED]
1 2 3 4 5 6 7 8 9 10

YOU ARE HEREBY NOTIFIED TO TERMINATE THE PROVISION OF THE FOLLOWING SERVICE(S) TO THE PERSON NAMED ABOVE. ONLY THE NUMBER OF UNITS RENDERED PRIOR TO OR ON THE EFFECTIVE DATE OF 8/29/2006 MAY BE BILLED.

For SCEI Only: The effective date is ten (10) calendar days from the date the form is completed which allows the consumer ten (10) days notice prior to the termination of service(s) (do not send copy to family in the event of death).

- ☐ Respite Care
☒ Attendant Care / Personal Assistance Services
☐ Medical Supplies, Equipment and Assistive Technology

Specify Item(s):

- ☐ Environmental Modifications
☐ Medicaid Waiver Nursing Services
☐ Habilitation (specify)
 ☐ Residential Habilitation
 ☐ Day Habilitation
 ☐ Prevocational Services
 ☐ Supported Employment Services
☐ Physical Therapy Services
☐ Occupational Therapy Services

- ☐ Speech, Hearing and Language Services
☐ Psychological Services
☐ Behavioral Support Services
☐ Personal Emergency Response Systems
☐ Prescribed Drugs
☐ Private Vehicle Modifications
☐ Health Education for Consumer-Directed Care
☐ Peer Guidance for Consumer-Directed Care

Reason:

- ☐ Change in need no longer justifies original request
☐ Change in Level of Care
☐ Change in Provider availability
☐ Death (do NOT send a copy to the family)
☒ Voluntary withdrawal
☐ Other: _____
- ☐ Medical condition has improved
☐ No longer meets ICF/MR or Nursing Facility Level of Care
☐ Medicaid Ineligible
☐ Consumer moved out of state
☐ Hospital/Nursing home stay exceeded more than thirty (30) consecutive calendar days

Comments (required for all reasons):

a1

PLEASE PRINT

DSN Board/Provider: Rich/Lex DSN Board

Svc. Coord./EI: Shmuel Playfair

Address: 420 Rivermont Dr. / Colo, SC 29223

Phone: (803) 252-5179 324

Signature: S. Playfair

Date: 8/28/2006

Original: ☒ Provider

Copy: ☐ Consumer/Legal Guardian and File

APPEALS PROCESS ATTACHED

Page 1 of 2

HASCI Form 11 (Revised 03/05)

Community Long Term Care**~~Service Termination Notice~~****PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
26 Office Park Court
Suite 202
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

CLTC PROCEDURE
CODE: T1019

Authorized Start Date: 11/24/05

Authorized End Date: 6/17/06
(if applicable)

Reason for Termination: ~~CLIENT'S CHOICE~~

Total Units Authorized: 18 Sun Mon 2 Tue 2 Wed 4 Thur 2 Fri 4 Sat 4 Unit Cost: \$12.80

Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0537275	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 80	
PRIMARY PHONE (803) 749-3637	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Spouse		HOME TELEPHONE (803) 749-3637	WORK TELEPHONE (803) 518-1239	

Physician: Eric Hutto, MD

Directions to client's home:

Il. on Parklane, Il. on 277, rt. on 1-20 to Augusta, exit 1-26 to Spartanburg, exit 101A to Imo, Il. into Friarsgate, cross over RR tracks on N.
Royal Tower, Il. on Chapplewhite.

Case Manager's Name: Suzette Pope

Date: 06/16/2006

Sent: Faxed

Date: _____ Initials: _____

☐ PROVIDER

☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

Community Long Term Care
Service Termination Notice

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Companion CLTC PROCEDURE
CODE: X0273
Authorized Start Date: 10/4/05 Authorized End Date: 10/21/05
(If applicable)
Reason for Termination: Responsible party request
Total Units Authorized: 18 Sun Mon Tue Wed Thur Fri Sat Unit Cost: \$7.00

CLIENT INFORMATION				
NAME <u>[REDACTED]</u>		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0531457	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. <u>2400070001</u>	ELIGIBILITY TYPE 80	
PRIMARY PHONE (803) 776-7441	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS [REDACTED] 09		
RELATIONSHIP Child/in-Law		HOME TELEPHONE (803) 776-7441		WORK TELEPHONE

Physician: DR. WILLIAM WILSON

Directions to client's home:

TAKE I-77 TOWARD CHARLESTON EXIT AT LEESBURG RD. TURN LEFT ONTO LEESBURG RD. GO PAST FIRST RED LIGHT ON LEFT
WILL BE GARDEN SPRINGS TURN INTO IT. TAKE A RIGHT AT THE FORK NEXT STREET YORKSHIRE TAKE RT. THEN LEFT ONTO
WILLSHIRW HOUSE ON LEFT .

Case Manager's Name: BETH WARNOCK Date: 10/21/2005

Sent: Faxed Date: _____ Initials: _____ ☐ PROVIDER ☐ BILLING CLERK ☐ FILE

Community Long Term Care
~~Service Termination Notice~~

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care, II

**CLTC PROCEDURE
CODE: T1019**

Authorized Start Date: 10/3/05

Authorized End Date: 12/31/05

(If applicable)

Reason for Termination: ~~Out of home full calendar month~~ vacation

Total Units Authorized: 10 Sun Mon Tue 4 Wed Thur 4 Fri 2 Sat

Unit Cost: \$12.80

Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0540495	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 32	
PRIMARY PHONE (803) 407-1897	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME SELF		ADDRESS		
RELATIONSHIP Self		HOME TELEPHONE (803) 407-1897	WORK TELEPHONE	

Physician: Dr. JOSEPH GABRIEL

Directions to client's home:

Lt. on Parklane, lt. on 277, rt. on 1-20 to Augusta, exit 1-26 to Spartanburg, exit Harbison to lt., rt. into Lakeside.

Case Manager's Name: Paulette Freeman

Date: 01/03/2006

Sent: Faxed

Date: _____ Initials: _____

☐ **PROVIDER**

☐ **BILLING CLERK**

☐ **FILE**

SCDHHS FORM 175-B JUL 94

**Community Long Term Care
Service Termination Notice**

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

CLTC PROCEDURE
CODE: T1019

Authorized Start Date: 7/19/05

Authorized End Date: 3/10/06
(If applicable)

Reason for Termination: CLTC Request

Total Units Authorized: 10 Sun Mon 2 Tue 2 Wed 2 Thur 2 Fri 2 Sat
Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

Unit Cost: \$12.80

CLIENT INFORMATION				
NAME <u>[REDACTED]</u>		BIRTHDATE	SEX Male	
ADDRESS				
CLTC CLIENT NO. 0512503	SOCIAL SEC NO. <u>[REDACTED]</u>	MEDICAID NO. <u>[REDACTED]</u>	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 544-9493	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Self		HOME TELEPHONE	WORK TELEPHONE	

Physician: Dr. Timothy Malone

Directions to client's home:

Merge onto 277, get off the farrow rd exit, left onto Farrow, left on Harden, lot on Elmwood, Right on Oak street

Case Manager's Name: Suzette Pope

Date: 03/13/2006

Sent: Faxed

Date: _____ Initials: _____

☐ PROVIDER

☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

Community Long Term Care**Service Termination Notice**

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

**Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223**

**From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223**

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care I (Home mgmt)

**CLTC PROCEDURE
CODE: S5130**

Authorized Start Date: 10/7/05

**Authorized End Date: 1/16/06 →
(If applicable)**

Reason for Termination: ~~changing providers~~

Total Units Authorized: 10

Sun Mon 4 Tue Wed 3 Thur Fri 3 Sat

Unit Cost: \$10.10

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Male	
ADDRESS				
CLTC CLIENT NO. 0533719	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 32	
PRIMARY PHONE (803) 407-6149	SECONDARY PHONE (803) 348-7822	THIRD PHONE		
RESPONSIBLE PARTY				
NAME SELF		ADDRESS		
RELATIONSHIP Self		HOME TELEPHONE (803) 407-6149	WORK TELEPHONE	

Physician: Joseph Gable, M.D.

Directions to client's home:

Lt. on Parklane, lt. on 277, rt. on 1-20 to Augusta, exit 1-26 to Spartanburg, take lt. to Harbison, Lakeside on rt.

Case Manager's Name: Paulette Freeman

Date: 01/13/2006

Sent: Faxed

Date: _____ Initials: _____

☐ **PROVIDER**

☐ **BILLING CLERK**

☐ **FILE**

SCDHHS FORM 175-B JUL 94

Community Long Term Care

Service Termination Notice

PROVIDER: VERIFY MEDICAID ELIGIBILITY MONTHLY

Rest Assured LLC (EX0728)
26 Office Park Court
Suite 202
Columbia, SC 29223

From: Columbia Cito
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care-I (Home mgmt)

CLTC PROCEDURE
CODE: S5130

Authorized Start Date: 5/19/05

Authorized End Date: 6/21/06
(If applicable)

Reason for Termination: Medicaid Ineligibility

Total Units Authorized: 10

Sun Mon 2 Tue 2 Wed 2 Thur 2 Fri 2 Sat

Unit Cost: \$10.10

CLIENT INFORMATION				
NAME <u>[REDACTED]</u>		BIRTHDATE	SEX Male	
ADDRESS <u>[REDACTED]</u>				
CLTC CLIENT NO. 0513642	SOCIAL SEC NO. <u>[REDACTED]</u>	MEDICAID NO. <u>[REDACTED]</u>	ELIGIBILITY TYPE 80	
PRIMARY PHONE (803) 233-2806	SECONDARY PHONE (803) 233-2806	THIRD PHONE (803) 772-5175		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Parent		HOME TELEPHONE (803) 738-2850	WORK TELEPHONE (803) 776-6518	

Physician: Dr. Deldra Hudson

Directions to client's home:

Take I-26 towards Spartanburg. Get off of exit 103, bear to right. Make right turn onto Columbianna Drive (BB & T and Bank of America) are the landmarks. Go down to second complex which is Columbianna Ridge Apts.

Case Manager's Name: Suzette Pope

Date: 06/23/2006

Sent: Faxed

Date: _____ Initials: _____



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SCDHHS FORM 175-B JUL 94

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Community Long Term Care
Service Termination Notice

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II **CLTC PROCEDURE
CODE: T1019**
Authorized Start Date: 12/2/05 **Authorized End Date:** 3/28/06
(If applicable)
Reason for Termination: Client request

Total Units Authorized: 5 **Sun** **Mon 1** **Tue 1** **Wed 1** **Thur 1** **Fri 1** **Sat** **Unit Cost: \$12.80**
Time of Day: ☒ **Morning** ☒ **Afternoon** ☐ **Evening**

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Male	
ADDRESS				
CLTC CLIENT NO. 0539249	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 772-3387	SECONDARY PHONE (803) 260-8622	THIRD PHONE (803) 772-5853		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Parent		HOME TELEPHONE (803) 772-5853	WORK TELEPHONE	

Physician: Dr. Jason Stacy

Directions to client's home:

Il. on Parklane, Il. on 277, rt. on 1-20 to I-20, exit rt. on Broad River, Il. on Zimalecrest, Carriage house apts on Il. 1st. bld. on Il. APT. T.

Case Manager's Name: Julia Parrott **Date:** 03/31/2006

Sent: ☒ **Faxed** **Date:** _____ **Initials:** _____ ☐ **PROVIDER** ☐ **BILLING CLERK** ☐ **FILE**

Community Long Term Care
~~Service Termination Notice~~

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223

From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

CLTC PROCEDURE
CODE: T1019

Authorized Start Date: 8/22/05

Authorized End Date: 1/9/06
(If applicable)

Reason for Termination: Eligibility request

Total Units Authorized: 9 Sun Mon 3 Tue Wed 3 Thur Fri 3 Sat Unit Cost: \$12.80
Time of Day: ☒ Morning ☐ Afternoon ☐ Evening

CLIENT INFORMATION				
NAME [REDACTED]		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0533270	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 732-3794	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS [REDACTED], SC 29212		
RELATIONSHIP Self		HOME TELEPHONE (803) 750-6797		WORK TELEPHONE

Physician: Dr. Lisa Schumaker

Directions to client's home:

8/17/2005 get on I-20 towards Augusta, take Broad River Rd Exit, go R, turn L at Heritage Sign near Harbison State Park, Veer R to 2nd Cal
de Sac, which is Boston Commons.

ll. on Parklane, ll. on 277, rt. on I-20 to Augusta, exit rt. on Broad River Rd., ll. on Zimacrest, rt. into Cambridge station, go straight back
to dumpster, apt behind this.

Case Manager's Name: Sara Sims

Date: 01/09/2006

Sent: Faxed

Date: _____ Initials: _____

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☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

**Community Long Term Care
Service Termination Notice**

**PROVIDER: VERIFY
MEDICAID ELIGIBILITY MONTHLY**

**Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223**

**From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223**

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

**CLTC PROCEDURE
CODE: T1019**

Authorized Start Date: 10/5/05

**Authorized End Date: 10/26/05
(if applicable)**

Reason for Termination: ~~RP choice~~

Total Units Authorized: 7

Sun Mon 2 Tue Wed 2 Thur Fri 3 Sat

Unit Cost: \$12.80

Time of Day: ☒ Morning ☒ Afternoon ☐ Evening

CLIENT INFORMATION				
NAME ~~Bonnie Allen~~		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0539266	SOCIAL SEC NO. [REDACTED]	MEDICAID NO. [REDACTED]	ELIGIBILITY TYPE 15	
PRIMARY PHONE (803) 788-2893	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Child/In-Law		HOME TELEPHONE (803) 788-2893	WORK TELEPHONE (803) 735-3910	

Physician: Dr R Fitzgibbon

Directions to client's home:

L on PARKLANE

L on TWO NOTCH

R. on POLO (after SesquiCentennial Park)

R. on RUNNING FOX West Take the 1st left on Long Oak Rd. til the road ends. Client lives in the 2nd house on the left. Client lives in a

Case Manager's Name: MELANIE PEARSON

Date: 10/26/2005

Sent: Faxed

Date: _____ Initials: _____

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☐ **FILE**

**Community Long Term Care
Service Termination Notice**

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MEDICAID ELIGIBILITY MONTHLY**

**Rest Assured LLC (EX0728)
9400 Two Notch Road, Suite D
Columbia, SC 29223**

**From: Columbia Cltc
Parklane Business Center
7499 Parklane Rd. St. 164
Columbia, SC 29223**

**AUTHORIZATION IS HEREBY GIVEN TO TERMINATE THE FOLLOWING SERVICE(S)
UNDER YOUR CONTRACT WITH THE STATE DEPARTMENT OF HEALTH AND
HUMAN SERVICES FOR THE PROVISION THEREOF.**

Service(s) Authorized: Personal Care II

**CLTC PROCEDURE
CODE: T1019**

Authorized Start Date: 3/14/05

**Authorized End Date: 11/14/05
(If applicable)**

Reason for Termination: ~~Client's choice~~

Total Units Authorized: 12 Sun Mon 2 Tue 2 Wed 2 Thur 2 Fri 2 Sat 2 Unit Cost: \$12.80
Time of Day: ☒ Morning ☒ Afternoon ☒ Evening

CLIENT INFORMATION				
NAME ~~XXXXXXXXXX~~		BIRTHDATE	SEX Female	
ADDRESS				
CLTC CLIENT NO. 0520212	SOCIAL SEC NO. ~~XXXXXXXXXX~~	MEDICAID NO. ~~XXXXXXXXXX~~	ELIGIBILITY TYPE 80	
PRIMARY PHONE (803) 931-0149	SECONDARY PHONE	THIRD PHONE		
RESPONSIBLE PARTY				
NAME		ADDRESS		
RELATIONSHIP Self		HOME TELEPHONE (803) 931-0149	WORK TELEPHONE	

Physician: Dr. William K Robinson

Directions to client's home:

RIGHT ON TWO NOTCH FROM PARKLANE RD. FOLLOW TN RD. AND CROSS OVER BELTLINE. DRIVE PAST ANTHONY'S

**-DRIVE-IN/MANIGAULT-HURLEY FUNERAL HOME - MAKE A LEFT TURN ON TO MAGNOLIA STREET. 2707 IS A WHITE HOUSE WITH RED
TRIMMING ON THE LEFT. EMERGENCY CONTACT PERSON IS HER DGT. BERNITHA WISE WHO CAN BE REACHED AT (804)374-2272.**

CLT. STATED THAT SHE HAS NO LOCAL SUPPORT. CLIENT'S HEALTH IMPAIRMENTS INCLUDE DIABETES, AND A HEART AILMENT.

Case Manager's Name: Julia Parrott

Date: 11/18/2005

Sent: Faxed

Date: _____ Initials: _____

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☐ BILLING CLERK

☐ FILE

SCDHHS FORM 175-B JUL 94

AIDES FOR PROVIDER

by Aide ID

PROVIDER ID:

Moss Bianca

Personal Care II

AIDE ID: 07280019 → other employment

Roberts Antoinette

Personal Care II

Personal Care I

Companion

AIDE ID: 07280025 → other employment

Woodard Shirley

Personal Care II

Personal Care I

Companion

AIDE ID: 07280065 → other employment

English Rosa

Personal Care II

Personal Care I

Companion

AIDE ID: 07280146 → other employment

Branch Elizabeth

Personal Care II

Personal Care I

Companion

AIDE ID: 07280194 → other employment

Beard Cheryl

Personal Care II

Personal Care I

Companion

AIDE ID: 07280240 → other employment

Bryant Tiesha

Personal Care II

Personal Care I

Companion

AIDE ID: 07280281 → other employment

Duncan Denisa

Personal Care II

Personal Care I

Companion

AIDE ID: 07280337

Gary Sharon

Personal Care II

AIDE ID: 07280367 → other employment

Simmons Barbara

Personal Care II

Personal Care I

Companion

AIDE ID: 07280371 → other employment

Glover Amy

Personal Care II

Personal Care I

Companion

AIDE ID: 07280393 → other employment

Glover Amy

Personal Care II

Personal Care I

Companion

AIDE ID: 07280398 → other employment

EXHIBIT

E# 3 (21 pgs)
Page NO. 156

Barbara Johnson RN
Director

Foxworth Linda

AIDE ID: 07280431

Personal Care II
Personal Care I
Companion

Young Demetrius

AIDE ID: 07280474 → other employment

Personal Care II
Personal Care I
Companion

Whetstone Helen

AIDE ID: 07280504

Personal Care II
Personal Care I
Companion

Thimoleon LaQuinta

AIDE ID: 07280570 → other employment

Personal Care II
Personal Care I
Companion

Snipes Latosha

AIDE ID: 07280621 → other employment

Personal Care II
Personal Care I
Companion

Ritters LaToya

AIDE ID: 07280774

Personal Care II
Personal Care I

Graham Margaret A

AIDE ID: 07280781 → other employment

Personal Care II
Personal Care I
Companion

Butler Leslie

AIDE ID: 07280787 → other employment

Personal Care II
Personal Care I
Companion

Matthews Diane

AIDE ID: 07280804 → other employment

Personal Care II
Personal Care I
Companion

Davis Nicole

AIDE ID: 07280920 → other employment

Personal Care II
Personal Care I
Companion

Wilson Kinn L

AIDE ID: 07281038 → other employment

Personal Care II
Personal Care I
Companion

Payne Joan

AIDE ID: 07281045 → other employment

Personal Care II
Personal Care I
Companion

Smalls Linda

AIDE ID: 07281070 → other employment

Belton Eva

AIDE ID: 07281102

Personal Care II
Personal Care I
Companion - Agency

Knighter Karen

AIDE ID: 07281159 → other employment

Personal Care II
Personal Care I
Companion

Faust Kristen

AIDE ID: 07281186 → other employment

Personal Care II
Personal Care I
Companion

Stroman Angie

AIDE ID: 07281213 → other employment

Personal Care II
Personal Care I
Companion

Schermertorn Irene

AIDE ID: 07281259 → other employment

Personal Care II
Personal Care I
Companion

Powers Katrina

AIDE ID: 07281347

Personal Care II
Personal Care I
Companion - Agency

Ellison Amanda

AIDE ID: 07281508

Personal Care II
Personal Care I
Companion - Agency

Williams Sharon

AIDE ID: 07281514 → other employment

Personal Care II
Personal Care I
Companion

Muldraw Pamela

AIDE ID: 07281552 → other employment

Personal Care II
Personal Care I
Companion

Welker Cherry

AIDE ID: 07281675 → other employment

Personal Care II
Personal Care I
Companion

Fullard Felisha

AIDE ID: 07281693 → other employment

Personal Care II
Personal Care I
Companion

Jackson James

AIDE ID: 07281783 → other employment

Personal Care II

Personal Care II
Companion

Smith Kim

AIDE ID:

07281821

→ other employment

Personal Care II

Personal Care I

Companion

Wise Danielle

AIDE ID:

07282005

→ other employment

Personal Care II

Personal Care I

Pressley Katrina

AIDE ID:

07282016

→ other employment

Personal Care II

Personal Care I

Companion

Keys Lashanta

AIDE ID:

07282020

→ other employment

Personal Care II

Personal Care I

Moody Johnathan

AIDE ID:

07282022

→ other employment

Personal Care I

Jones Davishia L

AIDE ID:

07282030

Personal Care II

Personal Care I

Companion

Coe Wanda

AIDE ID:

07282056

→ other employment

Personal Care II

Personal Care I

Bettis Magalene

AIDE ID:

07282089

→ other employment

Personal Care II

Personal Care I

Companion

Livingston Pearline

AIDE ID:

07282103

→ other employment

Personal Care II

Personal Care I

Companion

Wiggins Linda

AIDE ID:

07282132

→ other employment

Personal Care II

Personal Care I

Companion

Joyner Yarnayla

AIDE ID:

07282143

→ other employment

Personal Care II

Personal Care I

Companion

Wilson Kamelah

AIDE ID:

07282201

Personal Care II

Personal Care I

Companion

Fitts Suzanne

AIDE ID:

07282211

→ other employment

Personal Care II

Companion

Watkins Sharon

AIDE ID: 07282229

Personal Care II

Thomas Kimmérliisa

AIDE ID: 07282267 → other employment

Personal Care II

Personal Care I

Moses Avon

AIDE ID: 07282306 → other employment

Personal Care II

Personal Care I

Companion

Hawkins Brandi

AIDE ID: 07282326 → other employment

Personal Care II

Personal Care I

Companion

Smith April

AIDE ID: 07282396

Personal Care II

Personal Care I

Companion

Thomas Ashley

AIDE ID: 07282400 → other employment

Personal Care II

Personal Care I

Companion

Brooker Remona

AIDE ID: 07282424 → other employment

Personal Care II

Personal Care I

Companion

Harris Dorothy

AIDE ID: 07282426 → other employment

Personal Care II

Personal Care I

Companion

Norris Lucretia

AIDE ID: 07282443 → other employment

Personal Care II

Personal Care I

Companion

Godbolt Denise A

AIDE ID: 07282444 → other employment

Personal Care II

Personal Care I

Companion

Haynes Debra

AIDE ID: 07282446 → other employment

Personal Care II

Personal Care I

Companion

Shealy Cynthia

AIDE ID: 07282447

Personal Care II

Personal Care I

Companion

Robinson Christy

AIDE ID: 07282449 → other employment

Personal Care II

Personal Care I

Companions

Lee Deanna AIDE ID: 07282468

Personal Care II
Personal Care I

POUGE KATRINA

AIDE ID: 07282651

other employment

Personal Care II
Personal Care I
Companion

Johnson Amanda

AIDE ID: 07282671

other employment

Personal Care II
Personal Care I

Battle Shirley

AIDE ID: 07282711

Personal Care II
Personal Care I
Companion - Agency

Goodwin Ricky B

AIDE ID: 07282719

other employment

Personal Care II
Personal Care I
Companion - Agency

Glover Lashaunda

AIDE ID: 07282722

other employment

Personal Care II
Personal Care I
Companion

Shannon Gloria

AIDE ID: 07282732

other employment

Personal Care II
Personal Care I
Companion

Cole Terron M

AIDE ID: 07282747

other employment

Personal Care II
Personal Care I
Companion - Agency

Young Wanda

AIDE ID: 07282825

other employment

Personal Care II
Personal Care I
Companion

Kennedy Julia

AIDE ID: 07282856

Personal Care II
Personal Care I
Companion

Craft Camilla

AIDE ID: 07282857

other employment

Personal Care II
Personal Care I
Companion

Johnson Ndrina

AIDE ID: 07282858

other employment

Personal Care II
Personal Care I

Jackson Cammie

AIDE ID: 07282876

other employment

Personal Care II

Personal Care II
Companion
Pharr Monique

AIDE ID: 07282945 other employment

Personal Care II
Personal Care I
Companion

Street Deborah

AIDE ID: 07282987 other employment

Personal Care II
Personal Care I
Companion

Sutton Patricia

AIDE ID: 07283002 other employment

Personal Care II

Ramsey Emma

AIDE ID: 07283022 other employment

Personal Care II
Personal Care I
Companion

Green Brenda

AIDE ID: 07283063 other employment

Personal Care II
Personal Care I
Companion

Staples Varis

AIDE ID: 07283112 other employment

Personal Care II
Personal Care I
Companion

Frederick Delois

AIDE ID: 07283122

Personal Care II
Personal Care I
Companion

Dupree Kashaundra

AIDE ID: 07283124 other employment

Personal Care II
Personal Care I
Companion

Barry Vanetta

AIDE ID: 07283151 other employment

Personal Care II
Personal Care I

Johnson Vickie

AIDE ID: 07283158

Personal Care II
Personal Care I
Companion

Small Dinah

AIDE ID: 07283170 other employment

Personal Care II
Personal Care I
Companion

Johnson James

AIDE ID: 07283179

Personal Care II
Personal Care I
Companion

Dozier Shirley

AIDE ID: 07283254 other employment

Gadson Grefta S

AIDE ID: 07283264

other employment

Personal Care II
Personal Care I
Companion

Scott Shaunta

AIDE ID: 07283267

other employment

Personal Care II
Personal Care I

Suber Mildred

AIDE ID: 07283286

Personal Care II
Personal Care I
Companion

Purcell Lukisha

AIDE ID: 07283354

other employment

Personal Care II
Personal Care I
Companion

Tucker Kimberly

AIDE ID: 07283465

Personal Care II
Personal Care I
Companion

Pinckney Christopher

AIDE ID: 07283485

other employment

Personal Care II
Personal Care I
Companion

Torrès Amalia

AIDE ID: 07283492

other employment

Personal Care II
Personal Care I
Companion

Bridges Carole

AIDE ID: 07283558

other employment

Personal Care II
Personal Care I
Companion

Starks Pamela

AIDE ID: 07283660

other employment

Personal Care II
Personal Care I
Companion

Jordan Elizabeth

AIDE ID: 07283683

other employment

Personal Care II
Personal Care I
Companion

Kennedy Rashond

AIDE ID: 07283701

other employment

Personal Care II
Personal Care I

Goins Dorothy

AIDE ID: 07283756

other employment

Personal Care II
Personal Care I
Companion

Personal Care I
Companion

Ray Lisa

AIDE ID: 07283813 *other employment*

Personal Care II
Personal Care I
Companion

Ramsey Shemeka

AIDE ID: 07283829 *other employment*

Personal Care II
Personal Care I
Companion

Rush Lagwenia

AIDE ID: 07283833 *other employment*

Personal Care II
Personal Care I
Companion

Miller Sykati

AIDE ID: 07283860 *other employment*

Personal Care II
Personal Care I
Companion

Schermerhorne Crystal

AIDE ID: 07283894 *other employment*

Personal Care II
Personal Care I
Companion

Blasher Michelle

AIDE ID: 07283969 *other employment*

Personal Care II
Personal Care I
Companion

Treadwell Amelai

AIDE ID: 07284024

Personal Care II
Personal Care I
Companion

Williams Latonya

AIDE ID: 07284065 *other employment*

Personal Care II
Personal Care I
Companion

Leaphart Tracy

AIDE ID: 07284067 *other employment*

Personal Care II
Personal Care I
Companion

Herbert Felita

AIDE ID: 07284191 *other employment*

Personal Care II
Personal Care I

Gibbs Clarence

AIDE ID: 07284197 *other employment*

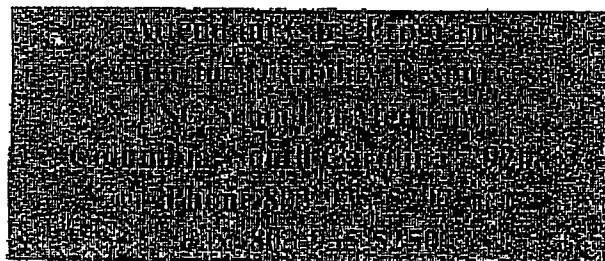
Personal Care II
Personal Care I
Companion

Davenport Winyah

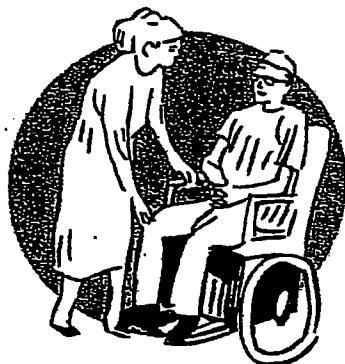
AIDE ID: 07284262 *other employment*

HOW DO I BECOME AN INDIVIDUAL ATTENDANT/ COMPANION PROVIDER?

Interested persons must submit an attendant/companion information sheet, the corresponding responsibilities agreement form, along with a photocopy of their PPD tuberculin skin test results to:



To obtain an information sheet call or write the address above or contact your local Community Long Term Care Office (CLTC).



*Cover graphic used with permission from Continuing Education for the Health Professions. Copyright © 1996 by Pee Dee AHEC, a division of McLeod Regional Medical Center. Reproduced by permission. All rights reserved.

CLTC OFFICES:

- Area 1: Greenville—(864) 242-2211
1-888-535-8523
Greenville, Pickens
- Area 2: Spartanburg—(864) 587-4707
1-888-551-3864
Cherokee, Union, Spartanburg
- Area 3: Greenwood—(864) 223-8622
1-800-628-3838
Abbeville, Edgefield, Greenwood, Laurens, McCormick, Saluda
- Area 4: Rock Hill—(803) 327-9061
1-888-286-2076
Chester, Lancaster, York
- Area 5: Columbia—(803) 741-0826
1-888-347-0908 *Donna*
Fairfield, Lexington, Newberry, Richland
- Area 6: Orangeburg—(803) 536-0122
1-888-218-4915
Allendale, Bamberg, Calhoun, Orangeburg
- Area 6A: Aiken—(803) 641-7680
1-888-364-3310
Aiken, Barnwell
- Area 7: Sumter—(803) 905-1288
1-888-761-5991
Clarendon, Kershaw, Lee, Sumter
- Area 8: Florence—(843) 667-8718
1-888-539-8796
Darlington, Dillon, Florence
- Area 8A: Bennettsville—(843) 479-9075
1-888-225-8048
Chesterfield, Marlboro
- Area 9: Conway—(843) 248-7249
1-888-539-8796
Georgetown, Horry, Marion, Williamsburg
- Area 10: Charleston—(843) 529-0142
1-888-805-4397
Berkeley, Charleston, Dorchester
- Area 10A: Point South—(843) 726-5353
1-800-262-3329
Beaufort, Colleton, Hampton, Jasper
Beaufort line 521-9191
- Area 11: Anderson—(864) 224-94
1-800-713-8003
Anderson, Oconee
- CLTC Central Office—(803) 898-2:
PO Box 8206 Columbia, SC 29202-8206

Become An



INDIVIDUAL ATTENDANT/ COMPANION PROVIDER

AN
EXCITING
JOB
OPPORTUNITY

FOR
YOU

EXHIBIT

E# 4(2pgs.)
FILE NO: ADM 2006-2

WHAT IS AN INDIVIDUAL ATTENDANT/COMPANION PROVIDER?

An Individual Attendant/Companion Provider is a self-employed individual who is eligible to provide 2 different types of services to qualified Medicaid clients. These providers are eligible for reimbursement directly from Medicaid.

WHAT SERVICES CAN AN INDIVIDUAL ATTENDANT/COMPANION PROVIDER PROVIDE?

Individual Attendant/Companion Providers are eligible to serve qualified Medicaid clients 2 ways: as an attendant and/or as a companion. Attendants are reimbursed at \$10.05 per hour and companions are reimbursed at \$7.00 per hour.

Attendants assist clients with many Activities of Daily Living. Some of the Activities of Daily Living clients may need assistance with are the following:

- Bathing
- Dressing
- Feeding
- Personal grooming
- Personal hygiene
- Transferring
- Mobility
- Monitoring of medical conditions

*Attendants may also be expected to provide assistance with Instrumental Activities of Daily Living as well as the tasks listed above.

CDSON

Companions provide assistance with Instrumental Activities of Daily Living:

- Socialization/Communication
- General housekeeping
- Meal preparation and set up
- Shopping assistance
- Errands and escort of clients
- Basic supervision for safety

WHAT TYPE OF MEDICAID CLIENTS WOULD I SEE?

Clients under the Elderly and Disabled and the HIV/AIDS Waivers of Community Long Term Care Services (CLTC), a division of the Department of Health and Human Services are eligible to receive the attendant and/or companion service(s) if the clients meet certain criteria. Waiver participants under the Head and Spinal Cord Injury (HASCI) waiver of the Department of Disabilities and Special Needs are eligible to receive the attendant service if they meet certain criteria.

WHO CAN BE AN INDIVIDUAL ATTENDANT/COMPANION PROVIDER?

Individual Attendants/Companions must be at least eighteen years of age, fully ambulatory, and provide the results of a PPD tuberculin skin test which cannot be over 1 year old in order to enroll as a provider. They must also be willing to submit to a SLED criminal records check.

HOW DOES THE SERVICE WORK?

1. Case managers from CLTC or Service Coordinators from the HASCI waiver screen their clients to determine if they meet the qualifications for this service.
2. The case managers/service coordinators then determine the client's interest in the service.
3. Once the client/waiver participant has been determined appropriate for the service, the client is asked to find an attendant with whom they would like to work and whose schedule would permit the attendant to provide care at the time the client prefers. The client may do this completely on his/her own or interview enrolled attendants/companions already on a provider list.
4. For the Attendant service: case managers/service coordinators will send a referral to the University Affiliated Program (UAP). A registered nurse from the UAP will make a phone visit to fully explain the service requirements. Once the client identifies an attendant and the attendant is enrolling as a Medicaid provider, a nurse from the UAP visits the client and the attendant in the client's home. The purpose of this visit is to observe the actual performance of care to ensure the attendant can safely provide the care as outlined in the service plan the case manager has designed. For the Companion service: case managers will contact the provider to discuss specific client needs, preferences, and duties to be performed.
5. For both services, case managers will determine the start date. Services will not begin until an individual has received his/her provider number.

But, here, the PCAS get paid by the State Assured

Here Rest Assured = Provider

S. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES
BUREAU OF HEALTH SERVICES

09/08/05

OLLIE MAE GOODSON

EX5678

4801 DALE DRIVE
COLUMBIA

SC 29203

YOUR ENROLLMENT IN THE SOUTH CAROLINA MEDICAID PROGRAM HAS BEEN APPROVED BY THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES EFFECTIVE: 09/08/05.

FUTURE COMMUNICATIONS WITH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REGARDING YOUR PARTICIPATION IN THE SOUTH CAROLINA MEDICAID PROGRAM SHOULD CONTAIN YOUR PROVIDER IDENTIFICATION NUMBER.

YOUR PROVIDER NUMBER IS: EX5678 *Provider ID#*

THIS NUMBER IS PERMANENTLY ASSIGNED TO YOU WHILE YOU PARTICIPATE IN THE PROGRAM. IF YOU SHOULD LEAVE THE MEDICAID PROGRAM AND SUBSEQUENTLY THIS NUMBER SHOULD BE USED ON YOUR REQUEST.

QUESTIONS REGARDING ENROLLMENT IN THE MEDICAID PROGRAM SHOULD BE DIRECTED

FOR CONTRACTED PROVIDERS:

DIVISION OF CONTRACTS
DHHS
POST OFFICE BOX 8206
COLUMBIA, S.C. 29202-8206
(803) 898-2605

FOR NON-CONTRACTED PROVIDER

MEDICAID PROVIDER ENROLLMENT
POST OFFICE BOX 8809
COLUMBIA, S.C. 29202-8809
(803) 788-7622 EXT. 41650

EXHIBIT

E# 5

FILE NO: ADM 722

QUESTIONS REGARDING POLICY AND PROCEDURES FOR THE MEDICAID PROGRAM SHOULD BE DIRECTED TO YOUR MEDICAID PROVIDER REPRESENTATIVE, DHHS, POST OFFICE BOX 8206, COLUMBIA, SOUTH CAROLINA 29202-8206.

THE FOLLOWING INFORMATION WAS KEYED FROM THE ORIGINAL ENROLLMENT FORM. IF THERE ARE DISCREPANCIES, PLEASE WRITE OR CALL USING THE APPROPRIATE ADDRESS OR PHONE INFORMATION LISTED ABOVE.

FEDERAL EIN NOT FOUND ON FORM

SSN 251984507

THIS NUMBER IS USED FOR TAX REPORTING. PLEASE VERIFY.

CNA

Certified Caregiver Acknowledgment of Understanding
Page 2

- SCDDSN provides the funding for my compensation as a certified caregiver when I provide caregiver services.
- Babcock Center, Inc. is merely the conduit or "funnel" through which state funds are used to compensate me for my caregiver services. Babcock Center, Inc. did not select me to provide caregiver services and will not direct, control, or monitor me in my performance of caregiver services.
- Because Babcock Center, Inc. is not involved in my selection as a caregiver, does not direct and control me in the delivery of my caregiver services, does not monitor me in the delivery of my caregiver services, does not fix my compensation, and does not have authority to cause the cessation of my caregiver services to the above referenced family, I understand that I am not an employee of Babcock Center.
- I understand that the compensation that I receive for my delivery of caregiver services will be considered taxable income for income tax purposes. I further understand that I have been directed to consult with an accountant or tax advisor regarding any tax obligations that may be generated as a result of the compensation I receive for delivering caregiver services.

Caregiver Signature: _____

Date: May 12, 2008

Respite Coordinator Signature: _____ Date: _____

EXHIBIT

E# 6

FILE NO: ADM 2008-8

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:

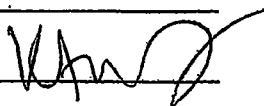
See attached

* 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 solely 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)

BOYKIN, DAVIS & HAWKINS, LLC

Attorneys and Counselors at Law

CHARLES J. BOYKIN*
KENNETH A. DAVIS
KARLA McLAWHORN HAWKINS
JAMILA B. MINNICKS*
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914 RICHLAND STREET, SUITE A-200
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11844
COLUMBIA, SOUTH CAROLINA 29211

TELEPHONE: 803-254-0707
FACSIMILE: 803-254-6809

kdavis@boykinlawsc.com

*CERTIFIED CIVIL ARBITRATOR AND MEDIATOR
†ALSO ADMITTED IN MARYLAND
‡ADMITTED IN LOUISIANA ONLY

March 16, 2007

VIA FACSIMILE AND U.S. MAIL

South 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 /A.D.

Kenneth A. Davis

/rar

Enclosures

cc: Reatha Johnson

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

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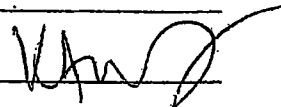
See attached

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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)

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



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

SC-DEW

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 (Bkrcty.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.

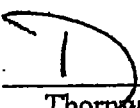
Where, as here, the patients and nurses set working hours rather than the agency and no work occurs at the agency's office, nurse's furnish their own tools, and are not given benefits other than compensation for services rendered, the court found the requisite indicia of control lacking to find an employment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

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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 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

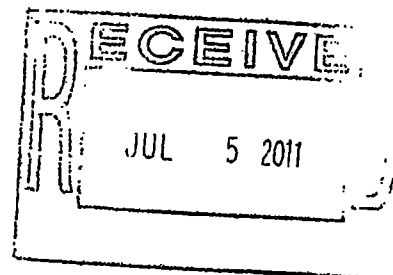
Enclosures

cc:  David Dick, Esquire
Biff Sowell, Esquire

June 30, 2011

VIA HAND DELIVERY

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, SC 29201



RE: Rest Assured, LLC/South Carolina Department of Employment and Workforce
Appellate Decision No. 2011-P-10
Appeal No. Admin. 2006-8
Our File No.: 6251/1500

Dear Ms. McBride:

On behalf of Rest Assured, LLC, enclosed are an original and one (1) copy of the Petition and Notice of Intent to Appeal the decision of the South Carolina Department of Employment and Workforce, Appellate Decision No. 2011-P-10. This notice is submitted for filing with your Court. Please return a clocked-in copy to me via our courier.

This Firm's check in the amount of One Hundred Fifty and 00/100 Dollars (\$150.00), representative of the filing fee, is also enclosed.

By copy of this letter to the South Carolina Department of Employment and Workforce, we are advising them of our appeal and requesting that they make the necessary filing with your Court.

If you should need additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in dark ink, appearing to read "D. C. Dick", with a stylized flourish at the end.

David C. Dick

DCD:ksa

Enclosures

cc: South Carolina Department of Employment and Workforce (via certified mail)

2011 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

2011 JUN 30 PM 4:09
C.C.P. & U.S. CODE

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.

South Carolina Department of Employment and
Workforce

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

(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			☐ Administrative Law Judge (980)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Public Service Commission (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☒ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Other (999)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: 06/30/2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, 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

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

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

**ORDER DENYING DEFENDANTS
MOTION TO DISMISS AND
GRANTING PLAINTIFF'S MOTION
TO TRANSFER**

2012 MAR 27 PM 2:14
JEANETTE W. ROBB
C.C.P. & C.D.
SCDEW

RICHLAND COUNTY
FILED

This matter came before the Court on January 19, 2012 for a hearing on Defendant South Carolina Department of Employment and Workforce's ("SCDEW") Motion to Dismiss and Plaintiff Rest Assured, LLC's ("Rest Assured") Motion to Transfer this case from the Richland County Court of Common Pleas to the State of South Carolina Administrative Law Court. Thornwell F. Sowell and David C. Dick of Sowell Gray Stepp & Laffitte, LLC, appeared as counsel for the Plaintiff. Debra S. Tedeschi, Assistant General Counsel for the SCDEW, appeared on behalf of the Defendant. This Court now orders that the above-captioned matter be transferred from the Richland County Court of Common Pleas to the State of South Carolina Administrative Law Court.

FACTS AND PROCEDURAL HISTORY

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

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SCANNED

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 who 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, four years after the original hearing. Counsel for Rest Assured 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." 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, 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

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mailed directly to Rest Assured with no copy to Rest Assured's counsel. Prior to the issuance of the Appellate Decision, every correspondence with the SCESC and the SCDEW had copied counsel. The SCDEW provided no explanation for why counsel for Rest Assured was not copied on the final determination.

On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. There is no dispute that the notice of appeal was timely served upon the SCDEW within 30 days.

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 based on an alleged failure to file the appeal in the Administrative Law Court. In response to the Motion to Dismiss, Rest Assured argued that the Court of Common Pleas was the appropriate court for the appeal and, in the alternative, filed a motion to transfer the appeal to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law.

LAW AND ANALYSIS

Rest Assured argues that the Court of Common Pleas is the appropriate jurisdiction to bring this appeal based on the law in effect at the time the cause of action for the appeal arose. In the alternative, Rest Assured argues that this appeal should be transferred to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules. This Court finds that the Administrative Law Court, not the Court of Common Pleas, is the proper jurisdiction for this appeal, but agrees that the appeal should be transferred to that court.

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South Carolina Code Ann. § 41-35-750 provides the procedure for appeals from the SCDEW, formerly the SCESC. In 2006 and 2007 when the issues regarding the designation of Rest Assured's personal care aides arose, S.C. Code § 41-34-750 provided, in part:

Within thirty days from the date of mailing of the Commission's decision, any party whose benefit rights or whose employer account may be affected by the Commission's decision may secure judicial review thereof by **commencing an action in the court of common pleas**, either in the county in which the employee resides or the county in which he was last employed, against the Commission for the review of its decision, in which action every other party to the proceeding before the Commission shall be made a defendant.

S.C. Code Ann. § 41-35-750 (1976) eff. July 1, 2006 (emphasis added).

On March 30, 2010, S.C. Code § 41-35-750 was rewritten to provide the Administrative Law Court with jurisdiction over appeals from the SCDEW. S.C. Code § 41-35-750 was rewritten as part of the reorganization of the SCESC into the SCDEW. The rewriting of this statute occurred during the four year period that Rest Assured waited to have its appeal heard in front of the appellate tribunal for the SCESC.

The procedure for appeals from the SCDEW, and former SCESC, is also governed by South Carolina Code of Regulations § 47-57, which at the time Rest Assured's right to appeal the decision of the SCDEW arose provided:

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.

eff. May 26, 2000 (emphasis added). This regulation was also changed on June 24, 2011, to provide that the Administrative Law Court was the proper jurisdiction for appeals from

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the SCDEW. This change became effective during Rest Assured's thirty day window in which to file an appeal from the SCDEW.

Rest Assured argues the former South Carolina Code section and former South Carolina Regulation apply to its appeal because that law was in effect when the original cause of action arose regarding the determination of its personal care aides. Rest Assured cites an Ohio Court of Appeals case for the proposition that "the law in effect at the time appellant's cause of action accrued determines their right of appeal." *Grooms v. Daugherty*, 1205, 1981 WL 5382 (Ohio Ct. App. Dec. 18, 1981). Rest Assured urges this Court to apply this reasoning to its case based on analogous law found in South Carolina. "[T]he law in effect at the time the cause of action accrued controls the parties' legal relationships and rights." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 378, 595 S.E.2d 461, 466 (2004) (citing *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997)).

On the other hand, the SCDEW would ask this Court to maintain a strict reading of the most current version of section 41-35-750. The SCDEW suggests that because section 41-35-750 makes it clear that the Administrative Law Court has jurisdiction over these types of appeals, there is no room for interpretation and Rest Assured has failed to meet the requirements set out in the statute. Thus, the SCDEW argues that Rest Assured is barred from bringing any claim in this Court or having the case transferred to the correct court.

This case certainly provides a unique situation. The appeal took over four years to be heard mainly due to a reorganization of the administrative agency and, in the meantime, the law changed and had not fully changed even after the time for the appeal started to run. Rest Assured's original cause of action arose while a former version of

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S.C. Code § 41-35-750 was in effect and provided the Court of Common Pleas was the proper jurisdiction for an appeal. However, Rest Assured's right to appeal actually accrued on May 31, 2011 when the SCDEW made its final determination. On May 31, 2011, the new version of the S.C. Code § 41-35-750 was in effect and provided the Administrative Law Court was the proper jurisdiction for the appeal.

To add confusion, the South Carolina Regulation dealing with the SCDEW had not been changed to reflect the new policies regarding appeal. On May 31, 2011, when Rest Assured's right to appeal arose, the South Carolina Regulation provided that the proper place for the appeal was the Court of Common Pleas, not the Administrative Law Court.

This Court now concludes that the proper jurisdiction for Rest Assured's appeal was the Administrative Law Court. The version of S.C. Code § 41-35-750 in effect at the time Rest Assured's right to appeal arose on May 31, 2011, governs this appeal and provides that the proper jurisdiction for the appeal was the Administrative Law Court. However, this Court declines to dismiss the case, and instead adopts Rest Assured's position that the case should be transferred pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law.

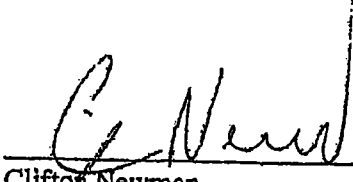
The Supreme Court of South Carolina has ruled that when an appeal from an administrative body is filed in the improper jurisdiction, the court will transfer the appeal to the proper court pursuant to Rule 204 of the South Carolina Appellate Court Rules. *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009). This is especially true when there is ambiguity in the law regarding the proper jurisdiction for the appeal. *Id.* SCACR Rule 204(a) provides that "[i]n the event that the

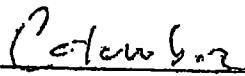
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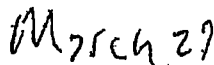
notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." (emphasis added). The Court is "guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers." *Bluffton Town Council Election*, 385 S.C. at 641, 686 S.E.2d at 688. Based on SCACR Rule 204(a) and the guiding principles found in *Bluffton Town Council Election*, this Court finds that there was sufficient ambiguity in the statutes and regulations to warrant a transfer of this case to the Administrative Law Court. This ambiguity is further bolstered by the length of time taken to hear the appeal, the recent reorganization of the SCBSC into the SCDEW, and the fact that counsel for Rest Assured was never copied on the final determination of the SCDEW. Because Rest Assured timely served its notice of appeal upon the SCDEW, the ends of justice would be best served by allowing Rest Assured to continue its appeal in the proper court.

IT IS ORDERED that the Motion to Dismiss is denied and the Motion to Transfer is granted. The above-captioned matter shall be transferred from the Richland County Court of Common Pleas to the State of South Carolina Administrative Law Court.

AND IT IS SO ORDERED.


Clifton Newman
Presiding Judge


_____, South Carolina


_____, 2012

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

APPEAL FROM SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
APPELLATE PANEL

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

Rest Assured,

Appellant,

vs.

SC Department of Employment and
Workforce,

Respondent.

BRIEF OF APPELLANT

Thornwell F. Sowell, III, Esquire

bsowell@sowellgray.com

David C. Dick, Jr., Esquire

ddick@sowellgray.com

SOWELL GRAY STEPP &

LAFFITTE, LLC

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Facsimile: 803-929-0300

Attorneys for the Appellant

Debra S. Tedeschi, Esquire

legal@dew.sc.gov

LEGAL DEPARTMENT-SC DEPT. OF

EMPLOYMENT AND WORKFORCE

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Telephone: 803-737-2666

Facsimile: 803-737-0124

Attorney for the Respondent

RECEIVED

JAN 28 2013

SC Court of Appeals

FILED

JAN 28 2013

SC ADMIN. LAW COURT

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STATEMENT OF ISSUES ON APPEAL

The South Carolina Department of Employment and Workforce Appellate Panel erred in law and in fact by finding that individuals working as personal care aides for Rest Assured were employees pursuant to South Carolina law.

STATEMENT OF THE CASE

On March 2, 2006, The South Carolina Employment Security Commission (SCESC) (currently known as South Carolina Department of Employment and Workforce (SCDEW)), issued a determination that Appellant Rest Assured, LLC ("Rest Assured") had an employer-employee relationship with certain in-home personal care aides that had been designated as independent contractors. (R. pp. 19-20).

On April 3, 2006, Rest Assured appealed this determination for administrative review to the SCESC. (R. p. 21). 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. (R. pp. 5-10; 25).

On March 16, 2007, Appellant filed an application to appeal the Administrative Ruling to the full Employment Security Commission. (R. pp. 171-172). Four years later, on March 28, 2011, Appellant was informed by the now SCDEW that the appeal had been scheduled for review. (R. p. 172).

At the hearing on May 11, 2011, undersigned counsel for Appellant made oral arguments to the Appellate Panel. (R. p. 185). Subsequently, the SCDEW issued an Appellate Panel Decision and Order dated May 31, 2011, denying Appellant's appeal. (R. pp. 1-4).

On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. (R. pp. 186-193). 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. *Id.*

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 based on an alleged failure to file the appeal in the Administrative Law Court. (R. p. 196). In response to the Motion to Dismiss, Rest Assured filed a Motion to transfer this appeal to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law. *Id.*

On March 27, 2012, the circuit court issued an order denying the motion to dismiss and transferring the case to the Administrative Law Court ("ALC") pursuant to Rule 204, SCACR, and South Carolina case law. (R. pp. 194-200). The SCDEW appealed this decision to the South Carolina Court of Appeals, but the appeal was dismissed.

The ALC accepted this case and issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, the SCDEW filed a motion to dismiss the appeal before the ALC based on lack of jurisdiction. The ALC issued an order on December 19, 2012 denying the motion to dismiss. The Record on Appeal was filed on January 8, 2013. The appeal is now before the ALC on the merits.

FACTS

Rest Assured is a business acting as a placement firm for in-home care services. (R. p. 11). Appellant places personal care aides ("PCAs") into clients' homes to help with the clients' daily care. (R. pp. 46:12-17; 87:17-20). The PCAs provide "custodial care" to the clients that consists of duties such as changing clothes, bathing, combing hair, meal preparation, and light housekeeping. (R. p. 46:12-17).

Rest Assured maintains a registry of approximately 250 PCAs (the "Registry"). (R. p. 88:13-19). The PCAs approach Rest Assured and sign up for the Registry by providing their qualifications and the times that they are available to work. (R. p. 54:1-3). Most of the PCAs have other full-time or part-time employment outside of any services they are performing through Rest Assured. (R. pp. 124-135). Rest Assured has an independent contractor agreement with each of the PCAs. (R. pp. 136-138). The PCAs are free to negotiate their contract rate with Rest Assured for each individual client. (R. pp. 45:9-20).

Rest Assured obtains clients from three primary sources, Medicaid, the U.S. Department of Veteran Affairs, and private pay individuals. (R. p. 88:1-10). When these sources have a client in need, they contact Rest Assured and provide a list of services the client requires and the times a PCA is needed. (R. p. 108:13-19). Rest Assured's client care liaison then searches the Registry to match any PCAs that meet the skills required and times available. (R. pp. 53:17-54:3; 89:6-8).

Once the matching PCAs are identified, they are sent to the home of the client to be interviewed by the client. (R. p. 89:6-17). The client then picks which PCA they want to provide the services. *Id.* Rest Assured has no influence on which PCA is chosen. (R.

pp. 89:18-90:2). The PCA can accept or deny the position, and it is totally up to the PCA to determine her own hours. (R. pp. 18; 48:11-13).

Once the PCA is chosen by the client, the PCA will begin to provide services to the client. There is no supervision by Rest Assured in the performance of these services. (R. p. 62:1-2). Rest Assured does not care how the services are performed, or which means and methods the PCA decides to utilize. (R. p. 57:9-20). The entire decision regarding whether to retain or terminate the PCA is left to the client. (R. pp. 62:14-16; 139-155). A PCA is only removed from a particular job at the request of the client. (R. pp. 82:6-83:6). Rest Assured then places the PCA back on the Registry. *Id.* A PCA has never been dismissed from a job for any reason other than client dissatisfaction. *Id.*

The PCA is allowed to consult with the client and change the patient care plan. (R. pp. 63:17-64:12). It is up to the client and the PCA to determine how to perform the services requested. *Id.* PCAs are free to work out their schedule, including their holiday schedule, directly with the client. (R. p. 81:7-12). Rest Assured provides no supplies or equipment to the PCA. (R. p. 69:9-20). No gloves, hand wash, cups, medical supplies, or uniforms. (R. pp. 69:9-70:10).

Many of the PCAs work for other in-home care providers while also working for Rest Assured. (R. pp. 78:5-13). Rest Assured does not withhold any taxes, and provides an IRS Form 1099 to each PCA at the end of the year. (R. pp. 81:7; 82:1-2). Other in-home care providers also treat their PCAs as independent contractors, including the South Carolina Department of Disability and Special Needs, South Carolina Department of Health and Human Services, and Medicaid. (R. pp. 98:16-99:4; 105:1-7; 166-168).

ARGUMENT

- I. **The South Carolina Department of Employment and Workforce Appellate Panel erred in law and in fact by finding that individuals working as personal care aides for Rest Assured were employees pursuant to South Carolina law.**

The SCDEW Appellate Panel found that the relationship between Rest Assured and its PCAs was that of an employer-employee for unemployment tax purposes because Rest Assured exercises sufficient control over its workers. The SCDEW Appellate Panel erred and/or abused its discretion in holding that the Rest Assured PCAs were employees. This finding by the SCDEW Appellate Panel ignored 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 the view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by an abuse of discretion. Accordingly, this Court should reverse the decision of the SCDEW Appellate Panel. S.C. Code Ann. § 1-23-380 (1976).

Pursuant to the South Carolina Labor and Employment Act, the SCDEW 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 SCDEW/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 *S. Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995); *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 PCAs.

1. Direct Evidence of 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 PCAs, it is the client who directs the actions of the PCAs. The client does not tell Rest Assured how the PCA is to perform the services; rather those matters are discussed directly with the PCA.

It is important to note that the direct control element applies to the PCA's "custodial care" services. Despite control over extraneous aspects of the PCAs work, such as the dates and times when work is offered and collection of compensation, Rest Assured exercises no control over the actual method of service. Accordingly, the PCA 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 independent contractor agreement that states that the PCA and the client set their hours of work, without input by Rest Assured, weighs heavily in favor of independent contractor status. See, e.g., *In re Serino*, 190 B.R. 778 (Bankr. M.D. Pa. 1995). Further, an employment relationship is not indicated where the employer does not require any specific number of hours worked. *Id.* Clearly the PCAs for Rest Assured do not fall within the scope of employees.

a. Non-Compete Clause

The SCDEW Appellate Panel mentions a provision in the independent contractor agreement with the PCAs, prohibiting the workers from competing with Rest Assured. However, the SCDEW Appellate Panel does not mention this as a reason for their ultimate determination.

Despite this non-compete clause, it does not prevent the PCA 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, Rest Assured handed up a document that showed that of Rest Assured's roughly 250 PCAs, over 90% of them work for other agencies as well.

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). The record is clear that the majority of PCAs with Rest Assured also work for similar personal care agencies and are therefore not the employees of Rest Assured.

b. Training and Supervision

The SCDEW Appellate Panel 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. Further, all of the evidence in the record supports the fact that Rest Assured does not supervise the PCAs or control their method of work.

Rest Assured does encourage the PCAs to obtain training and stay current on all of the procedures they are required to perform. (R. p. 106:5-16). However, Rest Assured does not make this training mandatory. *Id.* Occasionally, "but very rarely" Rest Assured

does offer optional training at their offices. *Id.* This "rare" optional training is not enough to indicate some control over the 250 PCAs working with Rest Assured.

Rest Assured calls the client every four months just to make sure the quality of services are up to standard and that the client is satisfied. (R. pp. 105:17-106:4). Rest Assured does not provide any supervision over the PCAs or control the means and methods of the PCAs. (R. pp. 62:1-2; 57:9-20). In fact, the independent contractor agreement specifically provides that the PCA "will determine the method, details and means of performing the Services upon receiving the care plan for patient." (R. p. 136). There is no evidence in the record to support the SCDEW Appellate Panel's finding that "[Rest Assured] has control over the manner in which the work is performed." (R. p. 004).

The health care industry, unlike other service providers, is heavily regulated and monitored by governmental agencies. Calls every four months by Rest Assured are required to ensure that the PCAs are complying with state and federal health codes. "[R]equiring 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.* This is especially true for Rest Assured whose main sources are the government, i.e. Medicaid and the VA.

c. Identification with the Company

The SCDEW Appellate Panel found that the PCAs' identification with Rest Assured by wearing a company name tag also indicates control to negate an independent contractor relationship. (R. p. 004). 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 name tag worn by the PCAs does not bear the Rest Assured Name. (R. p. 70:18-19). It simply displays the Rest Assured symbol. (R. p. 71:3-7). These are provided simply because these PCAs are working in the client's home and need to be identified. (R. p. 70:11-15).

The court in *Wilkinson* refuted the argument that a company name tag reflected an employment relationship, where a name tag was required by accreditation guidelines and/or applicable provisions of state or federal law. *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.").

d. Indispensability of Workers

The SCDEW Appellate Panel also found as an additional factor that the indispensability of the PCAs in question to Rest Assured's business indicates an employer-employee relationship. The SCDEW Appellate Panel states that the PCAs "are an integral part of the business and essential to the operation and success of the business." (R. p. 004). While this statement is true, it has no bearing on the employee-employer relationship of Rest Assured and the PCAs.

Just as a construction contractor relies on his subcontractors, so does Rest Assured rely on its PCAs. Most businesses that use independent contractors rely on them because they are essential to the operation and success of the business. If independent contractors were not essential to the success of the business, there would be no reason to use them.

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). The PCAs are allowed to totally dictate their own schedules and which jobs to accept or reject. Rest Assured does not control the PCAs.

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). Rest Assured only acts as a broker of these PCAs, and they do not employ them.

2. Furnishing of Equipment and Transportation

The SCDEW Appellate Panel seems to give little weight to 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 PCA is responsible for all supplies and transportation and associated operating costs incurred to provide services. (R. p. 136). Moreover, the PCAs are responsible for maintaining their own licenses and obtaining training each year. *Id.* Rest Assured does not provide any equipment or supplies to the PCA. (R. p. 69:9-20). This factor weighs heavily in finding the PCAs are independent contractors.

3. Method of Payment

The SCDEW Appellate Panel also found that Rest Assured "controls the method and manner of payment" by insuring payment to the PCA even if the client defaults. (R. p. 004). 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.

The personal care aide profession makes it impossible for there to be any compensation system other than the one employed by Rest Assured. Rest Assured acts simply as a broker service, matching the clients with the PCAs. Rest Assured makes its money by taking a cut of the PCA rate which is essentially a finders/matching fee. Rest Assured does not participate in the relationship with the PCA and the client, but simply matches their skills, requirements, and schedule. It is clear that this factor should weigh very little in this analysis, as there is no other feasible alternative to payment.

Each of the PCAs negotiates their rate with Rest Assured based on the specific client. (R. pp. 45:9-20). Accordingly, one PCA may have different rates for different clients. This method of pay is indicative of an independent contractor, as the PCA is not being paid a set rate for all of their work. The rate is negotiated on a client by client basis.

The SCDEW Appellate Panel state that the PCAs "do not stand to lose if the clients do not pay for services." The SCDEW Appellate Panel does not explain how this factor has any bearing on the analysis. The fact that the principal absorbs any losses sustained if the client does not pay is often how independent contracts work. This is one of the reasons that the principal can charge a premium over the services provided by the subcontractor.

In fact, South Carolina has made any "pay-when-paid" clause in a contract unenforceable in the construction context. S.C. Code Ann. § 29-6-230 (1976). This means that a contractor cannot withhold payment from an independent subcontractor just because the client does not pay. Similarly, Rest Assured cannot withhold payment from its PCAs just because the client does not pay. At the very least, this should not be a factor that would indicate some kind of employee status.

4. Termination Provision – the right to fire.

Without explaining further, the opinion of the SCDEW Appellate Panel states that because Rest Assured has the right to terminate the PCAs, this is a form of control. (R. p. 004). The SCDEW Appellate Panel 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 PCAs 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 PCA; rather it only retains the right to terminate the agreement. The PCA also retains the same right. Rest Assured is acting only as a personal aide broker, connecting the PCA and the client. A termination of the agreement would only mean the PCA would no longer be placed into the pool of eligible applicants for a job.

Rest Assured does not fire the PCA. The PCA is only taken off a job if the client requests it. Rest Assured has no control over whether the PCA remains on a job or not. If a PCA is taken off of a job they are placed back on the Registry.

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 PCAs is only terminated if the PCA

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 PCAs' work, and if the job is completed to the clients' satisfaction, the agreement remains in effect. The right to fire is not used as a method to control the PCA and thus does not imply an employee-employer relationship.

5. 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 an hourly basis and made little investment in their trade apart from education, the nurses controlled the nurse-patient relationship. *Id.* 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 the nurses' services. *Id.*

Where, as here, the patients and nurses set working hours rather than the agency and no work occurs at the agency's office, nurses 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. *Id.* This case is directly on point with the case of Rest Assured. The court in *In re Serino* specifically held that the reasons given by the SCDEW Appellate Panel as reasons for an employee relationship were not valid in the home healthcare context.

This is because the home healthcare industry is very different than many other industries. Rest Assured provided evidence that treating the PCAs as independent contractors is the industry standard. (R. pp. 98:16-99:4; 105:1-7; 166-168). In fact, both the State of South Carolina and Medicaid treat their PCAs as independent contractors. *Id.* Rest Assured modeled its business platform on the program created by the South Carolina Department of Disability and Special Needs ("SCDDSN") which treats its PCAs as independent contractors. (R. p. 86:5-13).

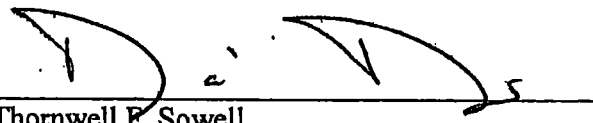
The high number of clients, PCAs, and turnover in this industry require that the PCAs be treated as independent contractors. Accordingly, the SCDEW is setting a bad precedent by claiming the PCAs are subject to unemployment. A PCA's job is sporadic and intermittent, and to claim that a PCA is entitled to unemployment every time a temporary job ends would create a nightmare for the employer and the SCDEW.

This philosophy is supported by federal law. The Fair Labor Standards Act of 1938 specifically provides for an exemption from minimum wage and overtime requirements for individuals providing companionship services to clients in their own homes. 29 U.S.C.A. § 213(a)(15). This federal law recognizes the difficulties faced in the companionship services industry, and provides an exemption. The federal law, case law from other jurisdictions, and the actions of the SCDDSN all support the proposition that the home health industry is distinct from other industries and PCAs should be treated as independent contractors.

CONCLUSION

South Carolina looks mainly to the control exerted over the PCAs to determine their employment status. In Rest Assured's case, the PCAs 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 PCAs to pick and choose them accordingly. Rest Assured exerts no control over these PCAs, 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 PCAs, this Court should reverse the decision of the SCDEW Appellate Panel, and find that the PCAs are independent contractors for unemployment tax purposes.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured

Appellations

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South Carolina Department of
Employment and Workforce

Responsur.

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

THE STATE OF SOUTH CAROLINA
 In the Administrative Law Court

BRIEF OF THE SC DEPT. OF
EMPLOYMENT AND WORKFORCE

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STATEMENT OF ISSUE ON APPEAL

DID THE SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND
WORKFORCE ERR IN FINDING APPELLANT IS AN EMPLOYER OF PERSONAL
CARE AIDES FOR UNEMPLOYMENT TAX PURPOSES?

STATEMENT OF THE CASE

Respondent South Carolina Department of Employment and Workforce ("SCDEW") concurs in the Statement of the Case presented in Appellant Rest Assured's brief.

FACTS

Rest Assured is a company that places in-home personal care assistants (PCAs) to elderly and disabled people. Rest Assured keeps a registry of over 280 PCAs, of which 70 to 90 are used each week. (R.pp.11; 46-51). The PCAs are not placed into Rest Assured's registry until they pass all background checks. (R.p.55). 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.87-88).

Once a dispatch request is received, Rest Assured assesses the client's needs and then matches two potential PCAs, based primarily on their availability, to interview with the client. (R.p.50, lines 1-7; 55, lines 2-13; 65, lines 8-13). After the interviews, the client chooses the PCA for the job. (R.p.89-90). 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.52, lines 1-17).

A PCA's pay rate from Rest Assured is based on what the client is paying to Rest Assured. (R.pp.66-69). 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.91, line 11-p.92, line 4). Rest Assured pays the PCA based on the PCA's weekly report of how many hours the PCA worked. (R.p.80). Even if the client fails to pay, Rest Assured still pays the PCA for the hours worked. (R.p.69, lines 1-8).

Rest Assured's director, Reatha Johnson, testified at the hearing that she offered and encouraged training for those on her registry, but she did not require it. (R.pp.65-66; 106). When asked if she supervised the PCAs, she stated she would visit the client home every four months for "quality control." (R.p.105, line 9-p.106, line 4). The PCAs are covered by workers compensation insurance. (R.p.73). Rest Assured does not provide any tools or supplies to the PCAs; supplies are provided either by the client or the PCA. (R.p.69, line 9-p.70, line 6). Each PCA wears a name badge with Rest Assured's logo on the badge. (R.pp.70-71).

After Johnson decided to treat the PCAs as subcontractors, rather than employees, the PCAs entered into an "Independent Contractor Agreement."¹ (R.pp.136-138). The Agreement stated that the PCA agrees not to participate "directly or indirectly, in any capacity, in any business or activity that is in competition with" Rest Assured. (R.p.137). Nonetheless, Johnson acknowledged that many of her PCAs regularly worked for other competing companies. (R.p.78; pp.156-164).

Furthermore, 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.137). In

¹ Johnson stated 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.112, lines 11-13).

reality, however, the power to terminate a PCA from an in-home job rested predominantly with the client. (R.p.58, lines 2-10; p.94, 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.82, lines 6-15; p.123). 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.14; 43; 32-33; 97-98).

As a result, a Field Deputy investigated Rest Assured regarding its tax liability status and furnished a report. (R.pp.122-123). The Employment Security Commission 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.19-20).

On appeal, SCDEW's Appellate Panel affirmed this determination finding Rest Assured exercises the control of its PCAs, and therefore, they were employees for unemployment tax purposes. (R.pp.1-4).

ARGUMENT

Standard of Review

In reviewing the Appellate Panel's determination on the employment status of workers, the standard of review to be applied by the Court is the substantial evidence rule under the Administrative Procedures Act (APA). *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 112, 439 S.E.2d 288, 289 (Ct. App. 1993), *rev'd in part on other grounds*, 318 S.C. 456, 458 S.E.2d 429 (1995).

Under the substantial evidence rule, a reviewing court may reverse or modify an administrative decision only "if 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." *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); *see also* S.C. Code Ann. § 1-23-380(5) (standard for judicial review under the APA).

"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.

Todd's Ice Cream, Inc., *supra*; accord *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency").

Furthermore, "[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of

drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the burden is on the Appellant "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

In the instant case, there is substantial evidence supporting SCDEW's decision, and the ruling is not affected by any error of law. Accordingly, this Court should affirm.

Substantial evidence supports SCDEW's decision that Rest Assured is an employer for unemployment tax purposes, and therefore, the Court should affirm.

Looking at the record as a whole, there is substantial evidence supporting SCDEW's determination that Rest Assured is a liable employer for unemployment tax on the wages paid to its PCAs. Therefore, the Court should affirm.

Pursuant to statute, "employment" is defined to include any service performed by any individual "who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." S.C. Code Ann. § 41-27-230(1)(b) (1986) (emphasis added). 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). 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, 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.* In other words, the Court must be guided by whether the actual conduct of the employer and worker mirrors the terms of the contract. *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009). If the

parties' conduct does not comport with the written agreement, the probative value of the agreement is much diminished.

Here, although the PCAs did sign an independent contractor agreement, it is clear the parties' conduct did not reflect the written terms of the agreement. The substantial evidence shows that despite clear language in the contract barring PCAs from working for competitors, Rest Assured freely allowed its PCAs to work for other companies. (R.p.78; pp.156-164). Moreover, the written agreement indicated Rest Assured had the right to terminate, but the evidence at the hearing showed that the right to terminate a PCA from a job rested with the client. The written agreement, therefore, is far from dispositive.

The evidence of the record shows Rest Assured had the right to control the PCAs in the following ways. First, it is Rest Assured who initially selects, i.e., matches, the PCA to the client. This is the ultimate right to control because only Rest Assured has the authority to send the PCA to the client.

Furthermore, the evidence shows that Rest Assured's clients had abundant control over the way the PCAs performed their work. Under South Carolina law, this control must be imputed to Rest Assured. See *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50. The facts in *Kilgore* involved temporary workers who were placed by Kilgore to perform work for Kilgore's clients, such as the State Newspaper. The *Kilgore* Court found the clients' "ability to exercise control over the workers' activities was derived solely from their contracts with Kilgore and Kilgore's contract with the workers. Therefore, it can be inferred 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).

The instant case is indistinguishable from the facts in *Kilgore*. The PCAs, like the temporary workers in *Kilgore*, did not contract directly with the clients. Here, Rest Assured clearly possessed the right to control the PCAs' work performance via Rest Assured's own contractual relationship with its clients.

Rest Assured reliance on federal bankruptcy law and North Carolina precedent is misplaced given that South Carolina common law controls this inquiry. Therefore, the fact that Rest Assured is akin to a temporary employment placement agency, with the right to control the PCAs' performance essentially delegated to Rest Assured's clients, weighs heavily in favor of a finding that the PCAs are, in fact, employees rather than independent contractors. *Id.*

Accordingly, there is substantial evidence in the record supporting the conclusion that Rest Assured actually had the right to control its PCAs in a number of ways, most specifically in directing how, when, and where the work was performed.

There is also substantial evidence on the factor related to method of payment to support that Rest Assured's PCAs are employees. The PCAs' hourly pay is derived from the rate Rest Assured is paid by the client (or the agency referring the client). Therefore, the method and amount of payment – an hourly rate that is not freely negotiated by the PCA, but rather agreed upon within the constraints of the rate that has already been agreed to between Rest Assured and the client – is more in Rest Assured's control than the PCAs. The fact that the PCAs are paid by the hour, based on worksheets turned in to Rest Assured, and regardless of whether the client actually pays its bill, further indicates

Rest Assured is the employer of the PCAs. This factor therefore also weighs in favor of the employer-employee relationship.

As to the furnishing of equipment, the evidence is shows that very little in the way of supplies is needed for the PCAs to perform their work. Moreover, while the PCAs may provide their own supplies, the evidence shows that the clients themselves also may provide the supplies needed for their in-home care. Therefore, the evidence on this factor is conflicting at best.

Regarding the right to fire, Rest Assured's Director clearly stated that the client had the ability to fire the PCA. Pursuant to *Kilgore*, this control may properly be imputed to Rest Assured. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50 (1993) (where the clients "believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance," this showed the workers were employees). Moreover, the language of the written agreement indicates an intention to create an at-will relationship, which favors an employer-employee relationship, rather than an independent contractor relationship. *See Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704 (at-will relationship indicates employee).

Rest Assured's argument that people who work temporary jobs or intermittently are not entitled to unemployment benefits is without merit. Rest Assured's repeated references to alleged industry standards and federal tax law is similarly misplaced based on South Carolina's statutory requirement that this issue be determined by state common law. Both the statutory and common law of South Carolina clearly support the proposition that an employer placing temporary employees may be subject to

unemployment tax liability where the substantial evidence supports the right to control. *Kilgore, supra*; see also S.C. Code Ann. § 41-27-230 (defining employment).

If the Legislature wants to wholesale exempt the home healthcare industry from unemployment taxation, then a statutory amendment is called for, not a judicial decision effectively creating such an exemption. See S.C. Code Ann. § 41-27-260 (Supp. 2012) (specifically defining "Exempted employment").

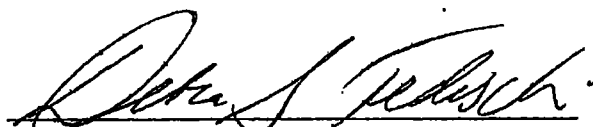
In sum, substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. at 366, 692 S.E.2d at 913. While there may be some evidence in the record indicative of an independent contractor relationship, there is unquestionably substantial evidence supporting SCDEW's decision that Rest Assured's PCAs are employees. The possibility of drawing two inconsistent conclusions from the evidence does not mean the Appellate Panel's conclusion is unsupported by substantial evidence. See, e.g., *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

Therefore, the Court should affirm the Appellate Panel's decision.

CONCLUSION

In conclusion, for the reasons discussed above, this Court should affirm the Appellate Panel's decision that Rest Assured's PCAs are employees, and Rest Assured is therefore liable for unemployment tax purposes.

Respectfully submitted,



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February 19, 2013

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

APPEAL FROM SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
APPELLATE PANEL

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

Rest Assured,

Appellant,

vs.

SC Department of Employment and
Workforce,

Respondent.

REPLY BRIEF OF APPELLANT

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Attorney for the Respondent

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SC ADMIN. LAW COURT

ARGUMENT

In reviewing the SCDEW Appellate Panel's determination regarding the employment status of workers, the Court may take its own view of the preponderance of the facts. *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 317, 713 S.E.2d 267, 270 (2011). The facts of this case demonstrate that not only did the evidence preponderate in favor of Rest Assured, but the substantial evidence also favored Rest Assured. Accordingly, by holding that the Rest Assured Personal Care Aides "(PCAs)" were employees, the SCDEW Appellate Panel was clearly erroneous in light of the substantial evidence. Therefore, this Court should reverse the decision of the SCDEW Appellate Panel.

All the evidence of this case demonstrates that Rest Assured did not control the PCAs. Rest Assured acted only as a placement agency and broker and had no control over the PCAs. Importantly, the PCAs signed contracts which acknowledged that they were independent contractors. (R. pp. 15-18). Further, the contract specifically provided that "[b]y accepting assignment(s) as a subcontractor, it is under the assumption of Rest Assured that you are your own business representative." (R. p. 18). "The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight." *Kilgore Group, Inc. v. S. Carolina Employment Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 50 (1993).

Rest Assured originally treated the PCAs as employees. (R. p. 112:1-3). However, Rest Assured and the PCAs themselves determined that they both desired independent contractor treatment of the PCAs. (R. pp. 112:11-113:7). Rest Assured provided literature on the difference between an employee and an independent contractor and provided access to an accountant to answer any questions. *Id.* The PCAs made the

informed decision to be treated as independent contractors. *Id.* After this decision was made, Rest Assured stopped providing equipment, bonuses, employment awards, and started issuing 1099s. (R. pp. 113:8-113:13).

Rest Assured is also authorized by the South Carolina Legislature to treat its PCAs as independent contractors. Rest Assured, as an In-Home Care Provider, is governed by the "Licensure of In-Home Care Providers Act" (the "Act"). S.C. Code Ann. § 44-70-10 (1976). The Act provides:

"In-home care provider" means a business entity, corporation, or association, whether operated for profit or not for profit, that for compensation directly provides or makes provision for in-home care services through its own employees or agents or through contractual arrangements with independent contractors or through referral of other persons to render in-home care services when the individual making the referral has a financial interest in the delivery of those services by those other persons who would deliver those services.

S.C. Code Ann. § 44-70-20 (1976) (emphasis added). Rest Assured is modeled on the State of South Carolina's independent contractor arrangement provided by the Department of Disability and Special Needs. (R. p. 86:5-13).

The SCDEW argues that the parties' conduct did not reflect the written agreement because the PCAs were allowed to work for other companies. However, the SCDEW is misreading the non-compete clause in the agreement. The non-compete clause simply states that the PCAs cannot act in competition with Rest Assured "with respect to a patient served" by Rest Assured. (R. p. 16). This fact is further confirmed by other provisions in the contract which state "Rest Assured is aware that subcontractors work for a variety of agencies and/or clients" and also encourage the PCAs to work for other agencies. (R. p. 18).

Most of the 250 PCAs working for Rest Assured work other full-time or part-time jobs, and work for other in-home care agencies. This was clearly contemplated in the contract and the contract was carried out that way. The independent contractor agreement between Rest Assured and the PCAs was followed by the parties "in every material respect" and should be given considerable weight by the Court. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 301, 676 S.E.2d 700, 702 (2009).

The record is also clear that Rest Assured did not have the right to control the PCAs. The contract clearly provides that the PCAs' "schedule and hours are determined by [the PCA]" and that the PCA "will determine the method, details and means of performing the Services upon receiving the care plan for the patient." (R. p. 18; R. p. 15). These contract provisions were confirmed by the actions of Rest Assured and the PCAs.

The SCDEW attempts to argue that control is somehow imputed to Rest Assured under *Kilgore*, 313 S.C. 65, 427 S.E.2d 48. However, *Kilgore* is distinguishable from the case of Rest Assured. In *Kilgore*, a temporary employment company would supply temporary workers to various businesses. *Id.* at 67. These businesses would then dictate the day-to-day activities of the workers and direct the workers as to the specifics of their jobs and tasks. *Id.* The South Carolina Supreme Court ruled that this direction and control was imputed to the temporary agency because the clients control was "derived solely from their contracts with Kilgore." *Id.* at 69.

The case of Rest Assured is the polar opposite of *Kilgore*. Rest Assured first contracts with providers such as Medicaid, VA, and SCDHHS. Rest Assured then receives a Care Plan from those providers which specifies what services are to be provided to the third-party client/patient. (R. p. 108:13-109:14). Based on the availability

schedules provided by the PCAs, Rest Assured matches possible PCAs with the client/patient. After a PCA is chosen it is totally up to the PCA to determine the means and methods to provide the specified services to the client/patient. In fact, the record is clear that the nature of the relationship between the PCA and the client/patient is controlled by the PCA. (R. p. 108:8-12).

Rest Assured's contract is with the provider, i.e. Medicaid and others, not the third-party client/patient. Further, the client/patient does not control the PCAs. The PCAs are given a specific Care Plan, allowed to accept or deny the assignment, and then allowed to perform the services as they see fit. This is in direct contrast to *Kilgore* where the clients contracted directly with the agency, hired the worker, and then directed all of the actions of the worker. Further, the Court in *Kilgore* relied on testimony that the temporary workers were treated exactly the same as the permanent workers of the client and controlled in the same manner. *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. In this case, the PCAs were not treated as employees or controlled by either Rest Assured or the client/patient.

This case is far more analogous to the case of *Wilkinson*, 382 S.C. 295, 676 S.E.2d 700. In *Wilkinson*, the Supreme Court of South Carolina found that a long-haul truck driver was an independent contractor, not an employee. *Id.* The Court based its decision on the driver's choice to become an independent contractor, the contract term that provided for the "means and methods" to be determined by the driver, and the fact that the driver could refuse any assignment. *Id.* at 301-02. Similarly, Rest Assured's PCAs also chose to be independent contractors, there is a specific contract term that the

PCA will determine the "means and methods," and the PCA is free to choose their own hours and refuse any assignment. (R. pp. 112:11-113:7; R. p. 15; R. pp. 18; 48:11-13).

In *Wilkinson*, the Court also found that a strong regulatory presence did not reflect control by the driver's motor carrier. 382 S.C. at 303, 676 S.E.2d at 704. This included the only "equipment" that was furnished to the driver, the company's logo on his truck. *Id.* Similarly, the only thing furnished by Rest Assured is its name badge with the company logo. Rest Assured is highly regulated by the In-Home Care Providers Act which provides in part that Rest Assured must screen PCAs for certain "personal information, completion of a minimum education requirement, completion of minimum training and continuing education requirements, and screening for communicable diseases." S.C. Code Ann. § 44-70-40 (1976). The Act also requires that Rest Assured perform background checks on each of the PCAs. S.C. Code Ann. § 44-70-60 (1976). Lastly, draft regulations by the Department of Health and Environmental Control require the PCAs to wear identification badges. DHEC Reg. 61-121-501(J). Clearly, this strong regulatory presence cannot be equated to control by Rest Assured.

The *Wilkinson* Court also found that the driver was paid per mile and issued a 1099 which was consistent with an independent contractor agreement. 382 S.C. at 303, 676 S.E.2d at 704. Similarly, Rest Assured issues 1099 to all the PCAs and "withholds no taxes." (R. p. 18). Also, each PCA is free to negotiate their rate for each separate assignment/job. (R. p. 45:9-20). This is strongly indicative of an independent contractor relationship.

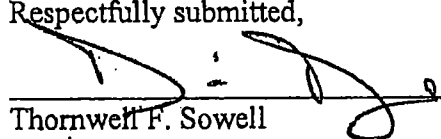
Lastly, the *Wilkinson* Court held that there was no right to fire because "termination of the parties' relationship was controlled by their agreement" and "either

party could terminate the contract upon 30 days' notice." 382 S.C. at 304, 676 S.E.2d at 704. Similarly, the relationship between Rest Assured and the PCAs is governed by the agreement. The provisions of the Independent Contractor Agreement with the PCAs specifically provide the causes for termination and provide that either party can terminate the agreement. (R. pp. 16; 18). Accordingly, Rest Assured does not have a right to fire the PCAs.

CONCLUSION

The preponderance of the evidence and the substantial evidence indicate an independent contractor relationship between Rest Assured and the PCAs. The PCAs are allowed to pick and choose their own schedule, accept or deny jobs, choose the means and methods to perform their jobs, and provide their own equipment and training. Rest Assured exerts no control over these PCAs. The PCAs chose to become independent contractors, and the agreement between Rest Assured and the PCAs clearly indicates the intention of the parties. Because Rest Assured exerts little to no control over the PCAs, this Court should reverse the decision of the SCDEW Appellate Panel, and find that the PCAs are independent contractors for unemployment tax purposes.

Respectfully submitted,



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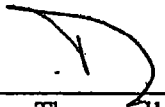
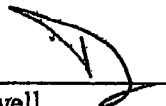
March 1, 2013

SC ADMIN LAW COURT

4. Exhibit A is pertinent to the Appellant's case because it demonstrates the State of South Carolina's approval of Appellant's subcontract.
5. Given the extreme length of time from the initial hearing until this Appellate review, it is appropriate to supplement the record with this exhibit.

Respectfully Submitted,

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

By:  

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Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
March 7, 2013



State of South Carolina
Department of Health and Human Services

Mark Sanford
Governor

Emma Forkner
Director

May 8, 2008

Ms. Reatha Johnson
Rest Assured, LLC
101 Rice Bent Way, Suite 8
Columbia, South Carolina 29229

Dear Ms. Johnson:

Community Long Term Care has received your corrective action plan for the survey that was performed on March 14, 2008. We also received a copy of and approve your sub-contract for Personal Care Aides.

We will allow you to continue to serve our clients.

Should you have any questions, you may contact me at (803) 898-2590.

Sincerely,

A handwritten signature in cursive script that reads "Debora D. Carter".

Debora D. Carter
Compliance Review Officer

Division of Community Long Term Care Waiver Management
P. O. Box 8206 • Columbia South Carolina 29202-8206

EXHIBIT A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,	)	Docket No. 12-ALJ-22-0209-AP
	)	
Appellant,	)	
	)	
vs.	)	NOTICE OF MOTION AND MOTION TO RECONSIDER
	)	
South Carolina Department of Employment and Workforce,	)	
	)	
Respondent.	)	
	)	
	)	

NOTICE IS HEREBY GIVEN that Appellant, Rest Assured, LLC, through its undersigned attorney, moves pursuant to Rule 41 of the Rules of Procedure for the Administrative Law Court for reconsideration of this Court's Order Denying Motion to Supplement Record dated and filed March 14, 2013. Appellant received the aforementioned Order on March 14, 2013. The grounds for the motion are as follows:

1. On March 7, 2013, Appellant moved to supplement the record on appeal with a May 8, 2008 letter from the South Carolina Department of Health and Human Services (DHHS).
2. On March 14, 2013, the Court denied the order because Appellant did not "present a reason for its failure to present the additional evidence at the proceeding before the agency or for its failure to request that the document be included in the Record on Appeal."
3. Appellant originally filed its appeal to the full South Carolina Employment Security Commission (ESC) (currently known as the South Carolina Department of Employment and Workforce) on March 16, 2007. The appeal was

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not actually heard until four years later. The letter from DHHS had not been sent at the time the Appellant appealed to the full ESC. The significant delay in time to hear the appeal to the ESC led to the inadvertent oversight of the letter from DHHS.

4. The supplementation of this letter would not prejudice the Respondent as it is simply being used to support the position that the State of South Carolina has approved the Appellant's use of subcontractors. This is a position that has been asserted by the Appellant since the initiation of this case.
5. Accordingly, the Appellant would ask this Court to reconsider the Motion to Supplement the Record and allow the record to be supplemented by the letter from DHHS.¹

Respectfully Submitted,

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

By: _____

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Attorneys for Appellant Rest Assured, LLC

Columbia, South Carolina
March 25, 2013

¹ In the event the Court grants this motion, the Appellant would ask the Court to reconsider its Order upholding the decision of the Appellate Panel in light of this letter from DHHS.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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

Rest Assured, LLC,.....Appellant,

v.

South Carolina Department of Employment
And Workforce,.....Respondents.

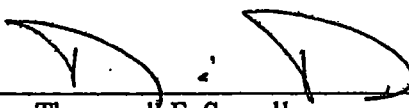
NOTICE OF APPEAL

Rest Assured, LLC appeals the Order (affirming as modified the Appellate Panel's decision) of the Honorable Ralph K. Anderson, III dated March 14, 2013, a copy of which was received by Appellant on March 14, 2013; the Order Denying Motion to Supplement Record of the Honorable Ralph K. Anderson, III dated March 14, 2013, a copy of which was received by Appellant on March 14, 2013; and, the Order Denying Motion for Reconsideration dated April 15, 2013, a copy of which was received by Appellant on April 15, 2013. A copy of each of the Orders is attached hereto.

[Signature page follows]

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April 15, 2013

Other Counsel of Record:

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Legal Department

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803-737-2666

Attorney for the Respondent

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,	)	Docket No. 12-ALJ-22-0209-AP
	)	
Appellant,	)	
	)	
vs.	)	ORDER
	)	
South Carolina Department of Employment	)	
and Workforce	)	
	)	
Respondent.	)	

STATEMENT OF THE CASE

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

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

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

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

ISSUE ON APPEAL

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

STANDARD OF REVIEW

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

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

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

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

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub

Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

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

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

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

Compliance with the Contract

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

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

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

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

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

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

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

Direct Evidence of the Right or Exercise of Control

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ DEW does not address this point in its brief.

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

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

Furnishing of Equipment

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

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

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

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

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

Method of Payment

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

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

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

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

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

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

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

¹⁵ R. pp. 45:6-9.

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

Right to Fire

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

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

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

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

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

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

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

CONCLUSION

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

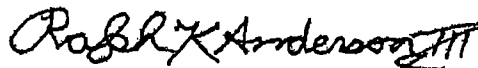
¹⁸ Rest Assured points out that either Rest Assured or the PCA has the right to terminate the contract, just as the parties did in Wilkinson. However, both parties in an at-will employee-employer relationship also have the right to terminate the relationship at any time. Also, in the event of a termination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

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

ORDER

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

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

March 14, 2013
Columbia, South Carolina

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

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

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

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

March 14, 2013
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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

BACKGROUND

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

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

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

March 14, 2013

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

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

This Court accepted the case and issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, DEW filed a Motion to Dismiss the appeal before the ALC based on lack of jurisdiction. This Court issued an order on December 19, 2012 denying the Motion to Dismiss. The Record on Appeal was filed January 8, 2013. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

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

DISCUSSION

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

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

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

(Supp. 2012).

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

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

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

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

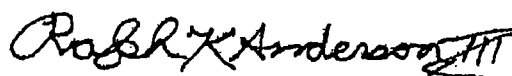
(Supp. 2012). Rest Assured has not alleged any irregularities that justify the Court remanding the case to the agency.

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

Based upon the facts of this case,

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

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

March 14, 2013
Columbia, South Carolina

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

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

March 14, 2013
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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

BACKGROUND

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

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

On July 11, 2011, DEW filed a Notice of Special Appearance and a Motion to Dismiss the action based on improper jurisdiction of the Circuit Court to hear the appeal, arguing that the appeal should have been filed in the ALC. In response to the Motion to Dismiss, Rest Assured

April 15, 2013

filed a Motion to transfer the appeal to the ALC pursuant to Rule 204, SCACR and South Carolina law.

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

This Court issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, DEW filed a Motion to Dismiss the appeal before the ALC based on lack of jurisdiction. This Court issued an order on December 19, 2012 denying the Motion to Dismiss. The Record on Appeal was filed January 8, 2013. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

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

DISCUSSION

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

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

(Supp. 2012).

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

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

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

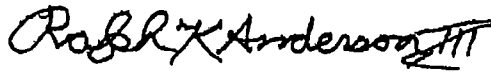
As to whether the evidence is material, Rest Assured failed to explain or even allege that the evidence it seeks to add to the record is material. In its Motion, Rest Assured asserts that the evidence is simply to support its position. That assertion does not establish materiality.

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

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

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

IT IS THEREFORE ORDERED that the Motion to Reconsider is denied.²
AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

April 15, 2013
Columbia, South Carolina

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

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

April 15, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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

Rest Assured, LLC,.....Appellant,

v.

South Carolina Department of Employment
And Workforce,.....Respondents.

AMENDED PROOF OF SERVICE

I certify that I served the Notice of Appeal on Respondent South Carolina Department of Employment and Workforce by depositing a copy of it in the United States Mail, postage prepaid, on April 15, 2013, addressed to its attorney of record, Debra S. Tedeschi, Esquire, Post Office Box 8597, Columbia, South Carolina 29209 and on the Administrative Law Court by hand-delivering a copy on April 15, 2013 to the Honorable Jana E. Shealy, Clerk, Administrative Law Court, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201.

[Signature page follows]

RECEIVED

APR 18 2013

SC Court of Appeals

April 18, 2013

A handwritten signature in cursive script, appearing to read "Karen S. Anders", written over a horizontal line.

Karen S. Anders, Paralegal
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
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Attorneys for the 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. 12-ALJ-22-0209-AP
Appellate Case No. 2013-000774

Rest Assured, LLC,.....Appellant,

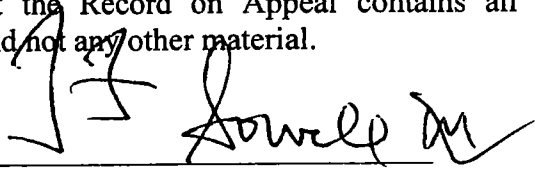
v.

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

CERTIFICATE OF COUNSEL

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

October 29, 2013


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