

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

**RECEIVED**

DEC 29 2015

Appellate Case No. 2014-002233

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**S.C. Supreme Court**

Rest Assured, LLC, ..... Respondent,

v.

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

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**PETITION FOR REHEARING**

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**Attorneys for Respondent**

Pursuant to Rule 221(a), SCACR, Respondent Rest Assured, LLC petitions this Court for a rehearing. On December 9, 2015, this Court issued an unpublished, per curiam opinion reversing the Court of Appeals on the basis that “had the Court of Appeals applied the proper standard of review, it would have been ‘constrained to affirm’ the ALC’s [Administrative Law Court’s] order.” This is incorrect for two reasons.

First, the Court of Appeals is not constrained to affirm orders that contain errors of law. The error of law committed by the ALC and the South Carolina Department of Employment and Workforce (DEW) is that they have consistently ignored the contract between Rest Assured and the personal care aides and have failed to give the contract the weight required by law. Second, the Court of Appeals is not constrained to affirm orders that are not supported by substantial evidence. The ALC exceeded its scope of review by making its own findings of facts rather than reviewing the findings of facts made by the DEW Appellate Panel.

For these reasons, Respondent respectfully submits that the Court should either rehear this case or issue a new opinion affirming the Court of Appeals.

### **ARGUMENT**

#### **I. The Court of Appeals correctly reversed the ALC based on an error of law.**

Contrary to what this Court states in its opinion, the Court of Appeals’ reversal is not based solely on the substantial evidence standard. The Court of Appeals correctly determined that the decisions below were based on errors of law that needed to be corrected on appeal. The primary error of law committed by the ALC and the DEW Appellate Panel is that they completely overlooked or failed to give the requisite weight to the contract between Rest Assured and the personal care aides when determining the nature of the

relationship between the parties. The Court of Appeals recognized this error of law and properly reversed the ALC on this basis.

According to the Administrative Procedures Act, an appellate court may reverse or modify a decision if the agency's inferences, conclusions, or decisions are "affected by other error of law," "clearly erroneous in the view of the reliable, probative, and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380 (1976). "Although [an appellate court] shall not substitute its judgment for that of the ALC as to findings of fact, [an appellate court] may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence in the record as a whole." *ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011).

Here, the Court of Appeals reversed a decision that was affected by an error of law. The ALC and the DEW Appellate Panel erred as a matter of law in failing to give the contract between the parties the requisite weight. Although the ALC recognized that the contract existed, the ALC does not mention the contract in the analysis and does not address the terms of the contract, which support a finding that the personal care aides were independent contractors. Even worse, the DEW Appellate Panel does not even mention the contract in its analysis of the case. The Court of Appeals attempted to correct these errors of law by reversing the ALC order.

In reversing the ALC, the Court of Appeals did not base its decision "solely on the absence of substantial evidence and not on any error of law" as noted by this Court. The Court of Appeals based its decision on the absence of substantial evidence *and* on an error

of law, namely the failure of the ALC to give the contract the requisite weight and the failure of the DEW Appellate Panel to even recognize to the contract. The Court of Appeals expressly referenced the contract in its opinion, stating that “[t]he contract agreement and the conduct between Appellant and its workers were similar to that of *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). . . .” (App’x p. 19). By recognizing the contract and relying on the *Wilkinson* case—which states that contracts are to be given considerable weight in determining the nature of the relationship between the parties—the Court of Appeals based the reversal, at least in part, on an error of law. The Court of Appeals did not have to use the words “error of law” to indicate that errors of law existed.

Although the substantial evidence standard is designed to grant deference to agencies with regard to factual determinations, it not designed to grant deference as to matters of law. If that were true, then the substantial evidence standard would give agencies like the DEW unfettered discretion to ignore the law without fear of reversal. Here, by ignoring the contract between the parties and failing to give it the requisite weight, the DEW (and later the ALC) have essentially rendered the contract meaningless. The very purpose of appellate court is to correct these kinds of errors so that the law is upheld.

Because the Court of Appeals correctly recognized the significance of the contract in defining the relationship between the parties, the Court of Appeals decision should have been affirmed.

**II. The ALC exceeded its scope of review and made findings of fact that are not supported by the evidence.**

Although this Court recognized that “the ALC sits in an appellate capacity and may not make its own factual findings,” the Court overlooked the fact that the ALC did make

its own findings of fact and did so without support from the record below. The ALC order contains findings of fact that were not raised by DEW and were not before the DEW Appellate Panel.

The most glaring example of this is the fact that the DEW Appellate Panel did not make a single finding of fact related to whether the patients controlled the work of the personal care aides, and did not even mention control by the patients, and yet on review the ALC determined that there was evidence of control. (R. pp. 31-34). DEW never even raised the issue of control by the patient until the case was on appeal before the ALC. Rather than constrain itself to the DEW Appellate Panel's findings as it was required to do, the ALC took it upon itself to make several factual findings regarding the alleged control by the patient, and in doing so exceeded the scope of its review in an effort to circumvent the poor reasoning and legally flawed order of the DEW Appellate Panel.

Additionally, the ALC improperly substituted its own judgment as to whether equipment had been furnished when the DEW Appellate Panel already made the determination that it had not. The ALC held that the "finder of fact could have found that the clients [patients] provide nearly all of the equipment to the aides and that what the aides supply is negligible." (R. p. 23). As the finder of fact, the DEW Appellate Panel found that "[e]quipment is not furnished." (R. p. 34).

By making its own factual findings, the ALC exceeded its scope of review. The ALC ultimately found that the determinations by the DEW Appellate Panel were flawed (R. pp. 15, 19, 21, 25), but then made its own factual findings to create entirely new determinations. The ALC was limited to reviewing the determinations made by the DEW Appellate Panel and was not permitted to make its own factual findings. Accordingly, the

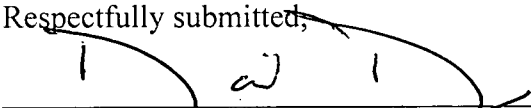
Court of Appeals correctly found that there was not substantial evidence in the record to support the ALC's decision.

### CONCLUSION

Rest Assured respectfully submits that the Court of Appeals correctly determined that the ALC order should be reversed. The ALC and DEW Appellate Panel's decisions are based on an error of law—namely the failure of the any court below to recognize and give weight to the agreement between the parties—and this error of law should have been corrected through the appellate process. By reversing the Court of Appeals, this Court is allowing an error of law committed by the ALC and the DEW Appellate Panel to stand. Further, the Court's opinion gives unprecedented weight to agency and ALC decisions, essentially allowing decisions that are incorrect as a matter of law to go unchecked.

Because the Court of Appeals correctly recognized that an error of law had been committed and that the ALC's decision was not supported by substantial evidence, Rest Assured respectfully requests that this Court rehear this matter or affirm the Court of Appeals' decision.

Respectfully submitted,



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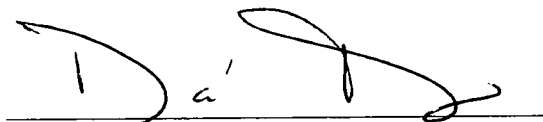
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**PROOF OF SERVICE**

I, the undersigned attorney of the Law Office of David C. Dick, LLC, attorney for the *Respondent Rest Assured, LLC*, certify that I served all counsel in this action with a copy of **Respondent's Petition for Rehearing** by electronic mail and by placing a copy of same in the U.S. Mail, First Class, postage prepaid, on December 29, 2015, as follows:

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