

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No. 2014-000246

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

v.

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

APPENDIX

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S.C. Supreme Court

APPENDIX

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

RECORD ON APPEAL

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

Elliot F. Elam, Jr.
Deputy Director
South Carolina Department of
Consumer Affairs
Post Office Box 5757
Columbia, South Carolina 29201-5757

TABLE OF CONTENTS

Order of Administrative Law Judge Durden	1
Request for Hearing	4
Notice of Assignment	7
Agency Letter of February 22, 2013	9
Email of March 5, 2013	13
Agency Letter of August 21, 2013	14
Agency Motion to Dismiss	21
Entera Response to Motion to Dismiss	28
Agency's Reply Motion	33
Entera's Motion to Reconsider	38

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Consumer Affairs,

Docket No. 13-ALJ-30-0473-CC

Petitioner,

vs.

ORDER OF DISMISSAL

Entera Holdings, LLC, and Entera Work
Compensation Solutions, LLC,

Respondents.

The above-captioned matter is before the South Carolina Administrative Law Court (ALC or Court) for a contested case hearing. On September 30, 2013, Respondents Entera Holdings, LLC, and Entera Work Compensation Solutions, LLC, (Entera) filed a Request for Contested Case Hearing with this Court. On October 22, 2013, Petitioner South Carolina Department of Consumer Affairs (Petitioner or Department) filed a Motion to Dismiss stating that Entera untimely filed its Request for a Contested Case Hearing. On November 1, 2013, Entera filed a Response to Motion to Dismiss asking that the case be dismissed because the August 21, 2013 agency decision was never properly served on Entera. On November 8, 2013, the Department filed a Reply to Response to Motion to Dismiss.

The Department's decision dated August 21, 2013 shows it to be a final agency decision. That decision was received by both Respondent and Respondent's counsel on August 23, 2013. Entera's position that the agency decision was improperly served because it was delivered by Federal Express is wholly without merit.

The ALC is authorized to preside over contested cases concerning decisions of the South Carolina Department of Consumer Affairs. See S.C. Code Ann. §§ 1-23-600(B) (Supp. 2012). However, for this Court to hear such a contested case, its jurisdiction must be properly invoked through a timely request for a contested case. See Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 372 S.E.2d 584 (1988) (holding that a party's failure to file an appeal of a zoning decision within the statutory time period divested the board of adjustment of jurisdiction to hear the appeal), overruled on other grounds by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995);

FILED

November 26, 2013

SC ADMIN. LAW COURT

Burnett v. S.C. State Highway Dept., 252 S.C. 568, 167 S.E.2d 571 (1969) (holding that a landowner's failure to timely appeal a condemnation decision by the Highway Department deprived the reviewing court of jurisdiction to hear the appeal.) see also, e.g., Schaible Oil Co. v. N.J. Dept. of Env'tl. Prot., 586 A.2d 853, 855-56 (N.J. Super. Ct. App. Div. 1991) ("The statutory time limit for requesting an adjudicatory hearing is mandatory and jurisdictional[;] . . . enlargement of statutory time for appeal to a state administrative agency lies solely within the power of the Legislature . . . and not with the agency or the courts."); Lewis v. N.C. Dept. of Human Res., 375 S.E.2d 712, 714 (N.C. Ct. App. 1989) ("The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal."). In the instant matter, Entera failed to timely serve its Request for a Contested Case Hearing to challenge the agency decision and, therefore, failed to properly invoke this Court's jurisdiction.

Pursuant to S.C. Code Ann. §§ 1-23-600(B) a party that files a request for a contested case hearing "must simultaneously serve a copy of the request on the affected agency." ALC Rule 11(C) requires a request for a contested case hearing to "be filed and served within thirty (30) days after the date of the written decision of the agency's determination." In the case at hand, Entera did not timely file or serve Petitioner with the Request for a Contested Case Hearing. Therefore, Entera did not cross the mandatory jurisdictional threshold. Accordingly, this Court has no choice but to find that Entera failed to properly invoke this Court's jurisdiction and to conclude that this matter must be dismissed. See Mears v. Mears, 387 S.C. 168, 337 S.E.2d 206 (1995). In dismissing this case, this Court wishes to emphasize that, while it is sympathetic to Entera's circumstances and realizes that this dismissal may seem unduly harsh, it has an obligation to carefully examine jurisdictional questions like that presented here, see, e.g., State v. Johnston, 327 S.C. 435, 438, 489 S.E.2d 228, 230 (Ct. App. 1997), rev'd on other grounds, 333 S.C. 459, 510 S.E.2d 423 (1999) (holding that "it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act"), and is constrained from extending the time for filing and serving a request for a contested case or deeming an untimely request to be timely because of the filing party's mistake, inadvertence, surprise, or excusable neglect, see, e.g., Burnett, 252 S.C. at 570-71, 167 S.E.2d at 572. Therefore,

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that Petitioner's motion to dismiss is **GRANTED** and the above-captioned case is **DISMISSED** with prejudice.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

November 26, 2013
Columbia, South Carolina

CONSTANGY
BROOKS & SMITH, LLP

File

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SUITE 105
GREENVILLE, SOUTH CAROLINA 29601
TELEPHONE (864) 242-2577 • FACSIMILE (864) 242-9815
www.constangy.com

dhkeller@constangy.com
864-242-2577

September 30, 2013

Honorable Jana E. Shealy
Clerk
South Carolina Administrative Law
Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

**Re: South Carolina Department of Consumer Affairs Letter of August 21,
2013
South Carolina Department of Consumer Affairs v. Entera Holdings,
LLC/ Entera Work Comp-Solutions, LLC**

Dear Ms. Shealy:

I have attached hereto the South Carolina Administrative Law Court request for contested hearing form and am providing you with the information on the hearing requested. I am also enclosing a check for the One Hundred Fifty (\$150.00) dollar filing fee and a certificate of service showing the date of service on you and the Department of Consumer Affairs.

The South Carolina Department of Consumer Affairs issued a fine against Entera Holdings and/or Entera Work Comp-Solutions, LLC, by letter dated August 21, 2013, a copy which is attached hereto, and received by the undersigned attorney for Entera Holdings LLC and Entera Work Comp-Solutions LLC on August 29, 2013.

The determination of the Department of Consumer Affairs that the defendants, herein, were a professional employer organization(PEO) and if they were operating as the same, is contested. Also the subject matter jurisdiction of the Department of Consumer Affairs to hear, investigate and decide this matter is contested.

It is requested that this matter be set for a hearing on the agency determinations, one through sixteen, administrative actions and administrative actions numbers one and two and

4

Honorable Jana E. Shealy

September 30, 2013

Page 2

that the same be overturned. Further, it is requested that the court determine whether the Department of Consumer Affairs had subject matter jurisdiction pursuant to South Carolina Code of Laws Annotated §40-68-155. It is requested that this matter be assigned to an administrative law judge as soon as possible and that all further correspondence be forwarded to me at the above address. Should you have any questions, please feel free to contact me.

Yours truly,



David H. Keller

DHK/cva
Enclosures

cc: Hana Pokorna-Williamson
South Carolina Department of Consumer Affairs
P.O. Box 5757
Columbia, South Carolina 29250-5757

**South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM**

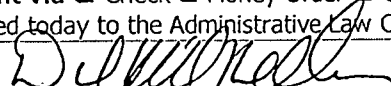
Last Name: FAIN		First: CLARK	Middle:	<input checked="" type="checkbox"/> Mr. <input type="checkbox"/> Mrs.	<input type="checkbox"/> Miss <input type="checkbox"/> Ms.	Docket No. (To Be Completed by ALC)
Mailing Address: ENTERA Holdings, LLC		City: Atlanta		State and Zip: Georgia 30339		
Home Number:	Work Number: 678-801-2329	Cell Number: 404 202 3272		*E-Mail Address:		

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

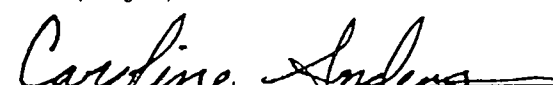
REPRESENTATION

Are you representing yourself? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		If No, please complete the following:	
Are you represented by an Attorney? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Are you represented by a CPA? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Name of Attorney: DAVID Hill Keller		Name of CPA:	
Mailing Address: CONSTANSY Brooks & Smith		Mailing Address:	
105 N. Spring St Ste 105			
City, State and Zip: Greenville, SC 29601		City, State and Zip:	
Work Number, Cell Number and E-mail Address: 864 990 1882; 864 380 5363		Work Number, Cell Number and E-mail Address:	
dhkeller@constansy.com			

CASE INFORMATION

Name of the Agency that issued the decision: (Example - Dept. of Revenue, Dept. of Insurance, DHEC) Department of Consumer Affairs	
In order to have your case processed, you must attach the agency decision. Is it attached? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	If no, please explain:
Date the decision was issued: 8/21/2013	Date the decision was received: 8/29/2013
Please provide a brief statement regarding why the hearing is being requested and the relief sought:	
Payment via <input type="checkbox"/> Check <input type="checkbox"/> Money Order <input type="checkbox"/> Cash for \$ submitted today to the Administrative Law Court via	(applicable filing fee pursuant to ALC Rule 71) is being <input type="checkbox"/> U.S. Postal Service <input type="checkbox"/> Hand-delivery
	9/30/2013
X Your Signature or Signature of Attorney/CPA	Date

CERTIFICATE OF SERVICE (MUST BE COMPLETED)

Your Name: CAROLINE Anders	Date: 9/30/2013	City: Greenville State: SC
I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):		
Dept of Consumer Affairs PO Box 5757	Columbia, SC 29250 - 5757	
Name and/or Agency	Address	City, State and Zip
Name and/or Agency		
Address		
City, State and Zip		
		Sep. 30, 2013
X Your Signature or Signature of Attorney/CPA		Date



The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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www.sccourts.org

February 19, 2014

Mr. David Hill Keller, Esquire
105 N. Spring St., Ste. 105
Greenville SC 29601

Re: SCDCA v. Entera Holdings
Appellate Case No. 2014-000246

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will *not* review filings for redaction or to determine if materials should be sealed.

This is to advise that the title in the above matter has been changed to read as follows:

South Carolina Department of Consumer Affairs, Respondent,

v.

Entera Holdings, LLC, and Entera Work Compensation Solutions, LLC;
Appellants.

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Elliott F. Elam, Jr., Esquire
Jana E. Shealy



Carri Grube Lybarker
Administrator

The State of South Carolina Department of Consumer Affairs

2221 DEVINE STREET, STE 200
PO BOX 5757
COLUMBIA, SC 29250-5757

Celebrating Over 35 Years of Public Service

February 22, 2013

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Myrtle Beach
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Greer
Magaly P. Perin
Simpsonville

Clark Fein
Entera Holdings, LLC
Entera Work Comp Solutions, LLC
2030 Powers Ferry Rd. SE, Suite 122
Atlanta, GA 30339

By FedEx

RE: Unlicensed PEO Activity in South Carolina

Dear Mr. Fein:

The South Carolina Department of Consumer Affairs regulates and licenses professional employer organizations (PEOs) in South Carolina. It came to our attention that you may be providing PEO services in this state without having a PEO license. Pursuant to S.C. Code Ann. §§40-68-30(A) and 40-68-150(A)(1), a person may not engage in or offer professional employer services in this State without holding a license issued under this chapter. A person who violates the provisions of this section is guilty of a misdemeanor. Furthermore, engaging in PEO services without a license is also a ground for a disciplinary action and sanctions by this Department.

We have reviewed a Workers' Compensation Service and Leasing Agreement that Entera Work Comp Solutions, LLC (Entera) entered into on January 3, 2013, with Home by Choice, Inc., an employer in Seneca, SC. Even though in the contract Entera proclaims itself to be an administrative services organization (ASO), it is our opinion that for the following reasons the agreement is in fact for PEO services as they are defined in S.C. Code Ann. §40-68-10 *et seq.*

I. Entera attempts to operate as a PEO.

(A) The agreement itself in its title states that it is a "Leasing Agreement". The word leasing or staff leasing is synonymous with professional employer services. *See*, S.C. Code Ann. § 40-68-150(A)(2). In fact, the South Carolina PEO statute originally used the term staff leasing until 2005.

9

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803-734-4233
ACCOUNTING
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Fax: 803-734-4286

E-Mail: SCDCA@SCCONSUMER.GOV
Website: WWW.SCCONSUMER.GOV

Toll Free in SC: 800-922-1594
Voice/TT: 800-735-2905

(B) Even if the agreement never used the word "leasing", it is the nature and the content of the services provided, not the name used that determines whether or not the contract is for PEO services. As long as the services provided in S.C. Code Ann. §40-68-10(9) and otherwise described or referred to throughout the statute are provided, the provider is a PEO.

(C) An administrative service organization (ASO) cannot include its client companies in its own workers' compensation policies. Such aggregation of employees from various companies can be done only if the primary insured is an employer of record of all such employees, which is the defining concept of a PEO. According to our NCCI Proof of Coverage search, Entera Holdings, LLC and Entera Work Comp Solutions, LLC have a workers' compensation policy with South Carolina coverage with Guarantee Insurance Company under the policy number GP0054800001122. The policy is listed as "Employee Leasing Policy - Employee Leasing Company and Client Companies." The primary insured is Entera Holdings, LLC. The FEIN listed for both Entera Holdings, LLC and Entera Work Comp Solutions, LLC is identical. South Carolina client companies listed under that policy are Fleet Force, Inc. in Charleston, SC and Home by Choice, Inc. in Seneca, SC. The policy is current with an expiration date of 9/30/2013. Therefore, Entera represented itself to Guarantee Insurance Company as a PEO for the purposes of its South Carolina workers' compensation coverage and continues to hold itself out as such. (See, Attachment No. 1.)

(D) Although the agreement between Entera and Home by Choice describes the services offered by Entera in a very rudimentary fashion as a series of alternatives whose application is dependent solely on the decision by Entera, one of the alternatives listed in Section 2. (b) states that "upon approval by Entera, C/E [client company] will make continuing payroll and compensation payments on behalf of Entera to all Covered Employees." (Emphasis added.) The client company making payroll payments on behalf of Entera clearly implies that Entera assigns the employees back to the client. The fact that the employees are referred to as "covered" employees only underscores the PEO concept inasmuch this is the word commonly used for employees in the PEO relationship.

(E) On Entera's web page description of its associated companies, Entera Work Comp Solutions, LLC is described in the following fashion:

Entera Work Comp Solutions, LLC is an administrative service organization providing services, expertise and workers compensation to smaller companies who do not normally receive attention from large insurance carriers. Entera Work Comp Solutions, LLC delivers and functions as a professional employee organization supplying human resource needs to smaller employers.

(See, Attachment No. 2.)

In one short paragraph, Entera manages to ascribe PEO functions to an ASO (*i.e.* providing workers's compensation) and ASO functions to a PEO (*i.e.*, supplying human resource needs). Once again, abstracting from labels and considering the content, Entera admits in its own words that the contracting entity in question considers itself a PEO and provides workers' compensation.

2. The service and leasing agreement contains deceptive and false statements and appears to be an attempt to defraud a client company.

(A) The agreement between Entera and Home by Choice, Inc. refers on several occasions to Home by Choice as a "Georgia employer." Upon information and belief, Home by Choice does not have now and never had in the past any employees in Georgia.

(B) Paragraph 1 (Scope of the Agreement) states that this Agreement will pertain to and cover only those employees of the client company who are Georgia residents as defined in Q.C.G.A. §40-5-1(15). Upon information and belief, Home by Choice employees are not residents of Georgia. Nevertheless, Entera presented an Acord Certificate of Liability Insurance as a proof of valid South Carolina workers' compensation coverage for Home by Choice. However, the Acord certificate is not executed by a representative of Guarantee Insurance Company but rather by Jennifer Katz, an executive of Entera. Home by Choice makes premium payments to Entera for this workers' compensation coverage. (*See*, Attachment No. 3.)

3. None of the Entera entities is registered with the South Carolina Secretary of State.

As of February 22, 2013, Corporate Search Results at the South Carolina Secretary of State site do not show any Entera entity.

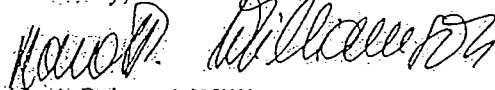
4. The service and leasing agreement violates South Carolina workers' compensation laws.

In violation of South Carolina workers' compensation laws, the agreement unlawfully attempts to transfer the jurisdiction over South Carolina workforce into Georgia. It also unlawfully limits the time within which an injured employee must give a notice of injury without forfeiting the right to be reimbursed.

Based on the above, we come to the conclusion that Entera provides its services in South Carolina without a license and in violation of PEO and workers' compensation laws. In order to come to a resolution of this matter, we suggest that within next five business days

of the receipt of this correspondence you agree in writing to apply for a South Carolina PEO license to be followed by a substantially complete license application within next ten business days, including an agreement that fully conforms with S.C. Code Ann. § 40-68-10 *et seq.* The licensing process would also involve appropriate fines for the existing ongoing violations of the PEO statute. If you fail to apply for a license, the Department will issue a cease and desist order. Failure to resolve this matter could also lead the Department to pursue a criminal complaint against the controlling person(s) of Entera.

Sincerely,



Hana Pokorná-Williamson
Staff Attorney

cc: Honorable Gary M. Cannon, Executive Director, S.C. Workers' Compensation Commission

Keller, David

From: Keller, David

Sent: Tuesday, March 05, 2013 4:44 PM

To: Williamson, Hana

Subject: Re: Entera Holdings

Ill get with you tomorrow afternoon. I am meeting with Entera on the 14

Sent from my iPad

On Mar 5, 2013, at 3:41 PM, "Williamson, Hana" <HWilliamson@scconsumer.gov> wrote:

Mr. Keller:

I am in receipt of your letter of February 28, 2013 regarding Entera Holdings. I understand that you'll be traveling today and tomorrow. I agree that we need to discuss the status of Entera as soon as possible. However, I am not sure what we would accomplish in a face to face meeting that could not be accomplished through a conference call. If Entera people have some documents they would like to share with us, they can email it here. Which reminds me that we would appreciate if you could ask them to send to us the entire contract they have with House by Choice and Fleet Force, Inc. The part of the contract we have is in a very small print and since it was faxed, the quality of the print deteriorated further.

Thank you.

Hana P. Williamson
Staff Attorney

S.C. Dept. of Consumer Affairs

(803) 734-4188



Carri Grube Lybarker
Administrator

The State of South Carolina Department of Consumer Affairs

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Celebrating Over 35 Years of Public Service

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August 21, 2013

Clark Fain
Entera Holdings, LLC
Entera Work Comp Solutions, LLC
2030 Powers Ferry Rd., SE, Suite 122
Atlanta, GA 30339

Via Federal Express

RE: Unlicensed PEO operation in South Carolina

FINAL AGENCY DECISION

The South Carolina Department of Consumers Affairs (the Department) regulates and licenses professional employer organizations (PEOs) operating in South Carolina pursuant to S.C. Code Ann. §40-68-10 *et seq.* A PEO is defined as a business-entity that offers professional employer services. S.C. Code Ann. §40-68-10 (10). Professional employer services are defined as an arrangement by which employees of a licensee are assigned to work at a client company and in which employment responsibilities are shared by the licensee and the client company. S.C. Code Ann. §40-68-10 (9). A term synonymous with professional employer services is "staff leasing." See, S.C. Code Ann. § 40-68-150(A)(2). In fact, the South Carolina PEO statute originally used the term staff leasing until 2005.

Pursuant to S.C. Code Ann. § 40-68-30(A), a person may not engage in or offer professional employers services in this State without holding a PEO license. To do so is a prohibited act under S.C. Code Section § 40-68-150 (A)(1) subject to a disciplinary action by the Department and a violation of this section is a misdemeanor.

Based on its regulatory authority, the Department has reviewed the operations of Entera Work Comp Solutions, LLC and Entera Holdings, LLC (Entera or Entera companies). The Department finds and concludes that Entera has been operating as a PEO in South Carolina without a valid PEO license at least since September 2011 in violation of S.C. Code Ann. Sections 40-68-30(A) and 40-68-150(A) (1), (2), (3) and (5).

Operational background

1. The Entera companies reside at 2030 Powers Ferry Rd., Atlanta, GA 30339 and operate under approximately five separate company names, primarily dealing with workers' compensation and human resources issues.

2. In February 2013, upon an independent inquiry, the Department reviewed page one of Workers' Compensation Service and Leasing Agreement that Entera Work Comp Solutions, LLC (Entera) entered into on January 3, 2013, with Home by Choice, Inc., an employer in Seneca, SC.

3. The agreement between Entera and Home by Choice, Inc. refers to Home by Choice as a "Georgia employer." Upon information and belief, Home by Choice has, at no time past or present, had any employees in Georgia. Further, Paragraph 1 (Scope of the Agreement) of the Agreement states that it will pertain to and cover only those employees of the client company who are Georgia residents as defined in Q.C.G.A. §40-5-1(15). Upon information and belief, no Home by Choice employees are residents of Georgia.

4. Entera provided Home by Choice with an Accord Certificate of Liability Insurance as a proof of a valid South Carolina workers' compensation coverage for Home by Choice. The certificate shows that the workers' compensation coverage is placed with Guarantee Insurance Company under policy number GPEO054800001122. The Accord certificate is not executed by a representative of Guarantee Insurance Company but rather by Jennifer Katz. Upon information and belief, Ms. Katz is an executive of Entera.

5. The Department ran the search of that policy through the National Council of Compensation Insurance (NCCI) Proof of Coverage database.¹ The search revealed that Entera Holdings, LLC and Entera Work Comp Solutions, LLC have a workers' compensation policy with South Carolina coverage with Guarantee Insurance Company under the policy number GPEO054800001122. The policy is listed as an "Employee Leasing Policy - Employee Leasing Company and Client Companies." The primary insured is Entera Holdings, LLC.² The FEIN listed for both Entera Holdings, LLC and Entera Work Comp Solutions, LLC is identical. The South Carolina client companies listed under that policy are Fleet Force, Inc. in Charleston, SC and Home by Choice, Inc. in Seneca, SC. The policy is current with an expiration date of 9/30/2013. During a subsequent search of the NCCI database in early March 2013, the Department found two additional South Carolina clients of Entera under the same policy number GPEO054800001122; namely, Labor Finders of South Carolina, Inc. with a location in Irmo, SC, and Labor Guys, LLC in Fairfax, SC.

6. Before a policy can be coded in the NCCI system as a staff leasing policy, very specific information regarding the PEO-client relationship must be provided to NCCI by the insurance carrier. Individual clients are clearly coded as such in the NCCI data base. The

¹ NCCI is a workers' compensation rating organization operating in numerous states. Every workers' compensation insurer has to report to NCCI each policy issued for South Carolina coverage, including the address and FEIN of the insureds, other employers/clients covered under the policy, effective date of the policy, cancellations or non-renewals, etc.

² A person who fills out and signs a request for insurance coverage is usually referred to as a primary insured or applicant. This person is generally the intended policyowner and is listed as applicant on the premium due page after a policy is issued.

carrier obtains that information through the application process for a PEO/staff leasing policy. Therefore, Entera represented itself to Guarantee Insurance Company as a PEO for the purposes of its South Carolina workers' compensation coverage and continues to hold itself out as such.

7. The introductory paragraph of the Agreement declares that Entera is an administrative service organization (ASO). Although an ASO bears some semblance to a PEO, there are significant differences. Both ASOs and PEOs assist their client companies with payroll and human resource issues, as well as with some federal, state and local compliance and regulatory issues. But an ASO cannot include its client companies in its own workers' compensation policy. Such aggregation of employees from various companies can be done only if the primary insured is an employer of record of all such employees, which is the defining concept a PEO.

Aggregation of insureds into larger groups produces lower premiums for workers' compensation, health or life insurance policies. The only way a PEO can achieve such a result is to become the employer of record for the client company's employees. When a client company enters into a PEO relationship, it has to let its current employees go, whereupon they are immediately hired as employees of the PEO, which, in turn, assigns or leases them back to their original workplace with the client. A PEO executes employment contracts with its clients' employees and becomes a statutory employer of record for state and federal tax purposes, insurance purposes and wage laws purposes. A client company advances to a PEO funds for each payroll period but the checks to all employees of all client companies are drawn from a PEO's account. A PEO does all the withholding. Likewise, W-2 forms would show a PEO as an employer.

8. Although the agreement between Entera and Home by Choice describes the services offered by Entera in a very rudimentary fashion as a series of alternatives whose application are dependent solely on the decision by Entera, one of the alternatives listed in Section 2(b) states that "upon approval by Entera, C/E [client company] will make continuing payroll and compensation payments on behalf of Entera to all Covered Employees." (Emphasis added.) The client company making payroll payments on behalf of Entera clearly implies that Entera assigns the employees back to the client. The fact that the employees are referred to as "covered" employees only underscores the PEO concept inasmuch this is the word commonly used for employees in the PEO relationship. The same employees are sometimes alternatively referred to as "assigned employees", such as in the South Carolina PEO statute, S.C. Code Ann. Section 40-68-10 *et seq.* This relationship is also referred to as a co-employment relationship, as defined in Regulation R28-1000 (A).

9. On Entera's web page, Entera Work Comp Solutions, LLC is described in the following fashion:

Entera Work Comp Solutions, LLC is an administrative service organization providing services, expertise and workers compensation to smaller companies who do not normally receive attention from large insurance carriers. Entera Work Comp Solutions, LLC delivers and functions as a professional employee organization supplying human resource needs to smaller employers.³

³ This was the description as it appeared on Entera's web page during our initial search in February through April, 2013. At some point following an exchange of letters between the Department and Entera's counsel, any reference to professional employer organization was removed from Entera's web page.

In one short paragraph, Entera manages to ascribe PEO functions to an ASO (*i.e.*, providing workers compensation) and ASO functions to a PEO (*i.e.*, supplying human resource needs). Abstracting from labels and considering the content, Entera admits that Entera Work Comp Solutions considers itself a PEO and provides workers' compensation.

10. As of August 12, 2013, Corporate Search Results at the South Carolina Secretary of State site does not show any Entera entity.

11. By a letter dated February 22, 2013, the Department informed Entera in writing that it was engaging in unlicensed PEO activities in South Carolina in violation of S.C. Code Ann. Section 40-68-10 *et seq.*, and that the Service and Leasing Agreement contained what appeared to be deceptive and false statements.

12. On February 28, 2013, Entera, through its South Carolina counsel responded that it was not a PEO "in this strictest sense of the word."

13. Subsequently, a search of the NCCI database located a company named First Choice ASO, LLC that was on Guarantee's workers' compensation staff leasing policy number GPEO563000001112 listed with the same Atlanta address as Entera companies, although on its web page it has a different Georgia address. That policy shows as a client Labor Finders of South Carolina, Inc. at its Greenville, SC location and Wall Timber Products, Inc. in Landrum, SC. First Choice ASO, LLC is not registered with the South Carolina Secretary of State.⁴

14. The Department also identified another company, HR One Services, LLC, listed in the NCCI database with the identical address as Entera companies. This company carries a staff leasing policy number GPEO58000001113 with Guarantee Insurance Company and is listed as a primary insured for the following South Carolina employers: Amp Medical Transport, LLC in Pelion, SC; Carolina Ambulance of Midlands, LLC in West Columbia, SC; Moree Industries in Cheraw, SC; Mstaff, LLC in Spartanburg, SC and; VE Bracket & Co., Inc. in Seneca, SC. The Department also has reason to believe that Steel Arc., Inc. in Duncan, SC and Image Management Solutions in Charleston, SC may be on the same policy or were on it several years on a predecessor staff leasing policy number UPEO447000001112 with Ullico Insurance Company taken out by HR One Services, LLC as the primary insured. Ullico Insurance Company, in receivership since March 2013, is an affiliate of Guarantee Insurance Company within the Patriot Insurance Group. HR One Services, LLC is also not registered with the South Carolina Secretary of State.

15. By letter dated March 27, 2013, the Department made additional inquiries regarding the operation of Entera companies, including inquiries regarding the relationship between the Entera companies and First Choice ASO and HR One Services. By the same letter, the Department requested additional details about Entera's operations in South Carolina, including complete contracts with its client companies and the declaration pages associated with the workers' compensation where Entera entities were primary insureds. To this date, no response has been received regarding those two entities.

16. Entera responded by a letter from its counsel dated April 10, 2013. Through its counsel, Entera asserted that it was not a PEO but rather an insurance broker who does not control in any way the employees but procures workers's compensation insurance for PEOs. It also asserted that all of the clients for Entera are actually PEOs themselves. These assertions are incorrect for the following reasons:

⁴ Labor Finders of South Carolina, Inc., with a location in Irmo, SC is listed as a client company on Entera's staff leasing policy.

(A) Entera's clients are not PEOs. Home by Choice, Inc. is a construction company. Fleet Force, Inc. , is, to the best of the Department's knowledge, also a construction company. Labor Finders of South Carolina provides temporary staffing and labor services for commercial, industrial, and construction applications, through its US franchise network. Labor Guys, LLC is likewise a temporary staffing company.

(B) With regard to its South Carolina clients, Entera is not an insurance broker. An insurance broker does not take policies in its own name; it merely facilitates the placement of policies. Entera has staff leasing workers' compensation policies in its own name as the primary insured. Moreover, Entera is not licensed as an insurance broker with the South Carolina Department of Insurance. See, S.C. Code Ann. Section 38-45-10 *et seq.*

(C) Through its counsel Entera also attached, based on the Department's request, its purported full South Carolina client agreement. The agreement was renamed as Workers' Compensation Service Agreement and references to Georgia employers and employees were removed. However, paragraph 3 of the agreement, page 2, which the Department did not have before, states the following:

Entera shall be primarily responsible for providing employee leasing and workers' compensation services through discretionary on site supervision, direction and control over covered employees. Entera shall provide workers' compensation coverage for covered employees and shall be considered the statutory employer of covered employees for workers' compensation purposes. ...Entera reserves the right to recommend the discipline or discharge of any covered employee... . Entera also reserves the right to direct and control the client company with respect to any work site or job location affecting any covered employee.

(Emphasis added.)

Despite proclamations as to being an ASO or an insurance broker, Entera's agreement language represents the essence of what a PEO is, a statutory employer. The quoted language is standard language describing the PEO co-employment relationship, as it appears in any other PEO agreements this Department regulates.

Administrative Action

Based on the facts above, there is evidence that Entera, and its affiliate companies, as well as its controlling persons have committed the following violations of South Carolina law:

1. Entera has knowingly engaged in professional employer services since at least September 2011 without a licence in violation of S.C. Code Sections 40-68-30(A), 40-68-150(A)(1) and 40-68-160(B) (6).
2. Various controlling persons of Entera have repeatedly violated S.C. Code Sections 40-68-30(A), 40-68-150(A)(1) and 40-68-160(B)(6) by acting as controlling persons without a license.

At the minimum, there have been multiple violations of South Carolina law by each Entera entity and by each controlling person associated with those entities. In situations as this, it is the policy of this Department to collect past license fees, past biennial assessment fees and to impose administrative penalties.

Based on the foregoing, **the Department orders all Entera companies to immediately cease and desist providing PEO services to client companies in South Carolina** and to file an application for a PEO license or PEO Group license should the companies wish to resume providing services. Further, the Department hereby imposes an administrative penalty of Twenty-Five Thousand Dollars (\$25,000) for the Entera companies referenced above as a group and a penalty of Two Thousand Dollars (\$2,000) on each controlling person of those companies. These penalties are due within thirty (30) days of your receipt of this decision.

The issuance of this determination represents a final staff decision. If you disagree with this finding, you may request a contested case hearing with the South Carolina Administrative Law Court (ALC) on this matter. Such a request must be made pursuant to the amended Rules of Procedure for the Administrative Law Court that became effective on May 1, 2013. Pursuant to Rule 11 of the amended ALC Rules of Procedure, the request must be made within thirty (30) days after notice of this decision at the following address:



Jana E. Shealy
Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Please note that faxed letters to the Clerk of the ALC are not acceptable for the purpose of filing a request for a contested case hearing.

Pursuant to Rule 11(D), the following elements must, at a minimum, be included within the request:

1. The name of the party requesting the hearing and the issue(s) for which the hearing is requested;
2. The caption or other information sufficient to identify the decision, order, letter, determination, action, or inaction which is the subject of the hearing;
3. A copy of the written agency decision, order, letter or determination, if any which gave rise to the request;
4. The relief requested.

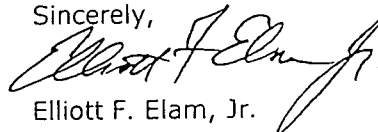
Furthermore, pursuant to Rule 71, the Administrative Law Court requires that a party requesting a contested case hearing must submit a filing fee in the amount of \$100 with the Administrative Law Court.

Finally, at the same time that you submit your written request to the ALC, you must serve a written copy of your request for a contested case hearing on the Department. A copy of your request, should you decide to file one, must be mailed to me at address listed on this letterhead. Again, please note that faxing a copy of your request for a contested case hearing to the Department is not acceptable.

Clark Fain
August 21, 2013
Page 7

If you fail to respond to this decision within thirty days after your receipt of this letter, the Department will provide notice of this decision to your client companies absent a showing that you have done so. If you have any questions concerning this decision, or if you want to discuss resolving this matter, please contact me as soon as possible.

Sincerely,



Elliott F. Elam, Jr.
Deputy Director

cc: David H. Keller, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of
Consumer Affairs,

Petitioner,

vs.

Entera Holdings, LLC and Entera Work
Compensation Solutions, LLC

Respondents.

MOTION TO DISMISS

DOCKET NO. 13-ALJ-30-0473-CC

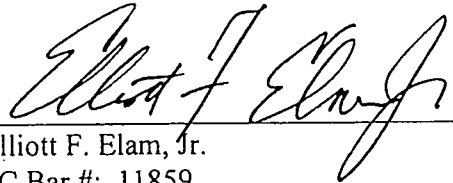
Pursuant to the Rules of this Court and the South Carolina Rules of Civil Procedure, Respondent South Carolina Department of Consumer Affairs (Department) hereby moves to dismiss the request for a contested case hearing filed by Entera Holdings, LLC and Entera Work Comp Solutions, LLC (Entera) for lack of subject matter jurisdiction.

Administrative Law Court Rule 11 (C) provides that unless otherwise provided by statute, a request for a contested case must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination. Failure to file the request within that time frame divests this Court of jurisdiction to hear a contested case. *Wedgfield Plantation Owners Association v. SCDHEC*, Docket No. 04-ALJ-07-0351-CC, citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985); and *Botany Bay Marina v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988). Furthermore, Appeal deadlines are absolute and the Court has no authority to expand the time in which the request for a contested case hearing must be filed. *Id.* citing *Mears v. Mears*, and *Clark v. SCDHEC*, Docket No. 98-ALJ-0498-CC; *Robinson v. SCDHEC*, Docket No. 02-ALJ-07-0034-CC; *Young v. Charleston County Assessor*, Docket No. 04-ALJ-17-0305-CC; *Charleston County*

Assessor v. Gladsky, Docket No. 01-ALJ-17-0386-CC; and *The Beach Company, Inc. v. SCDHEC*, Docket No. 04-ALJ-07-0199-CC.

In the instant case, as documented in the Federal Express shipping labels and the online tracking histories (Attachment 1), the Department's order was received separately by both Entera and its outside counsel on Friday August 23, 2013, and not on August 29, 2013, as alleged by Entera in its filing with this Court. Therefore, Entera received actual notice of the order on August 23, 2013 and was required to file with this Court by Monday September 23, 2013. Entera did not mail its request for a contested case until September 30, 2013.

Given Entera's failure to timely file its request for a contested case, the Department asks this Court to issue an order dismissing this case for lack of subject matter jurisdiction.



Elliott F. Elam, Jr.
SC Bar #: 11859
S.C. Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
Phone: (803) 734-4189
Fax: (803) 734-4287
eelam@scconsumer.gov

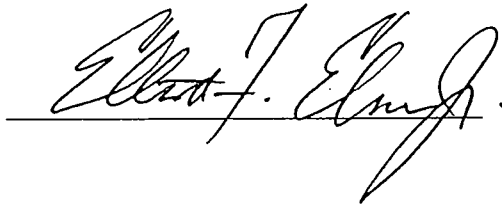
October 22, 2013

CERTIFICATE OF SERVICE

This is to certify that I, Elliott F. Elam, Jr., have this day served a copy of the foregoing **Motion to Dismiss** on the person(s) named below, at the address(es) set forth, by first class mail.

David H. Keller, Esquire
Constangy, Brooks & Smith, LLP
105 N. Spring Street, Suite 105
Greenville, SC 29601

Attorney for Entera Holdings, LLC and Entera Work Comp Solutions, LLC



October 22, 2013

FedEx Express **NEW Package US Airbill**

USCA199

FedEx Tracking Number

8771 0376 2150

1 From Please print and press hard.

Date 08-21-2013 Sender's FedEx Account Number 88804803 115948480-9

Sender's Name Elliott Elam Phone 803, 734-4200

Company DEPT OF CONSUMER AFFAIRS

Address 2221 DEVINE ST STE 200

City COLUMBIA State SC ZIP 29205-2418

2 Your Internal Billing Reference

3 To

Recipient's Name David H. Keller, Esq Phone ()

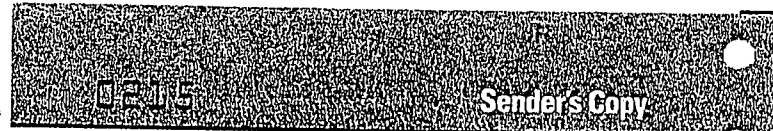
Company Constangy Brooks + Smith, LLP

Address 105 N Spring St., Suite 105

Address Greenville, SC State SC ZIP 29601

0443015870

The FedEx US Airbill has changed. See Section 4.
For shipments over 150 lbs., order the new FedEx Express Freight US Airbill.



4 Express Package Service

*To most locations. NOTE: Service order has changed. Please select carefully.

Packages up to 150 lbs. For packages over 150 lbs., use the new FedEx Express Freight US Airbill.

Next Business Day

- FedEx First Overnight**
Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Priority Overnight**
Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Standard Overnight**
Next business afternoon.* Saturday Delivery NOT available.

2 or 3 Business Days

- NEW FedEx 2Day A.M.**
Second business morning.* Saturday Delivery NOT available.
- FedEx 2Day**
Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Express Saver**
Third business day.* Saturday Delivery NOT available.

5 Packaging

*Declared value limit \$500.

- FedEx Envelope***
- FedEx Pak***
- FedEx Box**
- FedEx Tube**
- Other**

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery**
NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.
- No Signature Required**
Package may be left without obtaining a signature for delivery.
- Direct Signature**
Someone at recipient's address may sign for delivery. Fee applies.
- Indirect Signature**
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?

- No**
- Yes** As per attached Shipper's Declaration.
- Yes** Shipper's Declaration not required.
- Dry Ice** Dry Ice, 8, UN 1845 _____ kg
- Cargo Aircraft Only**

7 Payment Bill to:

- Sender** (Acct. No. in Section 1 will be billed)
- Recipient**
- Third Party**
- Credit Card**
- Cash/Check**

Total Packages _____ Total Weight _____ Total Declared Value! _____

Your liability is limited to \$100 unless you declare a higher value. See back for details. By using this Airbill you agree to the service conditions on the back of this Airbill and in the current FedEx Service Guide, including terms that limit our liability.

611

PULL AND RETAIN THIS COPY BEFORE AFFIXING TO THE PACKAGE. NO POUCH NEEDED.

ATTACHMENT 1



Ship (P/U) date :
Thur 8/22/2013 4:21 pm
COLUMBIA, SC US



Delivered
Signed for by: C.WINSTEAD

Actual delivery :
Fri 8/23/2013 4:06 pm
SC US

Travel History

Date/Time	Activity	Location
- 8/23/2013 - Friday		
4:06 pm	Delivered	SC
3:17 pm	On FedEx vehicle for delivery	GREENVILLE, SC
9:35 am	At local FedEx facility	GREENVILLE, SC
9:11 am	Delivery exception Customer not available or business closed	GREENVILLE, SC
7:30 am	Delivery exception Customer not available or business closed	GREENVILLE, SC
7:08 am	On FedEx vehicle for delivery	GREENVILLE, SC
6:40 am	At local FedEx facility	GREENVILLE, SC
6:19 am	At destination sort facility	GREER, SC
5:02 am	Departed FedEx location	INDIANAPOLIS, IN
12:38 am	Arrived at FedEx location	INDIANAPOLIS, IN
- 8/22/2013 - Thursday		
9:33 pm	Left FedEx origin facility	WEST COLUMBIA, SC
4:21 pm	Picked up	WEST COLUMBIA, SC

Local Scan Time

Shipment Facts

Tracking number	877103762150	Service	FedEx First Overnight
Signature services	Direct signature required	Delivered To	Receptionist/Front Desk
Packaging	FedEx Envelope	Special handling section	Deliver Weekday, Direct Signature Required

FedEx *NEW Package*
Express *US Airbill*

FedEx
Tracking
Number

8771 0376 2068

1 From *Please print and press hard.*

Date 08-21-2013

Sender's FedEx
Account Number

1155-6460-49

Sender's
Name

Elliott Elam

Phone (803) 734-4200

Company DEPT OF CONSUMER AFFAIRS

Address 2221 DEVINE ST STE 200

Dept./Floor/Suite/Room

City COLUMBIA

State SC

ZIP 29205-2418

2 Your Internal Billing Reference

First 24 characters will appear on invoice.

3 To

Recipient's
Name

Clark Fain

Phone ()

Company

Entera Holdings, LLC

Address

2030 Powers Ferry Rd., SE

We cannot deliver to P.O. boxes or P.O. ZIP codes.

Dept./Floor/Suite/Room

Address

Suite 122

Use this line for the HOLD location address or for continuation of your shipping address.

City

Atlanta

State

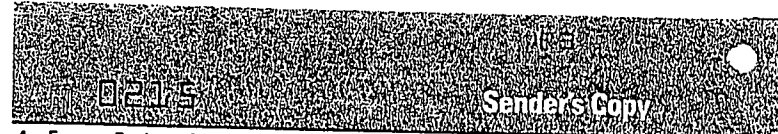
GA

ZIP

30339

0443015870

The FedEx US Airbill has changed. See Section 4.
For shipments over 150 lbs., order the new FedEx Express Freight US Airbill.



4 Express Package Service

* To most locations.

NOTE: Service order has changed. Please select carefully.

Packages up to 150 lbs.
For packages over 150 lbs., use the new
FedEx Express Freight US Airbill.

Next Business Day

FedEx First Overnight
Earliest next business morning delivery to select
locations. Friday shipments will be delivered on
Monday unless SATURDAY Delivery is selected.

FedEx Priority Overnight
Next business morning.* Friday shipments will be
delivered on Monday unless SATURDAY Delivery
is selected.

FedEx Standard Overnight
Next business afternoon.*
Saturday Delivery NOT available.

2 or 3 Business Days

NEW FedEx 2Day A.M.
Second business morning.*
Saturday Delivery NOT available.

FedEx 2Day
Second business afternoon.* Thursday shipments
will be delivered on Monday unless SATURDAY
Delivery is selected.

FedEx Express Saver
Third business day.*
Saturday Delivery NOT available.

5 Packaging

* Declared value limit \$500.

FedEx Envelope*

FedEx Pak*

**FedEx
Box**

**FedEx
Tube**

Other

6 Special Handling and Delivery Signature Options

SATURDAY Delivery

NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

No Signature Required
Package may be left without
obtaining a signature for delivery.

Direct Signature
Someone at recipient's address
may sign for delivery. Fee applies.

Indirect Signature
If no one is available at recipient's
address, someone at a neighboring
address may sign for delivery. For
residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?

One box must be checked.

No

Yes

As per attached
Shipper's Declaration.

Yes

Shipper's Declaration
not required.

Dry Ice

Dry Ice, S UN 1845 _____ kg

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging
or placed in a FedEx Express Drop Box.

Cargo Aircraft Only

7 Payment *Bill to:*

Sender
Acct. No. in Section
1-2 will be billed.

Recipient

Third Party

Credit Card

Cash/Check

FedEx Acct. No.
Credit Card No.

Total Packages

Total Weight

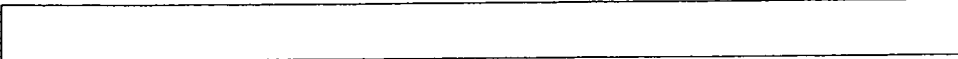
Total Declared Value¹

lbs. \$ _____ .00

¹Our liability is limited to \$100 unless you declare a higher value. See back for details. By using this Airbill you agree to the service conditions on the back of the Airbill and in the current FedEx Service Guide, including terms that limit our liability.

611

PULL AND RETAIN THIS COPY BEFORE AFFIXING TO THE PACKAGE. NO POUCH NEEDED.



Ship (P/U) date :
Thur 8/22/2013 4:21 pm
COLUMBIA, SC US



Delivered
Signed for by: M.BROWN

Actual delivery :
Fri 8/23/2013 6:56 am
GA US

Travel History

Date/Time	Activity	Location
- 8/23/2013 - Friday		
6:56 am	Delivered	GA
6:33 am	On FedEx vehicle for delivery	MARIETTA, GA
6:13 am	At local FedEx facility	MARIETTA, GA
4:47 am	At destination sort facility	ATLANTA, GA
2:50 am	Departed FedEx location	MEMPHIS, TN
- 8/22/2013 - Thursday		
11:25 pm	Arrived at FedEx location	MEMPHIS, TN
9:33 pm	Left FedEx origin facility	WEST COLUMBIA, SC
4:21 pm	Picked up	WEST COLUMBIA, SC

Local Scan Time

Shipment Facts

Tracking number	877103762068	Service	FedEx First Overnight
Signature services	Direct signature required	Delivered To	Receptionist/Front Desk
Packaging	FedEx Envelope	Special handling section	Deliver Weekday, Direct Signature Required

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 13-ALJ-30-0473-CC

South Carolina Department of,
Consumer Affairs

Petitioner,

vs.

Entera Holdings, LLC and Entera Work
Compensation Solutions, LLC

Respondents.

RESPONSE TO MOTION TO
DISMISS

The defendant, Entera Holding, LLC and Entera Work Compensations Solutions, LLC would response to the motion to dismiss as follows:

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

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

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

Rule 5 specifically states "Service shall be made by delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order. Service is deemed complete upon mailing. Service that complies with rule 5(b)(1) SCRCP, also shall satisfy this rule." Rule 5 states that the service must be made by delivering a copy directly to the attorney or by *mailing* the same via United States Postal Service. Service is not complete until one of those two items has occurred. It is therefore submitted that the letter which purports to be a final agency determination has never properly been served and service had never been accomplished.

**2. THE FINAL "STAFF" DETERMINATION IS NOT A CONTESTED CASE
UNDER THE ADMINISTRATIVE PROCEDURES ACT.**

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

The undersigned specifically requested a meeting with the agency prior to the issuance of the agency determination and this was declined (exhibit 1). Because no hearing was ever held this court actually lacks subject matter jurisdiction over the matter. Further, while the letter of August 21, 2013 maybe a "final staff decision" it is not a final "agency" decision as required by Rule 11. As such, the Administrative Law Court lacks subject matter jurisdiction over the entire process.

**3. THE LETTER OF AUGUST 21 DOES NOT CONSTITUTE A FINAL AGENCY
DECISION.**

As noted above the letter itself does not state that it is a final agency decision as required by the rules. Further, the deputy director of the agency, Elliot F. Elam, Jr. added a "caveat" to the agency decision, in which he made clear the letter was not a final agency decision if a response was made. He stated "if you fail to respond to this decision within thirty (30) days of your receipt of this letter the department will provide notice of this decision to you client company absence showing you have done so." The defendants, did in fact write Mr. Elam within thirty days after the date of the letter, as directed, providing him a response to the decision, to which he failed to respond (exhibit 2). Consequently by the addition of the additional language Mr. Elam, himself, advised the parties the letter was ~~not~~ a final agency decision. Mr. Elam altered the requirements stated earlier in the letter by stating that defendants were required to contact the agency, not the Administrative Law Court within thirty days. Therefore the Administrative Law Court lacks subject matter jurisdiction over the entire process.

**4. THAT THE ATTORNEY FOR DEFENDANT RECEIVED ACTUAL NOTICE OF
THE LETTER ON AUGUST 29, 2013.**

The agency has provided a Federal Express receipt showing the item was delivered to Federal Express on August 22, 2013. It indicates that it was "delivered" at 4:06 p.m. on Friday, August 23, 2013. The notice does not indicate where it was delivered or to whom it was delivered. The undersigned can merely state that I was out of the office on Friday, August 23. The undersigned's calendar for the week of August 26th indicates numerous events, many of which were out of the office. According to the records of the undersigned actual notice of the letter was received on August 29, 2013. This would have made the appeal due on August 28, 2013 which was a Saturday. The appeal was, therefore, filed on the 30th,

which was the next business day after the thirty days had run. Since actual notice was clearly received by the undersigned on August 29 and the agency has failed to advise where and how the document was purportedly delivered the provisions of Rule 11 have been satisfied. Further, Rule 11 clearly contemplates the issue before the court at this time by allowing a period of ninety days for appeal.

It is therefore, respectfully noted that the Administrative Law Court should dismiss this matter in it's entirety in that the requirements of Title 1 have never been met. Further, even if the letter on appeal fits into the terms and provisions of Title 1, the Deputy Executive Director of the agency advised the parties that he required contact with the agency rather than an appeal, even though an appeal with timely taken.

It is further respectfully submitted that the Court either dismiss this entire matter for lack of subject matter and remand it back to the Department of Consumer Affairs for strict compliance with Title 1 or in the alternative that the matter go forward based on defendant's appeal.

Respectfully Submitted.

November 1, 2013



David Hill Keller
SC Bar#: 003345
Constangy, Brooks & Smith, LLP
105 N. Spring St, Ste. 105
Greenville, SC 29601
Phone: (864) 990 – 1882
Fax: (864) 242 – 9815
dhkeller@constangy.com

CONSTANGY
BROOKS & SMITH, LLP

105 N. SPRING STREET
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September 6, 2013

Elliot F. Elam, Jr.
Deputy Director
South Carolina Department of Consumer
Affairs
Post Office Box 5757
Columbia, South Carolina 29250-5757

Re: Unlicensed PEO Operation in South Carolina

Dear Mr. Elam:

I am in receipt of your letter to Mr. Clark Fain of August 21, 2013 regarding the above referenced matter.

Please accept this letter as a formal objection to your findings of August 21. Mr. Fain and I would appreciate the opportunity to meet with you and present additional information so as to avoid the necessity of filing for a formal hearing with the Administrative Law Court. If we have not spoken by the time you receive this letter, I would appreciate it if you would give me a call at the above phone number, or on my cell phone, (864) 380-5363.

Yours truly,



David H. Keller

DHK/cva

cc: Clark Fain
Entera Holdings, Inc.
2030 Powers Ferry Road, Suite 122

32

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of
Consumer Affairs,

Petitioner,

vs.

Entera Holdings, LLC and Entera Work
Compensation Solutions, LLC

Respondents.

REPLY TO RESPONSE TO
MOTION TO DISMISS

DOCKET NO. 13-ALJ-30-0473-CC

Pursuant to the Rules of this Court and the South Carolina Rules of Civil Procedure, Respondent South Carolina Department of Consumer Affairs (Department) hereby replies to the Response to Motion to Dismiss filed by Entera Holdings, LLC and Entera Work Comp Solutions, LLC (Entera) in the above captioned case, and states:

(1) In its Response, Entera argues that the Department's decision in this matter has not been served properly, claiming that Administrative Law Court Rule 3 specifically provides for service by mail or service by personal delivery only. Initially, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of the Administrative Law Court govern the service of an order by an agency upon a person found by the agency to be in violation of its regulatory statutes and/or regulations. The Department was serving its decision, not initiating a proceeding at the Administrative Law Court. Therefore, the Rule does not apply.

(2) Beyond that, even if Rule 3 did apply to an agency's service of its order, the Rule governs the computation of time, not the method for service. Therefore, contrary to Entera's argument in its Response, Rule 3 does not specifically provide for service by mail or service by personal delivery only.

(3) Entera also argues that the provisions of Administrative Law Court Rule 5 would render the Department's service of its order incomplete. As before, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of this Court govern the service of an order by an agency upon a person found by the agency to be in violation of its regulatory statutes and/or regulations. Rule 5 provides that any document, pleading, motion, brief or memorandum or other paper filed with the Court shall be served upon all parties to the proceeding. When the Department issued its order, there was no proceeding before this Court, and there was no requirement to file it with this Court. Therefore, the Rule does not apply.

(4) Beyond that, even if Rule 5 did apply to an agency's service of its order, the rule also provides that service that complies with Rule 5(b)(1), SCRCF, also shall satisfy this Rule. Rule 5(b)(1), SCRCF provides that service may be made by:

.....delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein.

The Department's order was delivered to both Entera and its outside counsel by Federal Express, and as the attachments to the Department's Motion to Dismiss show, was accepted and signed for at both locations. Further support for this method of delivery is found in Rule 4 (d)(9), SCRCF which provides for service by a commercial delivery service.

(5) In its Response, Entera also argues that the Department's determination is not a "contested case" under the Administrative Procedures Act citing S.C. Code Ann. § 1-23-505 (Supp. 2012). Section 1-23-505 (3) defines a contested case as a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing. Any contested case hearing concerning a matter before the Department is held before the Administrative Law Court, not the agency. See, S.C. Code Ann. 37-6-414 (supp. 2012). There are no contested hearings before the Department. Entera's argument that a contested hearing before the agency was required before there could be a contested hearing this Court is confusing and completely without merit.

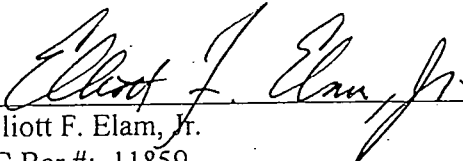
(6) Entera further argues in its Response that the Department's order of August 21, 2013 is not a final agency decision, despite the fact that the words "**FINAL AGENCY DECISION**" are noted at the top of the first page. Apparently, counsel has zeroed in on a single instance on page 6 which uses the phrase "final staff decision". However, there is nothing in the order, or in South Carolina law, to indicate that there is any further process before the agency for an aggrieved party after a staff finding; the staff finding is the agency finding. As noted above, there are no contested hearings before the Department. The order clearly states that if Entera disagreed with the findings, its remedy was to request a contested case before the ALC. The order further cites the relevant provisions of the ALC rules that apply. Furthermore, contrary to Entera's argument, the final paragraph did not, in any way, alter the process set forth in the order. Informing a party that the Department will directly give notice of the decision to its client companies is nothing more than an

incentive not to ignore the order, and fail to ask for a contested case or to make some other attempt to settle the matter through filing a license application and to pay a negotiated administrative penalty. It does not change the other terms of the order.

(7) Entera argues that it did not receive actual notice of the Department's order until August 29, 2013, a full six days after the Federal Express tracking receipt showed delivery to both Entera and its outside counsel. The Department served the order on both Entera's office in Atlanta and to Mr. Keller's office in Greenville, because although Mr. Keller had represented Entera in prior discussions with the agency, we did not know for a fact that Mr. Keller would handle a request for a contested case. In the Response, Entera admits that the Federal Express tracking receipt shows delivery on Friday August 23, but argues that the receipt does not indicate where it was delivered or to whom it was delivered. However, the tracking receipt for Mr. Keller, attached to the Department's Motion to Dismiss, clearly shows that the package was delivered to **Receptionist/Front Desk** and was signed for by **C. Winstead**. The tracking receipt for Mr. Fain shows that the package was delivered on August 23 to **Receptionist/Front Desk** and signed for by **M. Brown**. Both Entera and its outside counsel had constructive and actual notice of the Department's order on August 23, 2013. The fact that Mr. Keller did not look at it until August 29 does not extend Entera's time to request a contested case pursuant to Rule 11 (C).

(8) Finally, Entera mentions the 90-day provision of Rule 11(C) and seems to argue that the instant case is a situation contemplated by that provision. The 2009 Revised Notes to that Rule states that there must be substantial cause shown for an administrative law judge to allow a filing based on that provision. The Department submits that Entera has made no such showing.

(9) Contrary to Entera's Response, it has been provided with everything required for due process under the Administrative Law Court Rules, the South Carolina Administrative Procedures Act and the South Carolina Constitution. Given Entera's failure to timely file its request for a contested case, the Department asks this Court to issue an order dismissing this case for lack of subject matter jurisdiction.


Elliott F. Elam, Jr.
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S.C. Department of Consumer Affairs
P.O. Box 5757
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November 8, 2013

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December 6, 2013

The Honorable Deborah Brooks Durden
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

**Re: South Carolina Department of Consumer Affairs v. Entera Holdins, LLC
and Entera Work Comp Solutions, LLC.
Docket No. 13-ALJ-30-0473-CC**

Dear Judge Durden:

I am in receipt of the above referenced order in this matter. Pursuant to Rule 29 I would appreciate it if you would reconsider it upon the following grounds:

1. The order does not address the issue of whether the original order was properly served under the terms and provisions of South Carolina Law.
2. The rules and regulations of the administrative law court do not allow for or provide for a return to a response from the moving party's original motion and, therefore, the items in Mr. Elaim's letter of November 8th should not have been considered.
3. The individual allegedly receiving the document is no longer employed by this law firm and the facts and circumstances of her alleged receipt of the same are unknown to the undersigned.
4. That the final paragraph of the original agency decision altered the terms of the letter and that the defendants, herein, complied with the requirements placed on them by the agency itself.
5. Any and all other matters raised in my original response which have not been directly addressed herein are requested to be preserved and considered by you.

38

Honorable Debra Brooks Durden
December 6, 2013
Page 2

Yours truly,

A handwritten signature in black ink, appearing to read "D. H. Keller". The signature is fluid and cursive, with a large initial "D" and a long horizontal stroke at the end.

David H. Keller

DHK/cva

cc: Elliot F. Elam (COS)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Designation of Matter to be Included on the
Record on Appeal contains no matter which is irrelevant to the appeal.

August 6, 2014



David Hill Keller
Constangy, Brooks & Smith, LLP
105 North Spring Street, Suite 105
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(864) 990-1882
Attorney for Respondents

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

BRIEF OF APPELLANTS

David Hill Keller
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Greenville, South Carolina 29201

TABLE OF CONTENTS

Table Of Contents	i
Statement of Issues on Appeal	ii
Statement Of The Case	1
ISSUE I	2
ISSUE II	3
ISSUE III	3
ISSUE IV	4
ISSUE V	5
Conclusion	5

STATEMENT OF ISSUES ON APPEAL

ISSUE I

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

ISSUE II

THE FINAL "STAFF" DETERMINATION IS NOT A CONTESTED CASE UNDER THE ADMINISTRATIVE PROCEDURES ACT

ISSUE III

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

ISSUE IV

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

ISSUE V

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

Statement of the Case

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

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

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

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

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

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

ARGUMENT

ISSUE I

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

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

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

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

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

ISSUE II

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

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

The undersigned specifically requested a meeting with the agency prior to the issuance of the agency determination and this was declined (ROA p.13). Because no hearing was ever held the Administrative Law Court actually lacked subject matter jurisdiction over the matter. Further, while the letter of August 21, 2013 maybe a “final staff decision” it is not a final “agency decision” as defined by Rule 11 South Carolina Administrative Law Court Rules. As such, the Administrative Law Court lacked subject matter jurisdiction over the entire process.

ISSUE III

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

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

a "caveat" to the agency decision, in which he made clear the letter was not a final agency decision if a response was made. He stated "if you fail to respond to this decision within thirty (30) days of your receipt of this letter, the department will provide notice of this decision to your client companies absent a showing you have done so." (ROA p.20) The defendants, did in fact write Mr. Elam within thirty days after the date of the letter, as directed, providing him a response to the decision, to which he failed to respond (ROA p.32). Consequently by the addition of the additional language Mr. Elam, himself, advised the parties the letter was not a "final agency decision."(ROA p.20) Mr. Elam altered the requirements stated earlier in the letter by stating that defendants were required to contact the agency, not the Administrative Law Court within thirty days. Therefore the Administrative Law Court lacked subject matter jurisdiction over the entire process.

ISSUE IV

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

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

days had run. Since actual notice was clearly received by the undersigned on August 29 and the agency failed to advise where and how the document was purportedly delivered the provisions of Rule 11 South Carolina Administrative Law Court Rules have been satisfied. Further, Rule 11 clearly contemplates the issue before the court at this time by allowing a period of ninety days for appeal.

ISSUE V

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

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

CONCLUSION

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

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

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Agency Letter of February 22, 2013
Email to Department Attorney Dated March 5, 2013
Agency Letter Dated August 21, 2013
Agency's Motion to Dismiss
Agency's Reply Motion
Order of Judge Durden
Entera's Motion to Reconsider

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2014-000246

South Carolina Department of Consumer Affairs Respondent

v.

Entera Holdings, LLC, and Entera Work Compensation Solutions, LLC Appellants

BRIEF OF RESPONDENT
DEPARTMENT OF CONSUMER AFFAIRS

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Attorneys for Respondent
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iii

STATEMENT OF THE CASE 1

ARGUMENTS

I. THE RULES OF PROCEDURE FOR THE ADMINISTRATIVE LAW COURT DO NOT GOVERN THE DEPARTMENT’S SERVICE OF ITS FINAL AGENCY DECISION.....2

II. THE APPELLANT FAILED TO TIMELY FILE A REQUEST FOR A CONTESTED CASE HEARING BEFORE THE ADMINISTRATIVE LAW COURT.....4

III. THE DEPARTMENT’S DECISION DATED AUGUST 21, 2013 WAS A FINAL AGENCY DECISION.....6

IV. THE ADMINISTRATIVE LAW COURT PROPERLY ACCEPTED THE DEPARTMENT’S REPLY TO ENTERA’S RESPONSE TO THE MOTION TO DISMISS.....7

CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Botany Bay Marina v. Townsend</i> , 296 S.C. 330, 372 S.E.2d 584 (1988).....	4
<i>Mears v. Mears</i> , 287 S.C. 168, 337 S.E.2d 206 (1985).....	4

Administrative Decisions

<i>The Beach Company, Inc. v. SCDHEC</i> , Docket No. 04-ALJ-07-0199-CC.....	4
<i>Charleston County Assessor v. Gladsky</i> , Docket No. 01-ALJ-17-0386-CC.....	4
<i>Clark v. SCDHEC</i> , Docket No. 98-ALJ-0498-CC.....	4
<i>Robinson v. SCDHEC</i> , Docket No. 02-ALJ-07-0034-CC.....	4
<i>Wedgfield Plantation Owners Association v. SCDHEC</i> , Docket No. 04-ALJ-07-0351-CC.....	4
<i>Young v. Charleston County Assessor</i> , Docket No. 04-ALJ-17-0305-CC.....	4

Statutes

S.C. Code Ann. § 1-23-505 (Supp. 2013)	6
S.C. Code Ann. § 37-6-414 (Supp. 2013)	7

Other Authorities

South Carolina Constitution Article I Section 22.....	7
South Carolina Administrative Law Court Rules: Rule 3, SCALC.....	2
South Carolina Administrative Law Court Rules: Rule 5, SCALC.....	2,3
South Carolina Administrative Law Court Rules: Rule 11, SCALC.....	4,5
South Carolina Administrative Law Court Rules: Rule 19, SCALC.....	7
South Carolina Rules of Civil Procedure: Rule 4, SCRCP.....	3
South Carolina Rules of Civil Procedure: Rule 5, SCRCP.....	3

STATEMENT OF ISSUES ON APPEAL

- I. Was the service of the Department's final agency decision governed by the Rules of Procedure for the South Carolina Administrative Law Court?
- II. Did the Appellant timely file a request for a contested case hearing before the Administrative Law Court?
- III. Was the Department's decision a final agency decision?
- IV. Did the Administrative Law Court err when it accepted the Department's Reply to Entera's Return to Motion to Dismiss?

STATEMENT OF THE CASE

This matter comes before the Court on the Petition for Judicial Review filed by Entera Holdings, LLC and Entera Work Comp Solutions, LLC (collectively “Entera” or “Appellant”). The appeal challenges the Order of the Administrative Law Court (ALC) dismissing Entera’s request for a contested case hearing on a final agency decision of the Department of Consumer Affairs (“Department” or “Respondent”). The final agency decision cited Entera for operating as a Professional Employer Organization (PEO) without a license.

As documented in Federal Express shipping labels and online tracking histories, the Department’s decision dated August 21, 2013 was received separately by both Entera and its outside counsel on Friday August 23, 2013. Entera mailed its request for a contested case at the ALC on September 30, 2013. On October 22, 2013, the Department filed a Motion to Dismiss with the ALC. Entera filed its Response to the motion on November 1, 2013. The Department received a copy of the Response by U.S. Mail on November 4, 2013. On November 8, the Department filed a Reply to Entera’s Response on November 8, 2013. On November 26, 2013, Judge Durden issued an Order of Dismissal. On December 6, 2013, Entera filed a request for reconsideration. That request was deemed denied by SCALC Rule 29(D)(4) when the court declined to issue a ruling on the request. Entera filed its Notice of Appeal with this Court on February 4, 2014.

ARGUMENT

I.

THE RULES OF PROCEDURE FOR THE ADMINISTRATIVE LAW COURT DO NOT GOVERN THE DEPARTMENT'S SERVICE OF ITS FINAL AGENCY DECISION.

In its Brief, Entera argues that the service of Department's decision in this matter was not proper, claiming that Administrative Law Court Rule 3 specifically provides for service by mail or service by personal delivery only. Initially, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of the Administrative Law Court govern the service of an order by an agency upon a person found by the agency to be in violation of its regulatory statutes and/or regulations. The Department was serving its decision, not initiating a proceeding at the Administrative Law Court. Therefore, the Rule does not apply. Beyond that, even if Rule 3 did apply to an agency's service of its order, Rule 3 governs the computation of time, not the method for service. Therefore, contrary to Entera's argument in its Brief, Rule 3 does not specifically provide for service by mail or service by personal delivery only.

Entera also argues that the provisions of SCALC Rule 5 would render the Department's service of its order incomplete. As before, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of the ALC Rules govern the service of an order by an agency upon a person found by the

agency to be in violation of its regulatory statutes and/or regulations. Rule 5 provides that any document, pleading, motion, brief or memorandum or other paper filed with the Court shall be served upon all parties to the proceeding. When the Department issued its order, there was no proceeding before the ALC, and there was no requirement to file it with the ALC. Therefore, the Rule does not apply.

Beyond that, even if Rule 5 did apply to an agency's service of its order, the rule also provides that service that complies with Rule 5(b)(1), SCRCP, also shall satisfy this Rule. Rule 5(b)(1), SCRCP provides that service may be made by:

.....delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein.

The Department's order was delivered to both Entera and its outside counsel by Federal Express, and as the attachments to the Department's Motion to Dismiss show, was accepted and signed for at both locations. Further support for this method of delivery is found in Rule 4 (d)(9), SCRCP which provides for service by a commercial delivery service.

II.

THE APPELLANT FAILED TO TIMELY FILE A REQUEST FOR A CONTESTED CASE HEARING BEFORE THE ADMINISTRATIVE LAW COURT.

Administrative Law Court Rule 11 (C) provides that unless otherwise provided by statute, a request for a contested case must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination. Failure to file the request within that time frame divests the ALC of jurisdiction to hear a contested case. *Wedgfield Plantation Owners Association v. SCDHEC*, Docket No. 04-ALJ-07-0351-CC, citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985); and *Botany Bay Marina v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988). Furthermore, appeal deadlines are absolute and the ALC has no authority to expand the time in which the request for a contested case hearing must be filed. *Id.* citing *Mears v. Mears*, and *Clark v. SCDHEC*, Docket No. 98-ALJ-0498-CC; *Robinson v. SCDHEC*, Docket No. 02-ALJ-07-0034-CC; *Young v. Charleston County Assessor*, Docket No. 04-ALJ-17-0305-CC; *Charleston County Assessor v. Gladsky*, Docket No. 01-ALJ-17-0386-CC; and *The Beach Company, Inc. v. SCDHEC*, Docket No. 04-ALJ-07-0199-CC.

In the instant case, as documented in Federal Express shipping labels and online tracking histories, the Department's order was received separately by both Entera and its outside counsel on Friday August 23, 2013, and not on August 29, 2013, as alleged by Entera. Therefore, Entera received actual notice of the order on August 23, 2013 and was required to file with the ALC by Monday September 23, 2013. Entera did not mail its request for a contested case until September 30, 2013, after the deadline.

Entera argues that it did not receive actual notice of the Department's order until August 29, 2013, six days after the Federal Express tracking receipt showed delivery to both Entera and its outside counsel. The Department served the order on both Entera's office in Atlanta and to Mr. Keller's office in Greenville, because although Mr. Keller had represented Entera in prior discussions with the agency, we did not know for a fact that Mr. Keller would handle a request for a contested case. In its Brief, Entera admits that the Federal Express tracking receipt shows delivery on Friday August 23, but argues that the receipt does not indicate where it was delivered or to whom it was delivered. However, the tracking receipt for Mr. Keller, attached to the Department's Motion to Dismiss, clearly shows that the package was delivered to **Receptionist/Front Desk** and was signed for by **C. Winstead**. The tracking receipt for Mr. Fain at Entera shows that the package was delivered on August 23 to **Receptionist/Front Desk** and signed for by **M. Brown**. Both Entera and its outside counsel had constructive and actual notice of the Department's order on August 23, 2013. The fact that Mr. Keller did not look at it until August 29 does not extend Entera's time to request a contested case pursuant to Rule 11

Entera's Brief at 10 (c).

Entera's Brief at 10 (c).

III.

THE DEPARTMENT'S DECISION DATED AUGUST 21, 2013 WAS A FINAL AGENCY DECISION.

In its Brief, Entera further argues that the Department's order of August 21, 2013 is not a final agency decision, despite the fact that the words "**FINAL AGENCY DECISION**" are noted at the top of the first page. The basis of this claim is a single instance on page 6 of the decision which uses the phrase "final staff decision". However, there is nothing in the order, or in South Carolina law, to indicate that there is any further process before the agency for an aggrieved party after a staff finding; the staff finding is the agency finding. There are no contested hearings before the Department. The order clearly states that if Entera disagreed with the findings, its remedy was to request a contested case before the ALC. The order further cites the relevant provisions of the ALC rules that apply, with instructions how to request a contested case hearing. Furthermore, contrary to Entera's argument, the final paragraph of the decision did not, in any way, alter the process set forth in the order. Informing a party that the Department will directly give notice of the decision to its client companies is nothing more than an incentive not to ignore the order by failing to ask for a contested case or to make some other attempt to settle the matter through filing a license application and paying a negotiated administrative penalty. It does not change the other terms of the order.

Entera also argues in its Brief that the Department's determination is not a "contested case" under the Administrative Procedures Act citing S.C. Code Ann. § 1-23-505 (Supp. 2013). Section 1-23-505 (3) defines a contested case as a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal

rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing. Any contested case hearing concerning a matter before the Department is held before the Administrative Law Court, not the agency. See, S.C. Code Ann. 37-6-414 (supp. 2013). There are no contested hearings before the Department. Entera's argument that a contested hearing before the agency was required before there could be a contested hearing before the ALC is confusing at best, and completely without merit.

IV.

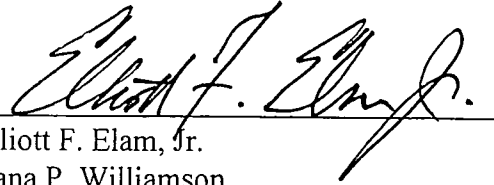
THE ADMINISTRATIVE LAW COURT PROPERLY ACCEPTED THE DEPARTMENT'S REPLY TO ENTERA'S RESPONSE TO THE MOTION TO DISMISS.

In its Brief, Entera argues that the Administrative Law Court erred by allowing the Department to supplement its initial filing citing SCALC Rule 19. As noted, by Entera, Rule 19 clearly allows a reply to be filed by a party which has made a motion. The Department filed a reply as allowed for in the rule. It did not "supplement" its original filing. Entera also argues that Rule 19 "does not allow for the inclusion of additional evidence or matters" in a reply. Entera does not specify what evidence or additional matters it is referring to. A cursory examination of the Department's reply will show that it is entirely legal arguments addressing Entera's response to the motion to dismiss. There are no attachments or anything that could remotely be considered evidence.

CONCLUSION

For the foregoing reasons, the Department asks this Court to affirmed the order of the Administrative Law Court.

By:



Elliott F. Elam, Jr.
Hana P. Williamson
S.C. Department of Consumer Affairs
Post Office Box 5757
Columbia, S.C. 29250-5757
(803) 734-4189

June 10, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

REPLY BRIEF OF APPELLANTS

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

TABLE OF CONTENTS

Table Of Contents	i
ISSUE I	1
ISSUE II	1
Conclusion	2

ARGUMENT

ISSUE I

THE DOCUMENT IN QUESTION WAS NEVER PROPERLY SERVED PURSUANT TO SOUTH CAROLINA LAW

Respondents state that they can serve papers upon a party by personal service. While appellants do not dispute this, the particular document in question was not served by personal service but was served by a third party delivery service. As noted in the brief-in-chief, all of the rules and regulations of South Carolina appellants have been able to find, require service of documents by US Mail.

It, therefore, remains the contention of appellants that service of any legal document in South Carolina is not effective unless it is either delivered by personal service, as noted by the Department or by US Mail.

ISSUE II

THE AGENCY ALTERED THE TERMS AND PROVISIONS OF THE FINAL AGENCY DECISION

Regardless of any other items in the letter of August 21, 2013, the Department altered the terms of the final agency decision, by including the last paragraph requiring that appellants contact "the Department" within 30 days of the receipt of the letter, which was accomplished well within that timeframe. As such, though the Department may have unintentionally altered the terms of the original letter, nonetheless they are the drafters of the letter and their Deputy Director added a paragraph to the letter indicating that a response to "the Department," not the ALJ, was due within 30 days. (ROA p.20)

CONCLUSION

It is therefore respectfully submitted that the order of the ALJ be vacated and the matter be remanded to the agency.

Respectfully Submitted,



David Hill Keller, Esq.

Bar # 003345

Constangy, Brooks & Smith, LLP

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

South Carolina Department of Consumer Affairs,
Respondent,

v.

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

Appellate Case No. 2014-000246

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2015-UP-102
Submitted January 1, 2015 – Filed March 4, 2015

AFFIRMED

David Hill Keller, of Constangy Brooks & Smith, LLP,
of Greenville, for Appellants.

Hana Pokorna-Williamson, Elliott F. Elam, Jr., and J.
Matthew Aronson, all of the South Carolina Department
of Consumer Affairs, of Columbia, for Respondent.

PER CURIAM: Entera Holdings, LLC and Entera Work Compensation Solutions, LLC (collectively, Entera) appeal the Administrative Law Court's (ALC) dismissal of their request for a contested case. Entera argues: (1) the Department of Consumer Affairs (the Department) never properly served its final decision; (2) the Department's letter informing Entera of its decision did not constitute a final agency decision; (3) Entera was not afforded an opportunity for a contested case before the Department; (4) Entera timely filed its request for a contested case within thirty days of receiving notice of the Department's final decision; and (5) the Department improperly supplemented the record after Entera filed its response to the Department's motion to dismiss. We affirm.

1. As to issue one, we find the Department provided the required notification of its decision. *See* S.C. Code Ann. § 40-68-160(E) (2011) (requiring that an entity subject to disciplinary action by the Department must be given notice of the decision); S.C. Code Ann. § 1-23-350 (2005) (requiring final agency decisions be in writing or stated in the record and directing that "[p]arties shall be notified either personally or by mail of any decision or order"); Rule 5, SCALCR ("Service shall be made upon counsel if the party is represented, or if there is no counsel, upon the party. Service shall be made by delivery . . .").

2. As to issue two, we find the document the Department sent to Entera was the final agency decision because "Final Agency Decision" was capitalized, underlined, and written in bold letters at the top of the document.

3. As to issue three, we find Entera could only challenge the Department's decision in a contested case hearing before the ALC. *See* S.C. Code Ann. § 40-68-160(B) (2011) ("The [D]epartment may take disciplinary action against a . . . person engaging in professional employer services without a license . . ."); § 40-68-160(E) ("All contested hearings pursuant to this section are before the [ALC].").

4. As to issue four, we find substantial evidence supports the ALC's finding Entera received notice of the decision on August 23, 2013. Therefore, its request for a contested case was untimely, and the ALC did not have jurisdiction to hear the case. *See Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) ("The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law."); S.C. Code Ann. § 1-23-600(B) (Supp. 2014) ("All requests for a hearing before the [ALC] must be filed in accordance with the [ALC's] rules of procedure."); Rule 11(C), SCALCR (stating a request for a

contested case hearing before the ALC "must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination"); *Botany Bay Marina, Inc. v. Townsend*, 296 S.C. 330, 334, 372 S.E.2d 584, 585-86 (1988) (finding the failure to appeal the Board of Adjustment's zoning decision within the fifteen days allowed for filing an appeal divested the Board of Adjustment of jurisdiction to hear the appeal), *overruled on other grounds by Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (stating "[s]ervice of the notice of intent to appeal is a jurisdictional requirement," and courts are unable to extend or expand the time in which the notice of appeal must be served).

5. As to issue five, we find the Department complied with Rule 19, SCALCR, in filing its reply and did not improperly supplement the record. *See* Rule 19(A), SCALCR (providing procedures for pre-hearing motions, responses, and replies).

AFFIRMED.¹

HUFF, SHORT, and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

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

PETITION FOR REHEARING

David Hill Keller
Constangy, Brooks, Smith & Prophete, LLP
110 W. North Street, Suite 150
Greenville, South Carolina 29201

Pursuant to South Carolina Appellate Court Rule 221, the appellants, Entera Holdings, LLC and Entera Work Comp Solutions, LLC, do hereby petition the Court for rehearing of its Order filed March 4, 2015 upon the following grounds:

ISSUE I

Service of the original document in this matter never has been completed. The Appellants, herein continue to believe that the State of South Carolina and its administrative agencies should be held to the same standard as all other potential litigants in the state. There is no authority anywhere in any of the Court Rules for service of legal papers by any other method other than the United States Postal Service. While this procedure of the South Carolina Court Rules may be archaic, nonetheless all of the judicial agencies of the State of South Carolina, including this Court, require service by U.S. Mail and will not accept service by any other method, other than hand-delivery. It is therefore submitted that the Court should reconsider its determination on Issue I and find that the agency determination was never properly served and that service has never been accomplished.

ISSUE II

The final staff determination is not a contested case under the Administrative Procedures Act. The Court, in its Opinion, found that because the words "final agency decision" were capitalized that this somehow makes the decision legally correct. The Court should review the record in this matter and realize that the Appellants requested multiple meetings with the agency and that these meetings were denied, or never occurred. Further the Appellants would request the Court to review the fact that the letter of August 21, 2013, in the body thereof was called a final staff decision and does not qualify as an "agency decision" under the South Carolina Rules of Court.

ISSUE III

The letter of August 21, 2013 does not constitute a final agency decision. This particular issue is truly, the crux of Appellants' Request for Reconsideration. It is axiomatic in legal matters that the law construes of legal documents with a special view toward the drafter of such document. It is, and remains, the contention of Appellants that the State should not only be held to the same standard as the drafter of all other documents, but should, in fact, be held to a higher standard. It is uncontested that the letter requires Appellant to respond *to the agency* within thirty days of receipt of the letter, which Appellants did. (ROA p.20; pg. 32) The Appellants continue to contend that Mr. Elam, the director of the agency, advised the parties that the letter was not a final agency decision (ROA p.20) and Mr. Elam specifically altered the terms and provisions of the staff decision by requiring Appellants to contact the "agency" and not the Administrative Law Court within 30 days. The Appellants contend that any reasonably prudent person reading this letter would have relied on the statements of the Agency that it was necessary to contact them which Appellants did.


Appellants would concede that Mr. Elam has probably placed this language in every letter that he has ever sent and that he likely did not even read the "boilerplate" portion of the letter before it was sent. However, Appellants would ask the Court to specifically reconsider its decision as to this issue.

While there was no testimony ever taken in this matter, the letter itself should be reviewed in a light most favorable to Appellants and be strictly construed against the drafter, particularly because the drafter is the State of South Carolina. It is clear the Agency altered the requirements stated earlier in the letter by stating that Appellants were required to contact the agency, not the Administrative Law Court.

IT IS THEREFORE RESPECTFULLY SUBMITTED that the determination of the Court of Appeals be reconsidered and that Opinion No. 2015-UP-102 of March 4, 2015 be withdrawn

and that the Court (1) make a determination that a remand to the Administrative Law Court is required regardless of any other error because of the reasons state herein.

DATED: 3/19, 2015

By:  _____
David Hill Keller, Esq.
Bar # 003345
Constangy, Brooks, Smith & Prophete, LLP
Attorney for Appellants

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Deborah Brooks Durden, Administrative Law Judge

Docket No. 2014-000246

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

v.

Entera Holdings, LLC and
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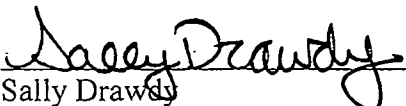
CERTIFICATE OF SERVICE

I, Sally Drawdy, say that I am the legal assistant for David H. Keller, attorney for Appellants Entera Holdings, LLC and Entera Work Comp Solutions, LLC with CONSTANGY, BROOKS, SMITH & PROPHETE, LLP in Greenville, South Carolina; and on the 19th day of March, 2014, a copy of the Appellants Petition for Rehearing was hand-delivered to the South Carolina Court of Appeals and copies were mailed in a sealed envelope, postage prepaid, along with a certificate of service on opposing counsel and the following person(s) at the following addresses:

Elliot F. Elam, Jr., Esq., Deputy Director
South Carolina Department of Consumer Affairs
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Columbia, SC 29211

Hana Pokorna-Williamson, Esquire
South Carolina Department of Consumer Affairs
2221 Devin Street
Columbia, SC 29204

Mr. J. Matthew Aronson, Esquire
500 Gills Creek Parkway, Apt. 1814
Columbia, SC 29209


Sally Drawdy
Legal Assistant to David H. Keller
Constangy, Brooks & Smith, LLP
110 W. North Street, Suite 150
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105 North Spring Street, Suite 105
Greenville, SC 29601
(864) 242-2577

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67-448/539

1524

03/19/2015

PAY TO THE ORDER OF South Carolina Court of Appeals

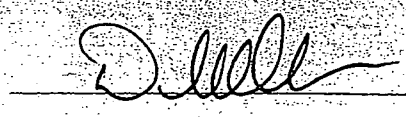
\$ 25.00

Twenty-five and 00/100

DOLLARS

South Carolina Court of Appeals
P-O Box 11629
Columbia, SC 29211

MEMO
Petition Filing Fee (SC Dept. Consumer Affairs/Enter))
1101



Constangy, Brooks & Smith, LLP

1524

South Carolina Court of Appeals

3/19/2015

\$25.00

Petition Filing Fee (SC Dept. Consumer Affairs/Enter)

Constangy, Brooks & Smith, LLP

1524

PAYMENT
RECORD

The South Carolina Court of Appeals

South Carolina Department of Consumer Affairs,
Respondent,

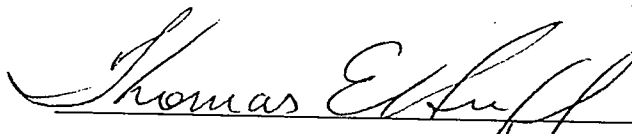
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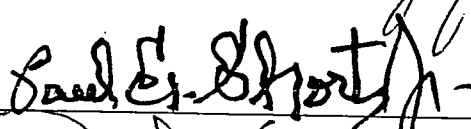
Appellate Case No. 2014-000246

ORDER

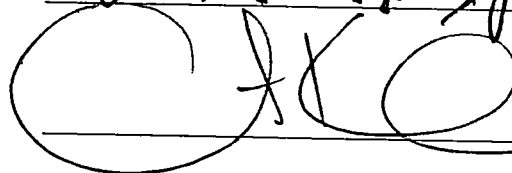
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc: David Hill Keller, Esquire
Elliott F. Elam, Jr., Esquire
Hana Pokorna-Williamson, Esquire

FILED

April 24, 2015

J. Matthew Aronson, Esquire
Jana E. Shealy
The Honorable Deborah Brooks Durden