



The Supreme Court of South Carolina

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February 10, 2016

The Honorable Jana E. Shealy
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia SC 29201

REMITTITUR

Re: Rest Assured v. SCDEW
Lower Court Case No. 2012ALJ220209AP
Appellate Case No. 2014-002233

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Thornwell F. Sowell, III, Esquire
David Cochran Dick, Jr., Esquire
Debra Sherman Tedeschi, Esquire
Tina Marie Cundari, Esquire

**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 Supreme Court**

Rest Assured, LLC, Respondent,

v.

South Carolina Department of Employment and
Workforce, Petitioner.

Appellate Case No. 2014-002233

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Memorandum Opinion No. 2015-MO-072
Heard November 17, 2015 – Filed December 9, 2015

REVERSED

Debra Sherman Tedeschi, of Columbia, for Petitioner.

Thornwell F. Sowell, III and Tina Marie Cundari, both of
Sowell Gray Stepp & Laffitte, LLC, of Columbia; and
David Cochran Dick, Jr., of Charleston, for Respondent.

PER CURIAM: We granted certiorari to review the decision of the Court of Appeals reversing the Administrative Law Court's (ALC's) determination that

respondent Rest Assured's workers were employees for purposes of unemployment tax liability. *Rest Assured, LLC v. S.C. Dep't of Emp't and Workforce*, Op. No. 2014-UP-235 (S.C. Ct. App. filed June 14, 2014). We agree with petitioner that the Court of Appeals erred in reversing the ALC's appellate decision because the ALC correctly held that petitioner's Appellate Panel's decision was supported by substantial evidence.

When reviewing a decision by petitioner's Appellate Panel in an unemployment tax liability matter, the ALC sits in an appellate capacity and may not make its own factual findings. *Stubbs v. S.C. Dep't of Emp't and Workforce*, 407 S.C. 288, 755 S.E.2d 114 (Ct. App. 2014). In deciding such an appeal, the ALC applies S.C. Code Ann. § 1-23-380 (Supp. 2014), exercising the same authority as the Court of Appeals under that statute to determine whether the Appellate Panel's decision is supported by substantial evidence. S.C. Code Ann. § 1-23-600(E) (Supp. 2014). Judicial review of an appellate decision of the ALC is to the Court of Appeals pursuant to S.C. Code Ann. § 1-23-610 (Supp. 2014). *Id.* Judicial appellate review of the ALC's decision is confined to the record, and the appellate court may reverse the ALC's decision if it finds it to be "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" § 1-23-610(B)(e); *Stubbs, supra*.¹ In determining whether the ALC's decision meets this evidentiary standard, an appellate court "need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011).

We find that had the Court of Appeals applied the proper standard of review, it would have been "constrained to affirm" the ALC's order. *Nucor Corp. v. S.C. Dep't of Emp't and Workforce*, 410 S.C. 507, 517, 765 S.E.2d 558, 563 (2014). Accordingly, the decision of the Court of Appeals reversing the ALC's determination is

¹ The Court of Appeals reversal was predicated solely on the absence of substantial evidence and not on any error of law. *Rest Assured, LLC, supra*.

REVERSED.

PLEICONES, Acting Chief Justice, BEATTY, HEARN, JJ., and Acting Justices James E. Moore and G. Thomas Cooper, Jr., concur.

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EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

Rest Assured, LLC, Appellant,

v.

South Carolina Department of Employment and
Workforce, Respondent.

Appellate Case No. 2013-000774

Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2014-UP-235
Heard May 7, 2014 – Filed June 18, 2014

REVERSED

Thornwell F. Sowell, III, of Sowell Gray Stepp &
Laffitte, LLC, of Columbia, and David Cochran Dick, Jr.,
of Charleston, for Appellant.

Debra Sherman Tedeschi, of Columbia, for Respondent.

PER CURIAM: Rest Assured, LLC, appeals an order by the Administrative Law Court (ALC) finding for the South Carolina Department of Employment and Workforce (SCDEW) that individuals working as personal care aides were

employees pursuant to South Carolina law. Rest Assured also challenges the ALC's refusal to allow it to supplement the record. We reverse and find the aide workers were independent contractors.

We agree with Appellant's argument that their personal care aide workers were not employees but contract workers. The 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) (stating whether independent contractor or employee status prevails depends on the issue of control and whether employer had the right to control the performance of the work). In our consideration of the record as a whole, we do not find there is substantial evidence in the record to support the ALC's decision. *See ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011) (noting that "although this court shall not substitute its judgment for that of the ALC as to findings of fact, we may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole").

We disagree with Appellant's argument that the record should be supplemented. Subsection 1-23-380(3) of the South Carolina Code (Supp. 2013) requires for additional evidence to be submitted it must be material and there must be good reasons for the failure to present the evidence. Here, Appellants presented no good reason for their five-year delay in presenting the evidence.

REVERSED.

HUFF, THOMAS, and PIEPER, JJ., concur.