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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO 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

Rest Assured, LLC, Respondent,

v.

South Carolina Department of Employment and Workforce, Petitioner.

Appellate Case No. 2014-002233

BRIEF OF PETITIONER

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II. DID THE COURT OF APPEALS EXCEED ITS SCOPE OF REVIEW AND IMPROPERLY SUBSTITUTE ITS JUDICIAL JUDGMENT IN PLACE OF PETITIONER'S ADMINISTRATIVE JUDGMENT?

STATEMENT OF THE CASE

On March 2, 2006, the South Carolina Employment Security Commission ("ESC") issued a tax status determination that the in-home Personal Care Assistants employed by Respondent Rest Assured, LLC ("Rest Assured") would be reclassified as employees for unemployment tax purposes. (R.pp.49-50). On April 3, 2006, Rest Assured timely appealed from this determination. (R.p.51). After an administrative hearing, the Administrative Hearing Officer affirmed the determination that Rest Assured's workers are employees rather than independent contractors. (R.pp.35-40). Rest Assured timely appealed this ruling to the SCESC. (R.pp.199-200).

On March 30, 2010, pursuant to Act No. 146, the ESC became Petitioner South Carolina Department of Employment and Workforce ("DEW").

On May 11, 2011, the DEW Appellate Panel had a hearing on Rest Assured's appeal from Administrative Ruling 2006-8. The Appellate Panel issued its decision on May 31, 2011, which affirmed the Administrative Hearing Officer's ruling that the individuals working as home health aides for Rest Assured were employees for unemployment tax purposes. (R.pp.31-34).

Rest Assured filed a Petition and Notice of Intent to Appeal in the Richland County Court of Common Pleas on June 30, 2011. (R.pp.216-223). Thereafter, DEW filed a motion to dismiss, dated July 11, 2011, arguing the circuit court lacked jurisdiction to hear the appeal because S.C. Code Ann. § 41-35-750 requires that a petition for judicial review be filed in the South Carolina Administrative Law Court ("ALC"). (R.pp.224, 226). In response, Rest Assured filed a motion to transfer the appeal to the ALC. *Id.*

On March 27, 2012, the circuit court issued an Order recognizing that proper jurisdiction for Rest Assured's appeal was in the ALC, yet denying DEW's motion to dismiss, and transferring the appeal to the ALC. (R.pp.224-230).

On March 14, 2013, after full briefing, the ALC issued an Order affirming DEW's decision that Rest Assured's Personal Care Assistants were employees for unemployment tax liability purposes. (R.pp.9-27; 231-271).

Rest Assured appealed the ALC's Order to the Court of Appeals. (R.pp.279-280). After full briefing and oral argument, the Court of Appeals reversed and expressly found Rest Assured's "aide workers were independent contractors." *Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce*, Op. No. 2014-UP-235 (S.C. Ct. App. filed June 18, 2014) (App.pp.18-19).

DEW filed a Petition for Rehearing and a Request for Rehearing *En Banc*, but the Court of Appeals denied the DEW's requests on September 18, 2014. (App.pp.1-16).

On October 20, 2014, DEW filed with this Court a Petition for a Writ of Certiorari to the Court of Appeals. On January 16, 2015, this Court unanimously granted the petition for a writ of certiorari as to Questions I and II.

This Brief of Petitioner follows.

STATEMENT OF THE FACTS

Respondent Rest Assured, LLC ("Rest Assured") is a company that places in-home Personal Care Assistants (PCAs) to care for elderly and disabled people. Rest Assured keeps its own registry of over 280 PCAs, of which 70 to 90 are used each week. (R.p.41; pp.76-81). Rest Assured does not place the PCAs into its registry until they pass all background checks, including a SLED check, a tuberculosis test, etc. (R.p.85).

Rest Assured gets 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). (R.pp.117-118). Rest Assured also gets requests for PCAs from private, "out of pocket" paying individuals. (R.pp.118, 121).

Once Rest Assured receives a dispatch request, the company, through its "client care liaison," assesses the client's needs and then matches at least two potential PCAs, based primarily on their availability, to interview with the client.[1] (R.p.80, lines 1-7; p.85, lines 2-13; p.95, lines 8-13; p.119, line 9-p.120, line 2). Therefore, the PCAs rely completely on Rest Assured for both placement into these assignments and guidance on what the clients' needs are. (R.pp.138-139). After the interviews, Rest Assured's client chooses the PCA for the job from the initial matches identified by Rest Assured.[2] (R.p.119-120).

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[1] During the administrative hearing, "clients" are sometimes referred to as "patients."

[2] Rest Assured's website describes its matching services as follows:

> We work very hard to match a caregiver from our agency that not only has the experience but very similar in characteristics and personality as well. The success of Rest Assured Home Care was founded on the principles of

The PCA's job duties may include bathing and grooming of the client, companionship and meal preparation for the client, as well as light housekeeping. (R.p.82, lines 1-17).

A PCA's pay rate from Rest Assured is based on what the client is paying to Rest Assured. (R.pp.96-99). In other words, Rest Assured first negotiates with the client, and then Rest Assured negotiates with the PCA for an hourly rate; the PCAs themselves are not permitted to negotiate with the clients. (R.p.75). The client never directly pays the PCA; for the referrals from a governmental agency, Rest Assured sends the bill directly to the agency which in turn, pays Rest Assured. (R.p.121, line 11-p.122, line 4).

Rest Assured pays the PCA based on the PCA's weekly report of how many hours the PCA worked. (R.p.110). Significantly, Rest Assured's director, Reatha Johnson, testified at the administrative hearing that if the client ever failed to pay Rest Assured, her company nonetheless would pay the PCA for the hours worked. (R.p.99, lines 1-8). Johnson explained: "I haven't actually had – had that situation to – to arise yet, but I would – I would certainly, you know, if they worked out the company would take a loss and just go ahead and pay that – aide [i.e., PCA]." (R.p.99, lines 4-8).

When asked if she supervised the PCAs, Johnson stated she would visit clients' homes every four months for "quality control" and to "ensure" clients were satisfied with the PCA, "as a representative of Rest Assured, **because that's who they initially contacted was Rest Assured for services**." (R.p.135, lines 9-15) (emphasis added). Johnson further affirmed that these home visits were done to make sure her clients "are

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> catering to each individual's needs no matter how small and providing superior care and compassion while caring for you or a loved one.

See http://www.restassuredllc.net/Requirements.html (last visited February 13, 2015).

satisfied, and it's PR and marketing and all that." (R.p.135, line 17-p.136, line 4). Johnson's testimony was clear that the contract for services is between Rest Assured and the client. (R.p.138, lines 1-7).

Moreover, Rest Assured provides the PCAs with workers compensation insurance. (R.pp.103-104; 166-167). Rest Assured does not provide any tools or supplies to the PCAs; instead, supplies are provided either by the client or the PCA. (R.p.99, line 9-p.100, line 6). Johnson stated that she offered and encouraged training for the PCAs on her registry, but she did not require it. (R.pp.95-96; p.136). Each PCA wears a name badge with Rest Assured's logo on the badge. (R.pp.100-101).

For unemployment tax purposes, Johnson originally reported her PCAs as employees, but at some point decided to treat them as "subcontractors." (R.pp.142-143). Explaining this decision, Johnson testified at the hearing that "it just was not beneficial to me as a company to consider them employees because of their turnover rate, and they jump from agency to agency." (R.p.142, lines 11-13). When asked if any business practices changed once she considered them subcontractors, Johnson indicated that the only thing that changed was she no longer provided gloves to the PCAs and she stopped giving out "bonuses;" the relationship with her clients, however – assessing clients' needs and matching them with an appropriate PCA – that all stayed "the same." (R.p.143, lines 8-17).

After Johnson decided to treat the PCAs as subcontractors, rather than employees, the PCAs entered into an "Independent Contractor Agreement." (R.pp.166-168). The right to terminate outlined in the written agreement stated that **either** Rest Assured or the PCA could terminate the contract at any time. For Rest Assured, the right to terminate

could be based upon when a PCA engaged in conduct that "is harmful, detrimental, improper, or fraudulent to or for the business." (R.p.167).

The power to terminate a PCA from a particular in-home job rested predominantly with the client. (R.p.88, lines 2-10; p.124, lines 9-11). If a client "fired" a PCA, Rest Assured generally would place the PCA right back into its registry for use on other jobs. (R.p.112, lines 6-15; p.153). The only instance where Rest Assured would terminate a PCA from its registry is when the PCA took one of Rest Assured's clients to a competing company. (R.pp.108-109).

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

As a result, a Field Deputy investigated Rest Assured regarding its unemployment tax liability status and furnished a report. (R.pp.152-153). The Employment Security Commission (DEW's predecessor agency) thereafter issued a determination on March 2, 2006, finding: (1) Rest Assured's workers should be reclassified as employees, and (2) Rest Assured was liable for unemployment tax on the PCAs' wages. (R.pp.49-50).

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

(1) "exercises control over its workers by offering training and assigning and supervising work;" and

(2) "controls the method and manner in which payment is made to the workers and ... collects all of the monies."

(R.p.34).

Rest Assured appealed from DEW's final administrative decision to the Administrative Law Court (ALC).

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

The ALC determined that the facts of the instant case "are quite similar to those in" *Kilgore*, a case specifically involving unemployment tax liability. (R.p.16). Moreover, the ALC expressly found the Supreme Court's decision in *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 297, 676 S.E.2d 700, 701 (2009) – which held that a workers' compensation claimant was an independent contractor, not an employee, for workers' compensation purposes – to be distinguishable from the instant case. (R.pp.18-19).

Rest Assured appealed from the ALC's decision. After full briefing and oral argument, the Court of Appeals reversed. *Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce*, Op. No. 2014-UP-235 (S.C. Ct. App. filed June 18, 2014) (App.pp.18-19). In its *per curiam*, three-paragraph, unpublished opinion, the Court of Appeals expressly made a finding that Rest Assured's "aide workers were independent contractors." (App.p.19).

The Court of Appeals did not cite or attempt to distinguish the *Kilgore* case (or any other unemployment tax liability case) even though *Kilgore* clearly is binding South Carolina Supreme Court precedent on the issue of unemployment tax liability status.[3] The Court of Appeals' opinion also failed to apply the proper standard of review regarding whether substantial evidence existed to support DEW's finding under the four-factor, common-law test, as clearly set out in *Kilgore*.

Instead, on the dispositive issue of whether PCAs were employees, the Court of Appeals only cited *Wilkinson*, a workers' compensation case.[4] In doing so, the Court implicitly acknowledged it reweighed the facts, which is impermissible under the substantial evidence standard of review.

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[3] This Court in *Kilgore* specifically found substantial evidence supported the agency's finding that workers assigned to clients by a temporary staffing agency were employees of the staffing company for unemployment tax purposes. *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993).

[4] In a workers' compensation case, the employee vs. independent contractor issue is a jurisdictional issue, and therefore the appellate 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); *see also Wilkinson, supra.* In the unemployment context, however, the factual question of whether workers are employees is reviewed by the appellate court under the substantial evidence rule. *See infra*, Argument, Section II. **This means that in the unemployment arena, there is a significantly more deferential standard of review than that used by a reviewing court in a workers' compensation case.**

DEW petitioned for rehearing and requested rehearing *en banc*, but the Court of Appeals denied DEW's requests. (App.pp.1-16). DEW then petitioned for a Writ of Certiorari to the Court of Appeals, which this Court granted.

ARGUMENT

Standard of Review

DEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA).

In reviewing a determination on the employment status of workers for unemployment tax purposes, the standard of review to be applied by the Court is the substantial evidence rule under the 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 APA:

> [A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S.C. Emp. Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." *Id.* at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

> [S]omething 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. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also 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, the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp. 2014). The 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 Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

In the instant case, DEW determined that Rest Assured's PCAs are properly classified as employees, and therefore Rest Assured must report these workers' wages for unemployment insurance tax purposes. The ALC correctly determined that DEW's tax status determination is supported by substantial evidence and the ruling is not affected by any error of law.

On appeal, the Court of Appeals erred in reversing, entered a decision in conflict with this Court's precedent, and exceeded its scope of review. Accordingly, this Court should reverse.

I. The Court of Appeals' Decision Conflicts with South Carolina Supreme Court Precedent on the Dispositive Issue of Whether the Substantial Evidence Supports DEW's Determination that Rest Assured's Personal Care Aides Are Employees for Unemployment Insurance Tax Purposes.

This case involves an important matter of unemployment tax policy that is properly governed by this Court's prior opinions, but such binding precedent was **not** cited or applied by the Court of Appeals. This Court has recognized that:

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

Alton Newton Evangelistic Ass'n, Inc. v. S.C. Emp. Sec. Comm'n, 284 S.C. 302, 305, 326 S.E.2d 165, 167 (Ct. App. 1985) (citing S.C. Code Ann. § 41-27-20) (emphasis added). Whether the PCAs in this case are determined to be employees for unemployment tax liability purposes must be based on "the usual common law rules," as directed by S.C. Code Ann. § 41-27-230(1)(b).

A. The instant case is indistinguishable from *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993).

The leading case in South Carolina for determining the status of employees for unemployment tax purposes when "the right to control" the employees is delegated from the employer to its client is *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993). This Court in *Kilgore* found that the temporary workers assigned by the employer (a staffing agency) to its clients were employees, and therefore, the employer was required to pay unemployment taxes on the wages paid to its employees. Given that *Kilgore* is binding South Carolina Supreme Court precedent, DEW frequently

applies this case when determining whether workers are employees for unemployment tax liability purposes.

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 governing unemployment tax liability, "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*, 313 S.C. at 68, 437 S.E.2d at 49-50 (emphasis added). The test is not whether 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) the 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.*

Furthermore, any agreement to waive an employee's right to unemployment benefits is invalid under South Carolina statute. S.C. Code Ann. § 41-39-10 ("No

agreement by an 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.").[5]

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

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

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

The PCAs, like the temporary workers in *Kilgore*, did not contract directly with the clients, but rather, Rest Assured (like the temporary staffing agency in *Kilgore*) directly negotiated first with the clients, and then separately with the PCAs, after they were matched to a client.[6] Moreover, in *Kilgore*, the evidence showed it was the clients who controlled the temporary "workers' performance and the manner in which it was done." *Id.* at 69, 437 S.E.2d at 50. Similarly, Rest Assured's owner, Johnson, testified

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[5] Indeed, Section 41-39-10 specifically forbids an employer from "directly or indirectly" requiring or accepting "any waiver of rights" to unemployment benefits by an employee. S.C. Code Ann. § 41-39-10. Any employer who violates this statute "shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months or both." *Id.*

[6] Johnson's testimony was clear that the PCAs were not permitted to negotiate fees directly with the clients. (R.p.75, line 6-10).

that the PCAs "do basically what the client wants them to do." (R.p.94, lines 1-5). Johnson stated further that she bases her decision of whether to retain or terminate a PCA based on what the client wants. (R.pp.92-93).

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

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

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

(R.pp.17-18) (emphasis added).

The ALC correctly found that substantial evidence in the record supports the DEW's finding that Rest Assured has the right to control, and exercises that control over, the PCAs. First, it is Rest Assured who initially 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. The ALC specifically stated the following:

> 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.

(R.p.16). As noted by the ALC, because Rest Assured narrows the slate of possible PCA candidates and then delegates the ultimate choice of PCA to its client, Rest Assured has a right of control, and this negates the independence of the PCAs.

Moreover, 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 directly by the client (or by the governmental 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. *See Matter of Nurse Care Registry, Inc.*, 154 A.D.2d 804, 804, 546 N.Y.S.2d 245, 246 (1989) (when affirming the finding that nurses on a registry were employees for unemployment tax purposes, the Court noted: "If the facility fails to pay Nurse Care, the individual worker does not suffer. The loss is Nurse Care's."); *see also* 103 Am. Jur. Proof of Facts 3d 1 § 14 (2008) ("Payment by the hour, week or month, generally points to an employer-

employee relationship."). Therefore, there is substantial evidence in the record that the method-of-payment factor also weighs in favor of the employer-employee relationship.

Regarding the right to fire, Johnson testified that the client had the ability to fire the PCA. (R.p.88, lines 2-10; p.124, lines 9-11). Pursuant to *Kilgore*, this control is therefore properly 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, which gives both Rest Assured and the PCA a "right to terminate," indicates an intention to create an at-will relationship. (R.p.46). An at-will relationship 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).

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

The Court of Appeals' opinion failed to cite this Court's *Kilgore* precedent, even though *Kilgore* is directly applicable and was relied on by both DEW and the ALC. Furthermore, the Court of Appeals failed to cite **any** of this Court's binding cases in the unemployment tax liability area, including but not limited to, *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 458 S.E.2d 429 (1995). As stated above, the omission of any reference to precedential cases that applied the proper standard of review suggests the Court of Appeals erred by taking its own view of the facts.

B. *Kilgore*'s applicability is not restricted to temporary staffing agencies.

Additionally, a close reading of *Kilgore* shows that this Court obviously intended for the decision to apply to more than simply the temporary staffing agency context. Indeed, in holding that "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," the Court specifically cited two cases: *John W. Tripp & Assoc. v. Industrial Claims Appeals Office,* 739 P.2d 245 (Colo. Ct. App. 1987) (where the business provided management consulting, professional recruiting, placement, and temporary employment services);[7] and *Matter of Holbrook Speech Services, Inc.,* 116 A.D.2d 863, 498 N.Y.S.2d 185 (1986) (where the business provided speech, occupational and physical therapists to nursing homes, home care agencies, and private patients). *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

The case of *Holbrook Speech Services* is particularly analogous to the instant case. Holbrook was a professional corporation engaged in the business of providing the services of speech, occupational and physical therapists to nursing homes, home care agencies, and private patients. *Holbrook*, 116 A.D.2d at 863-64, 498 N.Y.S.2d at 186. The *Holbrook* court recognized that "the services provided by the therapists are not of a

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[7] The Colorado Court of Appeals held that where the consultants "received wages set by Tripp, could be discharged by Tripp, and held themselves out as Tripp's employees," the decision that the consultants were employees was "supported by substantial evidence." *John W. Tripp & Assocs. v. Indus. Claim Appeals Office*, 739 P.2d 245, 247 (Colo. App. 1987); *see also Nat'l Claims Associates, Inc. v. Div. of Employment*, 786 P.2d 495, 497 (Colo. App. 1989) (where the court affirmed, under the substantial evidence standard, finding that vocational rehabilitation counselors were employees).

Likewise, the evidence here shows that the PCAs receive wages set by Rest Assured, can be discharged by Rest Assured, and hold themselves out as Rest Assured's employees. Therefore, pursuant to *Kilgore* and *John W. Tripp* (which this Court cited in *Kilgore*), the PCAs employed by Rest Assured are properly considered employees.

nature to be supervised or controlled by the employer" but that there were, "however, other indicia of an employment relationship." *Id.* Specifically, the salient facts noted by the court were that Holbrook: maintained "a registry of therapists;" contracted "directly with the various clients" first; and then selected "an appropriate therapist from the registry." *Id.* In addition, Holbrook billed its clients directly and collected payment. *Id.*

Based on this evidence, the *Holbrook* court upheld the New York Unemployment Insurance Appeal Board's finding that the therapists on the registry were employees.[8]

Holbrook is not an isolated case. Health care professionals placed by a referral agency are often found to be employees for unemployment tax purposes. In another factually analogous case, the New York appellate court found that:

> Where, as here, there is active direction and control of client contact, of the individual worker's wages, and of the billing and collection from clients, an employment relationship can be found to exist as such activities constitute "substantial evidence of control over important aspects of the services performed other than results or means."

Matter of Nurse Care Registry, Inc., 154 A.D.2d 804, 805, 546 N.Y.S.2d 245, 246 (1989) (citation omitted).

Similarly, in *Matter of David Gentile Nursing Servs. (Roberts)*, 65 N.Y.2d 622, 480 N.E.2d 745 (1985), where the evidence showed that prospective clients initially contacted a nursing placement company, and the company then: (1) selected a nurse from its pool of available nurses, (2) established the nurses' hourly wage and paid them weekly, (3) billed the clients and collected payment, the Court held that "such active employer direction and control of client contact, of the employee's wages, and of the

[8] The New York courts, like the appellate courts in South Carolina, review this factual issue under the substantial evidence standard. *See Holbrook*, 116 A.D.2d at 863, 498 N.Y.S.2d at 185 ("The precise issue is whether the Board's characterization of the therapists as employees of Holbrook is supported by substantial evidence, generally a factual matter for Board resolution.").

billing and collection from clients was symptomatic of an employer-employee relationship." *Id.; see also Claim of Richardson*, 246 A.D.2d 943, 944, 667 N.Y.S.2d 858, 859 (1998) (workers for a business that provided domestic help to predominantly elderly and infirm clients were properly classified as employees for unemployment liability purposes); *Claim of Skeete*, 253 A.D.2d 926, 926, 678 N.Y.S.2d 153, 154 (1998) (where nursing registry selects a qualified nurse from its list, each nurse is required to adhere to the registry's care plan, registry guarantees a specified pay rate to the nurses and handles the collection of client fees, the court found the nursing registry "exercises overall control"); *Matter of Kimberg*, 188 A.D.2d 781, 781, 591 N.Y.S.2d 98, 99 (1992) (in case involving placement of home therapists, the court stated "it has been determined that an organization which screens the services of professionals, pays them at a set rate and then offers their services to clients exercises sufficient control to create an employment relationship"); *Claim of Barbato*, 178 A.D.2d 686, 687, 577 N.Y.S.2d 159, 160 (1991) (where nurse placement company selected a particular worker for assignment, agreed to pay the worker a set hourly wage, and handled the billing and collection from clients, an employer-employee relationship was found).[9]

Moreover, in *Holbrook*, the court specifically rejected the argument that because a company may be a registry or referral service, this does not automatically mean that the

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[9] The holding that health care workers are employees for unemployment tax purposes is not restricted to New York's appellate courts, but can be found in other jurisdictions as well. *See, e.g., Dep't of Labor, Licensing & Regulation v. Fox*, 697 A.2d 478, 483 (Md. Ct. App. 1997) ("Dental Placements is not a mere referral or brokering service which matches the needs for staffing of dentists' offices with the availability of independent contractors. Under the Dental Placements' system of doing business there is an express contract between Fox and a dentist and a separate express contract between Fox and the worker."); *Goldberg v. Dep't of Indus., Labor & Human Relations*, 484 N.W.2d 568, 573 (Wis. Ct. App. 1992) ("It is immaterial whether the right or power to control is in fact exercised as long as the right to exercise such control exists.").

workers who are placed are not employees under unemployment law. The *Holbrook* court explained as follows:

> While Holbrook strenuously maintains that it is simply a "registry or referral service" and there is considerable evidence supportive of this contention, such conflict merely presents a factual controversy for Board resolution. Upon comparison, it becomes clear that Holbrook was ... actively engaged in client contact, assignment, fees and wages.

Holbrook, 116 A.D.2d at 863-64, 498 N.Y.S.2d at 186. Likewise, Rest Assured is actively engaged in contacting the clients, assigning the PCAs to the clients, collecting the fees, and then directly paying the PCAs their wages. The facts here are indistinguishable from those of *Holbrook*, which was directly cited and relied upon by this Court in *Kilgore*.

It is significant to note that Rest Assured has repeatedly contended in this appeal that it acts "only as a placement agency and broker and had no control over the PCAs." (Rest Assured Reply Brief, pp.1-2; *see also* Rest Assured Appellant Brief, p.9 "Rest Assured's role is" similar "to that of a broker or other middleman"). However, current, binding South Carolina Supreme Court precedent specifically envisions that the wages of an employment placement agency's employees are subject to unemployment tax liability.[10] *Kilgore*, *supra*. Rest Assured's contention is tantamount to an argument against this Court's precedent, and is one that the Court of Appeals should have rejected

[10] It is also worth noting that the Legislature recognizes that temporary staffing agencies in South Carolina are subject to unemployment taxation, and temporary workers of these agencies are entitled to unemployment benefits provided they meet specific eligibility requirements. *See* S.C. Code Ann. § 41-35-110(3)(c) (Supp. 2014). Therefore, the fact that Rest Assured acts as a "placement agency" does not insulate it from unemployment tax liability. Instead, it is the right-to-control test, under the common law, that governs whether Rest Assured is liable for unemployment taxation on its workers' wages. *See Kilgore*, *supra*; S.C. Code Ann. § 41-27-230(1)(b).

outright. Instead, the Court of Appeals inappropriately issued a decision that is in direct conflict with the Court's decisions on this issue.

Accordingly, because the Court of Appeals' decision directly conflicts with South Carolina Supreme Court precedent, this Court must reverse.

II. The Court of Appeals Exceeded its Scope of Review by Reversing the Administrative Law Court, Which Found DEW's Decision Was Supported by Substantial Evidence in the Record, and Improperly Substituting its Judicial Judgment for Agency Judgment.

By reversing the ALC's decision, the Court of Appeals exceeded the narrow scope of review in unemployment tax status cases. As this Court very recently explained in an unemployment case, even when the appellate court would have taken a different view if it had been weighing the evidence, the appellate court "may not substitute [its] view of the evidence for that of the fact-finder." *Nucor Corp. v. S.C. Dep't of Emp. & Workforce*, 410 S.C. 507, 517, 765 S.E.2d 558, 563 (2014). The *Nucor* Court explained that under the deferential substantial evidence standard of review, the reviewing court may be "constrained to affirm" DEW's decision when "supported by some evidence in the record." *Id.*

Here, the ALC correctly determined that the record contained the requisite evidence to support DEW's finding that Rest Assured's PCAs are employees. In contrast, the Court of Appeals' reversal amounts to judicial fact-finding. Thus, this Court should reverse the Court of Appeals' decision and hold that DEW's administrative determination is supported by substantial evidence.

The Court of Appeals clearly engaged in judicial fact-finding when it specifically stated in its opinion as follows:

> **We reverse and find the aide workers were independent contractors....**
>
> We agree with [Rest Assured's] argument that their personal care aide workers were not employees but contract workers.... In our consideration of the record as a whole, we do not find there is substantial evidence in the record **to support the ALC's decision**.

Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce, Op. No. 2014-UP-235 (S.C. Ct. App. filed June 18, 2014) (App.p.19) (emphasis added). The Court of Appeals incorrectly viewed this case as one of review of the ALC's decision.[11] Instead, the Court of Appeals was statutorily required to evaluate whether the substantial evidence in the record supports **DEW's final administrative decision** that Rest Assured had misclassified its workers as independent contractors.

DEW clearly determined that Rest Assured's PCAs are "employees and should be reported for unemployment tax purposes." (R.p.34). Instead of reviewing that determination under the narrow substantial evidence standard, the Court of Appeals improperly took its own view of the evidence and reversed DEW's factual findings.

A. The Court of Appeals failed to determine whether the evidence in the record would allow reasonable minds to reach the conclusion that DEW reached in order to justify its administrative agency action.

As stated above, DEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject

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[11] Rest Assured incorrectly maintained in its Court of Appeals Reply Brief that the "substantial evidence rule does not govern the standard of review over this decision." (Rest Assured Reply Brief, p.1). While the Court of Appeals' Order references the substantial evidence rule, it does not cite any unemployment insurance cases. Rather, the Court of Appeals cited only *ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011). *ESA Servs.* involves an appellate review of the ALC's findings of fact on a contractual issue, so it is not at all analogous to this case.

to the APA). In reviewing a determination on the employment status of workers for unemployment tax purposes, the standard of review to be applied by the Court is the substantial evidence rule under the 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); *see also Kilgore, supra.*

This is a very "narrow scope of review." *McEachern v. S.C. Emp. Sec. Comm'n*, 370 S.C. 553, 561, 635 S.E.2d 644, 649 (Ct. App. 2006). The appellate court may reverse the decision of the agency only "where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.* at 557, 635 S.E.2d at 646-47 (footnotes and citations omitted); *accord* S.C. Code Ann. § 1-23-380;[12] *Merck v. S.C. Emp. Sec. Comm'n*, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986) (when

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[12] S.C. Code Ann. § 1-23-380 provides for "Judicial review upon exhaustion of administrative remedies" and states as follows:

> (5) **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.

(Emphasis added).

reviewing DEW's final decisions, the reviewing court "must affirm the factual findings of the Commission if they are supported by substantial evidence").

"Substantial evidence" is evidence which, when 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." *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 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").

Significantly, the substantial evidence rule "**does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.**" *Todd's Ice Cream, Inc.*, 281 S.C. at 258, 315 S.E.2d at 375 (emphasis added); *accord* S.C. Code Ann. § 1-23-380(5) (the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact"); *see also Nucor, supra.* Furthermore, 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, it is the Appellant who bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

It is noteworthy that when this Court reviewed the Court of Appeals' decision in *Smoky Mountain Secrets,* the Court reversed the Court of Appeals' own finding that the delivery workers were independent contractors. This Court emphatically stated that "[a]ppellate scope of review in this action is limited to determining the existence or not of

substantial evidence supporting the factual findings" of DEW's predecessor agency, the Employment Security Commission. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995). The Court in *Smoky Mountain Secrets* held that the record contained "substantial evidence supporting the finding that Respondent had the right and authority to control and direct persons delivering its products, thus qualifying them as employees rather than independent contractors," and thus, the Court of Appeals had exceeded its scope of review by making its own factual finding that the workers were not employees. *Id.*

This is precisely the circumstances of the instant case. Here, DEW determined that Rest Assured's PCAs are employees, and therefore Rest Assured must report these workers' wages for purposes of unemployment tax liability. (R.p.34). DEW made the factual findings that Rest Assured exercises control over its workers by assigning and supervising work and controlling the method and manner by which payment is made. *Id.*

Under the Court's narrow scope of review, it is clear that DEW's tax status determination is supported by substantial evidence and the ruling is not affected by any error of law. The ALC correctly affirmed, and this Court should reverse the Court of Appeals since it exceeded its scope of review.

It bears repeating that the proper appellate scope of review in this case is narrowly "limited to determining the existence or not of substantial evidence supporting the factual findings of" DEW. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. at 457, 458 S.E.2d at 430 (citing *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993)). In *Smoky Mountain Secrets,* the Supreme Court reversed the Court of Appeals' decision which found delivery drivers were independent contractors,

which was contrary to the Employment Security Commission's finding that these workers were employees for unemployment tax purposes. The Supreme Court held the Agency's finding that the workers were employees "was not clearly erroneous," and therefore, the Court of Appeals had "exceeded its scope of review." *Smoky Mountain Secrets,* 318 S.C. at 457, 458 S.E.2d at 430 (reversing pursuant to Rule 220, SCACR, the Court of Appeals' conclusion in *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 116, 439 S.E.2d 288, 291 (Ct. App. 1993) that the drivers were independent contractors).

Just as in *Smoky Mountain Secrets*, the Court of Appeals has in the instant case exceeded its scope of review, re-weighed the facts, and participated in judicial fact-finding, which is contrary to the substantial evidence standard found in the APA.

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

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

Todd's Ice Cream, Inc., 281 S.C. at 258, 315 S.E.2d at 375 (emphasis added); *see also* S.C. Code Ann §§ 1-23-380(5), 1-23-610(B).

The record in the instant case supports DEW's conclusion that Rest Assured had the right to control the PCAs, and that control was mostly delegated to Rest Assured's clients. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50. When the Court of Appeals

decided the PCAs were independent contractors, it impermissibly substituted its own judgment for DEW's decision, and improperly reversed the ALC's decision which found DEW's conclusion was supported by substantial evidence in the record.

Because the substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment, this Court must reverse the erroneous decision issued by the Court of Appeals.

B. Even when the record on appeal allows the possibility of drawing two different conclusions from the evidence, this does not mean DEW's conclusion is unsupported by substantial evidence.

DEW's Appellate Panel is the ultimate finder of fact in unemployment matters. *See Merck*, 290 S.C. at 460, 351 S.E.2d at 339 ("The Commission has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal."); S.C. Code Ann. § 41-29-300(A) ("The sole purpose of the [Appellate] panel is to hear and decide appeals from decisions of the department's divisions."). The possibility of drawing two inconsistent conclusions from the evidence does not mean the DEW's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. at 226, 467 S.E.2d at 917.

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

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

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

Moreover, when applying the substantial evidence rule, the appellate court may reverse only "in those cases where a manifest or gross error of law has been committed by the administrative agency." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

In the instant case, DEW did not commit a manifest or gross error of law by concluding from the evidence in the record that Rest Assured has the right to control the work of its PCAs. It is beyond dispute that reasonable minds could reach the same conclusion that DEW reached when the evidence establishes that Rest Assured controlled the placement of the PCAs, collected the fees from the clients, paid hourly wages to the PCAs, and periodically supervised the PCAs at their workplaces in clients' homes.

Even if the evidence arguably allows more than one inference to be derived from the evidence in the record on the issue of control because Rest Assured and all of its PCAs entered into a written "independent contractor agreement," there is nevertheless clear evidence that Rest Assured:

- initially matched the PCAs to the clients;
- had the right to control the PCAs and directly exercised that right of control when it would make in-home visits to ensure both the quality of the PCAs' work and the clients' satisfaction; and
- exercised complete control regarding the method of payment, by negotiating fees first with the clients and then with the PCAs, collecting all monies, as well as paying the PCAs their hourly wage even if the clients failed to pay.

This undisputed evidence clearly supports a reasonable determination that the PCAs are employees. Where the evidence relating to whether an individual is an

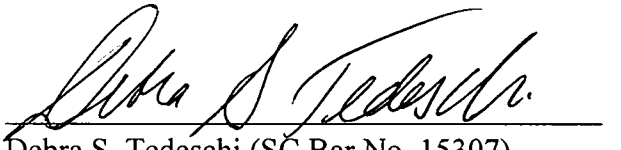
independent contractor or employee is conflicting or where more than one inference can be derived therefrom, the question is one of fact, and that factual finding is made by DEW. *Todd's Ice Cream,* 281 S.C. at 259, 315 S.E.2d at 376. Because the record on appeal contains substantial evidence supporting DEW's decision that the PCAs are employees, the Court of Appeals impermissibly re-weighed the facts and engaged in judicial fact-finding, thereby exceeding its scope of review. *See Lark v. Bi-Lo, Inc.,* 276 S.C. at 136, 276 S.E.2d at 307 (for an appellate court to reverse a final agency decision, "the decision under appeal must be 'clearly erroneous' in view of the substantial evidence on the whole record").

Accordingly, this Court should reverse the Court of Appeals' decision and re-establish the proper analysis for this unemployment tax liability issue.

CONCLUSION

In conclusion, for the reasons discussed above, this Court should reverse the Court of Appeals' opinion, and reinstate the ALC's Order which upheld DEW's decision that Rest Assured's PCAs are employees for unemployment tax purposes.

Respectfully submitted,



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February 17, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson III, Chief Administrative Law Judge

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

Rest Assured, LLC,

Respondent

v.

South Carolina Department of
Employment and Workforce

Petitioner.

PROOF OF SERVICE

I certify that I have served the Brief of the Petitioner Department of Employment and Workforce on Respondent Rest Assured, LLC by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2015, addressed to its attorneys of record,

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February 17, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Rest Assured LLC v. SC Department of Employment and Workforce
Appellate Case No. 2014-002233

Dear Mr. Shearouse:

Enclosed are fifteen copies of the Brief of the Petitioner, SC Department of Employment and Workforce. Also included are thirteen bound copies of the Appendix, Court of Appeals Record on Appeal and Court of Appeals Briefs.

Please let me know if you have any questions.

Sincerely,

Jessica Chesley

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