

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

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

v.

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

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FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS

In reviewing the Administrative Law Court's ("ALC") determination regarding the employment status of workers associated with Rest Assured, LLC ("Rest Assured"), "this Court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Olson v. S. Carolina Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008). The South Carolina Department of Employment and Workforce ("SCDEW") erroneously believes that this Court should apply the substantial evidence standard of review. However, the substantial evidence rule applies to factual determinations made by the ALC. *See Smoky Mountain Secrets, Inc. v. S. Carolina Employment Sec. Comm'n*, 312 S.C. 111, 113, 439 S.E.2d 288, 289 (Ct. App. 1993) rev'd in part, 318 S.C. 456, 458 S.E.2d 429 (1995) ("We must affirm the factual findings of the Commission if they are supported by substantial evidence.")(emphasis added). In this case there are no real issues of fact. The question before this Court is whether the ALC erred in its application of these undisputed facts to the legal question involving the Personal Care Aides' ("PCAs") employment status.

This Court does not have any obligation to rely on the prior legal conclusions of the ALC. By holding that the Rest Assured PCAs were legally employees, the decision of the ALC was affected by errors of law. The substantial evidence rule does not govern the standard of review over this decision. Therefore, this Court should reverse the decision of the ALC.

The undisputed evidence of this case demonstrates that Rest Assured's PCAs were legally independent contractors. 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. 45-48). 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. 48). “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. 142, ll. 1-3). However, Rest Assured and the PCAs themselves determined that they both desired independent contractor treatment of the PCAs. (R. p. 142, l. 11 – p. 143, l. 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. p. 143, ll. 8-13).

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. 116, ll. 5-13).

The SCDEW argues that the parties' conduct did not reflect the written agreement because the PCAs were not 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. 46). 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. pp. 45-48).

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. pp. 45-48). These contract provisions were confirmed by the actions of Rest Assured and the PCAs.

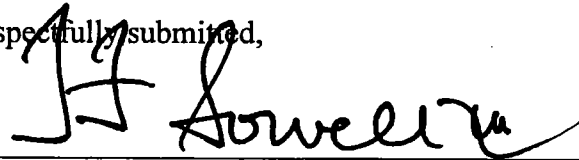
Lastly, the SCDEW argues that Rest Assured's reliance on federal bankruptcy law and North Carolina precedent is misplaced. However, there is no case in South Carolina concerning home health care aides or a factually similar case. This Court has routinely looked to other jurisdictions to find factually similar circumstances and relied on those cases. *See Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n*, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984) (applying a Connecticut and Alabama case to an employment status determination where there were no factually similar South Carolina cases). Accordingly, it is appropriate to examine the cases which are factually identical to the case of Rest Assured and apply the same reasoning to determine the PCAs are independent contractors.

#### CONCLUSION

The ALC's decision was affected by errors of law. The ALC incorrectly applied the law of South Carolina to the facts of this case. 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 ALC, and find that the PCAs are independent contractors for unemployment tax purposes.

*[Signature page follows]*

Respectfully submitted,



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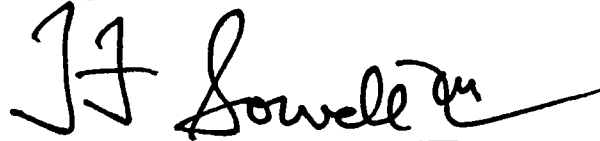
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant complies with Rule  
211(b), SCACR.  
November 19, 2013



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