THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE

ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0294-AP

Cellular Sales of South Carolina, LLC, Appellant,

v.

South Carolina Department of Employment and Workforce, Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from a final Order of the South Carolina Administrative Law Court (hereinafter "ALC") affirming the final decision of the South Carolina Department of Employment and Workforce (hereinafter "SCDEW" or "Department") holding sale representatives providing services to Cellular Sales of South Carolina, LLC (hereinafter "CSSC" or "Appellant") are its employees rather than independent contractors for the purposes of paying state unemployment taxes to the Department under S.C. Code Ann. § 41-27-230(1)(b). (R. pp. 1-12)

On November 12, 2008, Nadezda Rains (hereinafter "Rains") file for unemployment benefits upon separation from Appellant on November 1, 2008. A review of Rains work history produced no record of wages being reported by Appellant for services provided by Rains. SCDEW's Benefits Division referred the matter to SCDEW's Employer Status Division. On November 14, 2008, the case was assigned to a Department tax field deputy to conduct an audit of Appellant to determine the employer-employee relationship between Appellant and its workers. (R p.23-lines 3-10) On April 8, 2009, the Department issued an administrative determination holding Appellant's sale representatives were in fact employees under applicable

law. As a consequence, Appellant is liable to pay unemployment compensation contributions and assessments on wages paid to those employees. (R pp.148-149.)

Appellant requested an administrative hearing before the Department's Appeal Tribunal (hereinafter "Tribunal") on April 30, 2009. See S.C. Regs. § 47-36.B (Supp. 2010) The Tribunal conducted an evidentiary hearing on March 18, 2011, and issued a decision on May 4, 2011, which affirmed the administrative determination referenced above. (R. pp. 172-176.) Appellant appealed the Tribunal decision to the Department's Appellate Panel (hereinafter "Panel") on June 3, 2011. See S.C. Regs § 47-36.C (Supp. 2010); see also S.C. Code Ann. § 41-35-750. The Panel scheduled oral argument for May 9, 2012 and on May 25, 2012, it issued the Department's final decision holding that sales representatives providing services to Appellant are its employees under S.C. Code Ann. § 41-27-230(1)(b). (R. pp. 187-192.)

Appellant filed an appeal seeking judicial review of the Panel's final decision with the ALC on June 22, 2012. On April 11, 2013, the Honorable Deborah Brooks Durden issued her final order affirming the Panel's decision. (R. pp. 1-12) Thereinafter, Appellant sought judicial review of the ALC order by this honorable Court.

FACTS

Appellant is a limited liability corporation ("LLC") which operates a business to promote and sell products and services of a national wireless communications provider. Rains, worked as a sales representative for Appellant prior to being separated. (Tr. p. 14-lines 6-7; p. 42-lines 12-16.) Appellant maintains it contracted with Rains and other similarly situated workers (hereinafter collectively "sales representatives") in their capacity as officers of their own LLC's for the performance of their work as sales representatives. (R pp. 85-line 3-4; 113-line 17-20.) Pursuant to the verbiage of the written agreement between Appellant and Rains dated January 8,

2008, Appellant only engaged the services of corporations or LLC's to serve in the capacity as sales representatives. (R. pp. 150-153.) On January 7, 2008, Rains formed the entity named Rains, LLC, and was assigned an employer identification number. (R. pp. 154-157.) Rains formed this LLC pursuant to the directives of Appellant. (R. pp. 75-lines 8-12; 117-line 6-8.) Rains did not possess a license to operate a business while working for Appellant because Rains was working under Appellant's business license. (R. p. 135-line 2-9.)

Appellant contends that its sales representatives have exclusive control over their work schedule, perform work without supervision, and set prices at their own discretion. (R. pp. 94-lines 1-3; 97-lines 3-5. 107-lines 12-20.) Appellant further states that the sales representatives perform the position based on their own sales background and experience. (R. p. 95-lines 7-9.) In contrast, Appellant provided recommended pricing guidelines and gave specific instructions for the pricing of several products. (R. p. 122-lines 15-18.) If sale representatives sell at minimum prices or a limited type of product, they will be contacted by a manager. (R. p. 125-lines 6-8.) Additionally, Rains received instruction on how to sell slow-selling products. (R. p. 122-lines 1-3.) Appellant trained sale representatives on its computer system and commission structure and provided product information and promotional materials. (R. p. 133-lines 7-12.) CSSC has several physical business locations where sales representatives work in various shifts. (R. p. 107-lines 12-16.) At these locations, sales representatives can accommodate walk-in customers or meet customers for scheduled appointments. (R. p. 88-lines 3-6.) On at least one occasion, Appellant instructed Rains to stand outside the store to publicize the location and its promotional events. (R. p. 117-lines 15-18.) Appellant asserts sales representatives have the ability to sell on their own time, set outside appointments, and travel to customer locations; however, Rains performed her job solely at the store. (R. p. 95-lines 12-13.) While Appellant had no onsite

supervisor, there were periodic visits to the location by an area manager. (R. p. 92-lines 5-8.) Sales representatives sign up for shifts, and based on these chosen times, Appellant will post a schedule. (R. p. 132-lines 4-5.) On numerous occasions Appellant failed to schedule Rains for her chosen shift times. If sales representatives could not be present for an assigned shift, they had the responsibility to find another sales representative to cover for their absence. (R. p. 120-lines 1-3.) Furthermore, if sales representatives "swap" shifts too often or are not present at the store for their entire shift time, CSSC effectively disciplines sales representatives by assigning them to a less desirable timeslot in a subsequent shift schedule. (R. p. 120-lines 16-19.) Appellant acknowledged that store privileges could be removed, but added that sales representatives can still perform outside sales. (R. p. 104-lines 9-12.) When Appellant determined Rain's job performance unsatisfactory, a manager would contact Rains by phone or e-mail. (R. pp. 122-lines 7-11; 137-38-lines 16-19, 1-2.)

Appellant owns the store inventory and requires it to be checked multiple times a day by sales representatives. (R. pp. 125-lines 9-11; 126-lines 14-20.) Sales representatives are required to set up inventory displays and return any damaged inventory to Appellant's corporate office. Appellant provides equipment at the store locations including computers and general office supplies. (R. p. 128-lines 9-16.) Sales representatives would collect and process payment from customers by entering the form of payment in Appellant's computer system. (R. p. 160-lines 1-9.) Rains maintained her own money bag, however, Appellant required her to deposit the collected money into Appellant's bank account by a specified deadline. (R. pp. 96-lines 9-13;129-lines 16-18.) Furthermore, Appellant required Rains to provide faxed copies of these deposit slips. (R. p. 130-lines 16-18.) Appellant receives payment from a verified sale directly from the national carrier. CSSC then determines and issues payment to sales representatives' as

commission. (R. pp. 99-lines 18-20.) Sale representatives' commission pay is based on their sales performance including retail sales of phones, accessories, service plans and feature upgrades. (R. p. 89-lines 14-18.) Sales representatives are required to repay Appellant if a customer canceled service. (R. p. 98-lines 10-14.)

Appellant reports the sales representatives' income on an Internal Revenue Service Form 1099 in the name of the sale representative's respective LLC. (R pp. 76-lines 7-10; 167) Appellant asserts it does not withhold taxes from these earnings, provides no employment benefits, and does not reimburse for expenses. (R. pp. 136-37-lines 19-20, 1-6.) While Rains elected to receive straight commission pay, payment in the form of a draw was an available option. (R. p. 132-lines 17-18.) Appellant maintained that the sales representatives are not prohibited from working for other companies, but they can not share confidential information or work in sales for a competitor from the same national carrier. (R. p. 88-lines 7-11.) Rains did not sell for any other business while working for Appellant.

The agreement signed by sales representatives at the time of hire does not include provisions for terminating the relationship. Appellant asserts the contract could be terminated by either party at anytime. In the present case, Appellant initiated the separation and the reason for her termination is unknown. (R. p. 94-lines 12-19.) Appellant's area manager simply informed Rains that her services were no longer needed. (R. pp. 112-lines 14-7.)

ARGUMENTS
STANDARD OF REVIEW

In the present case, the Director of the Unemployment Insurance Division of the Department determined as did the Tribunal, the Panel, and the ALC, that Appellant's sales representatives are "employees" within the common law definition of the word so that

unemployment contributions were due on the wages paid to them. See S.C. Code Ann § 41-27-230(1)(b). The Department respectfully asks this Court to affirm these findings.

SCDEW is an agency governed by the Administrative Procedures Act (APA). McEachern v. S. Carolina Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) Under the APA, a reviewing court may reverse or modify the decision of the Department where it is arbitrary, capricious or constitutes an abuse of discretion. Id. Reviewing courts apply the substantial evidence rule, under which, the Department's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record [or] affected by an error of law." S.C. Code Ann. § 1-23-610(B)

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Merck v. South Carolina Employment Sec. Comm'n, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986). "It is more than a mere scintilla of evidence, but is something less than the weight of the evidence." Porter v. South Carolina Pub. Serv. Comm'n, 333 S.C. 12, 20-21, 507 S.E.2d 328, 332 (1998). "Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding." Id. 333 S.C at 21, 507 S.E.2d at 332.

Many of the cases cited by Appellant in it's Brief involve the Workers' Compensation Commission. The Court has held that for the purposes of the Workers' Compensation Commission, "the employee relationship is a jurisdictional issue and thus, its review is governed by the preponderance of the evidence standard." Givens v. Steel Structures, Inc., 279 S.C. 12, 301 S.E.2d 545 (1983). Accordingly, the Court has the authority to makes it decision based upon its own review of the facts. Id; see also Kirksey v. Assurance Tire Co., 314 S.C. 43, 45, 443

S.E.2d 803, 804 (1994)("The Court of Appeals stated it could find facts in accordance with the preponderance of the evidence when determining jurisdictional questions. The Court of Appeals applied the correct standard of review."). However, in the context of cases involving unemployment benefits such as the instant case, the Court has held:

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

Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984). Therefore, any analysis of case law involving the Workers' Compensation Commission must be confined to its application under the substantial evidence standard.

I. THE ADMINISTRATIVE LAW COURT'S ORDER AFFIRMING THE APPELLATE PANEL'S DETERMINATION HOLDING RAINS TO BE AN EMPLOYEE OF CSSC IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD AND IN ACCORD WITH APPLICABLE LAW.

The Panel determined that CSSC's sales representatives were employees. The ALC affirmed the Department's final decision finding substantial evidence in the record to support the Panel's decision. This Court should affirm the decision of the ALC as there is substantial evidence to support the Panel's decision that the sales representatives are employees.

S.C. Code Ann. § 41-27-230(1)(b) defines "employment" as service for wages under a contract of hire by an "individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." "Whether an individual is an employee or an independent contractor is a fact-specific determination reached by applying certain general principles." S. Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995) Determining employment status

under the common law is ultimately a question of the employer's right to control and direct the particular work. Furthermore, "in determining whether an individual is a servant (employee) or an independent contractor, the proper test to be applied is not the actual control exercised by the alleged master, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Todd's Ice Cream, 281 S.C. at 258, 315 S.E.2d at 375-76. The principal factors used to determine the right of control are: "(1) direct evidence of right or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire." Id; Smokey Mountain Secrets, Inc. vs. S.C. Employment Security Commission, 312 S.C. 111, 439 S.E.2d 288 (S.C.App. 1994). Additionally, the finder of fact must "evaluate the four factors with equal force in both directions to provide an even-handed and balanced approach" Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

Written Agreement

Appellant argues that the Panel's decision and ALC's affirmance are "clearly erroneous in view of the substantial evidence to the contrary" namely the existence of a signed document acknowledging the independent contractor status of the sales representatives (App. Br'f p. 6.) Appellant argues "[CSSC] specifically informed [Rains] and [Rains] fully acknowledged- 'Cellular Sales ... contracts with legal entities to market and sell cellular telephones ... Cellular Sales does not employ or hire individuals to serve as sales representatives.'" and sales representatives are informed of this "so that they're fully aware that it is not an employment position." (App. Br'f p.12 *citing* R. pp. 93-line 16; 150.)

The Court has stated "[t]he primary test of [the agreement]'s character is the intention of the parties, which is to be gathered from the whole scope of the language used." Wilkinson,

supra. Most importantly, the findings should be guided "by the parties' conduct." Id., 382 S.C. at 300, 676 S.E.2d at 702 (2009); see also Spivey v. D.G. Const. Co., 321 S.C. 19, 22, 467 S.E.2d 117, 119 (Ct. App. 1996)(An "employment relationship... may be implied from conduct of the parties.") While the agreement "must be considered" the Court recognizes that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." See Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68–69, 437 S.E.2d 48, 50 (1993).

It is undisputed that Rains and CSSC executed a signed agreement. However, Appellant fails to point out that while "the contract entered into by the parties must be considered ...and has considerable weight[,]...neither party controls the legal effect of the contract." Id. 313 S.C. at 68, 437 S.E.2d at 50. Rains testified "in the contract it said then I (sic) supposed to have that [LLC] after 90 days of starting the business and if I'm not my contract will be terminated and I would not be able to conduct the business..." (R. p. 114-lines 1-4.) This testimony is supported by the fact that Rains signed the agreement in her individual capacity and, for all practical purposes, Appellant ordered her to create the LLC as a condition to work for CSSC. Id. The ALC correctly found ""Rain's [LLC] was formed for the sole purpose of satisfying Appellant's employment requirement." (R. p. 8.).

Direct Evidence of the Right or Exercise of Control

The Panel found evidence in the present case shows Appellant exercises actual control over several aspects of its sales representatives' positions. (R. pp. 187-192.) The record shows Rains received instruction on selling specific products, and Appellant counseled her when her sales performance numbers were unsatisfactory. Id. The sales representatives were granted latitude with pricing. Id. However, Appellant supplied pricing guidelines which Rains was

compelled to follow because noncompliance meant a call from a manager. Id. Appellant exercised control over the shift schedule for staffing the store location. Id. While sales representatives could request certain shifts, a CSSC manager finalized and posted the schedule. Id. Appellant directed Rains to create Rains, LLC as a condition of employment and Rains denied this entity was formed for any other reason but to satisfy Appellant's requirement. Id.

The ALC, in affirming, the Panel's decision, held "substantial evidence exists in the record as a whole supporting a finding that Appellant exercises actual control over its sales representatives." (R. pp. 1-12.) This holding is based on the ALC's review of the record as a whole. The ALC further found "[i]t is clear from the transcript that Appellant had the right to control and direct [Rains] in her work." Id. The ALC highlighted the following evidence within the record on which it relied for this holding. First, "the activities of sales representatives were monitored by cameras..." Id. Secondly, the ALC found that "sales representatives received specific instruction on selling and counseling on performance." Id.

There is no dispute in the record that sales representatives were monitored by video camera. (R. pp. 135-lines 1-5; 145-lines 7-15.) The evidence is conflicting as to the purpose of that monitoring. Appellant argues the cameras were intended only for security purposes. (R. p. 142-line 20.) Rains testified the cameras were utilized to monitor sales representatives to insure compliance. (R. p. 145-lines 7-15..) She stated:

> MS. RAINS: [Sales representatives were] monitored by the cameras in the store, and make sure that we are complying with whatever directions was (sic) provided to us.
>
> ***
>
> MS. RAINS: But again we were monitored by the cameras and we were getting frequent phone calls for not dressed appropriately, or maybe not doing what...what...you're not supposed to just...we were monitored by the cameras.

***

MS. RAINS: ...about...about the cameras and ... well, yes, I understand that probably the purpose of them was the security measures, but again, we were receiving the phone calls during our shifts, and that's because the cameras was monitored, and they were monitored in the way to make sure that you ... you ... you ... you're doing everything by the book of you're supposed to sell a certain way, supposed to say certain way, you're supposed to dress a certain way. And it's never been ... there are security problems. You ... you know, you need to go out of the store, you need to hide somewhere. No, it was always a problem with the way ... how you conducting the business.

(R. pp. 119-lines 1-2; 135-36-lines 19-20, 1-2; 145-lines 7-15.) Rains received specific instructions on selling and counseling on performance. (R. p. 137-lines 16-19.) The record contains testimony referencing a Ryan Smith who Appellant contends Rains mistakenly believed to be a manager. (R. pp. 142-43-lines 3-4, 14-17.) Appellant argues "it is a telling indication that, although [Rains] may have believed she was receiving formal instruction or being counseled by CSSC, she was actually getting help from fellow sales representatives." (App. Br'f p. 9.) This contention is not supported by the record. Rains directly refutes this assertion; as she testified:

MS. RAINS: The name of the ... our ... the same person who fired for say ... the regional...regional manager. His name was Ryan. Do not remember his last name, Ryan. And like I said Ms. Hunt has his name and his phone number and stuff...he was in charge, and you calling this person and telling him you cannot come in the store and he will tell you ... ask you why, and what, and what...what you're thing so it can be done.

***

MS. DEAN: Did you ever receive any performance evaluations?

MS. RAINS: Verbally, yes. And actually yeah, there was ... several e-mails about, you know, way to go, you know, this person is the best, you know, that person is going to get some kind of prize because he sold more, oh yeah, you're not supposed to do that, and you know, the first person in the list for the month of January is so and so, and second is so and so, and third is so and so. Yeah, there was a verbal and the e-mail [UNCLEAR]. Mm-hm. Based on your

> performance...Again, verbal; "you're doing good," or "you're not selling enough." And the e-mails from the top of the management telling you, "Oh, yeah, you did great." That's something you're going to get from [UNCLEAR] or the first, second, and third [UNCLEAR].

(R. pp.121-lines 7-11; 137-38-lines 15-19, 1-2, 9-12.) A review of the record as a whole supports a finding that Smith supervised Rains. In support of this fact, Rains testified that Smith *was in fact the person who terminated her*. She stated:

> MS. RAINS: Or just I've been fired by another agent. That's kind of, you know, it...it hurts my feelings I will say because if he was not in charge, and he could not make that call, why that was happening; how that happened and [UNCLEAR] he had a manager on his ... the card, business card. It said, "Management," you know "Manager." So I don't understand it. And then the card, business cards, we were getting from Cellular Sales of Knoxville, and we were paying for them, so I mean we ... we couldn't just go somewhere and print the business cards. But he was designated by somebody. And that is ... that is a whole new surprise for me.

(R pp.144-45-lines 16-20) The evidence above supports a finding that Appellant designated Smith as regional sales manager by providing business cards with that title. Furthermore, Rains testimony succinctly illustrates what the record as a whole shows; Appellant's witness, Ms. Dean, had no first hand information as to what position Smith occupied.[1] She further testified:

> MS. RAINS: The name of the ... our ... the same person who fired for say ... the regional...regional manager. His name was Ryan. Do not remember his last name, Ryan...he was in charge, and you calling this person and telling him you cannot come in the store and he will tell you ... ask you why, and...what you're thing so it can be

[1] Appellant's witness testified on at least two occasions as to her uncertainty of Mr. Smith's position:

> MS. DEAN: He is another sales rep I would imag[ine]....On a local level that may be something done locally. Id.
> ***
> MS. DEAN: I said I would of have assumed he was a sales representative...Only because he's not the regional director or any of the office employees which is the people that I mainly deal with. (Tr. p. 74-line 17.)
> ***
> MS. DEAN: No I have not ever been a sales representative, and nor do I work directly with the sales representatives. I am in an administrative role in the corporate office, and work more with the office individuals and the attorneys. (Tr. p. 36-line 5-7.)

> done. [UNCLEAR] managed, and again training was several steps. Of course I understand that [Ms. Dean] who we're talking with was ... was never being in the representative, so she does not know the procedures and exactly how it's done. But there was a dress code, how we're supposed to dress. There was a way ... how you're supposed to talk, where you're supposed to stand, what you're supposed to say, what you're not supposed to say.

(R. pp. 144-45-lines 16-20.)

Additionally, Appellant asserts "the ALC's determination places undue influence on the fact these sales representatives were 'scheduled' to work while overlooking the evidence it was the sales representatives themselves who sought out and requested in-store shifts." (App Br'f p. 11.) On the contrary, the record as a whole contains substantial evidence to support the finding of the Panel and the ALC in this regard. Rains testified that sales representatives signed up for shifts, and based on these chosen times, Appellant would post a schedule. However, there were numerous weeks where Appellant failed to schedule Rains for her chosen shift times. Furthermore, if Rains could not be present for her assigned shift, she had the responsibility to find another sales representative to cover for her absence. Finally, Rains testified that if sales representatives "swap" shifts too often or are not present at the store for their entire shift time, it would result in CSSC disciplining sales representatives by assigning them to a less desirable timeslot in a subsequent shift schedule.

Method of Payment

The Panel found "after verification of a completed sale, [CSSC] determined and distributed sales representatives' commissions." (R. pp. 104-lines 3-4; 106-lines 2-5.) Despite CSSC's contention that it pays commissions to the LLC and not the individual, the Panel found it most telling that Rains "made no use of Rains, LLC to show her independence as a sales entity

and had seemingly little understanding of its purpose other than to satisfy CSSC's requirement." (R. pp. 187-192.)

The ALC found substantial evidence existed on the record as a whole to support the Panel's findings. The ALC stated:

> The Appellate Panel found that the method of payment structure that was used by Appellant to pay sales representatives established control by Appellant. The decision rests on the evidence in the record which states that sales representatives were paid commission based on retail sales of products and services, including fees charged to customers on returned items, and that the LLC was never used to establish independence as a sales entity....The Panel found that [Rains] performed her work duties exclusively at the business location of Appellant, where she was provided computers, office space, general supplies, and inventory which was owned by Appellant. The decision also rested on the fact that [Rains] operated under the business license of Appellant which covered sales representatives while working in the store.

Id. Accordingly, evidence on the record as a whole concerning the method of payment further supports the Panel's conclusion that sale representatives are employees of CSSC.

Furnishing of Equipment

The Panel found that "the equipment used by the sales representatives for any and all aspects of their work was located in the store location leased by Appellant. Furthermore, Rains operated under Appellant's business license which covered sales representatives while working in the store." Id. The ALC held substantial evidence on the record as a whole existed to support the Panel's findings as:

> Appellant provided sales representatives with all of the materials to complete their job, including transactional forms. In addition to the forms, there were product displays, signs, and promotional materials provided by the national carriers and utilized at Appellant's physical location. Sales representatives did not pay rent to Appellant and all of the equipment used was leased in Appellant's name.

(R. pp. 1-8.)

The Right to Fire

As the Panel pointed out, the written agreement does not define the length of the relationship or the terms under which either party could terminate the relationship. (R. pp. 187-192.) Rains was hired for an indefinite period of time and separation occurred when Appellant informed her that her services were no longer needed. Such a finding establishes CSSC had the right to and *in fact did fire* Rains unilaterally without notice.

The ALC affirmed stating "a review of the record reveals that Appellant controlled the method and manner in which the sales representatives' jobs were carried out. In addition to this, Appellant scheduled work hours, instructed and counseled sales representatives on sales performance, and gave pricing guidelines which directly affected the pay received." (R. pp. 1-8.) As such, the ALC concluded "there is substantial evidence that Appellant had the 'right to fire' sales representatives and did so in this case." Id.

Appellant cites Lewis v. L.B. Dynasty, Inc., 400 S.C. 129, 136-37, 732 S.E.2d 662, 666 (Ct. App. 2012), reh'g denied (Oct. 18, 2012) in support of its argument that "any business has a right to impose conditions on those to whom it pays money for work, regardless of whether the worker is an independent contractor or an employee" therefore "the right to terminate the relationship for a violation of its conditions does not make the worker an employee." Id. Unlike the facts in Lewis, the record in the present case shows CSSC imposed significant restrictions on its sales representatives' conduct. Cf. Id. 400 S.C. at 136-37, 732 S.E.2d at 666 (finding no employee-employer relationship, in part, because Lewis had "cited no significant restriction on her conduct...that is not simply a requirement that Lewis obey the law."). As stated above, Rains testified "...there was a dress code, how we're supposed to dress. There was a way ... how you're supposed to talk, where you're supposed to stand, what you're supposed to say, what you're not

supposed to say..." (R. pp. 144-45-lines 16-20.) Furthermore, the fact that the agreement provided no guidance on the "right to fire" weighs in favor of an employee-employer relationship under Wilkinson, supra. There, the Court stated "We find Palmetto did not have a "right to fire" Wilkinson. The termination of the parties' relationship was controlled by their agreement." Id., 382 S.C. at 304, 676 S.E.2d at 704. In the present case, there was no such provision in the agreement and therefore, no restriction on CSSC's right to fire sales representatives for any reason or no reason at all.

II. THE ADMINISTRATIVE LAW COURT'S ORDER AFFIRMING THE APPELLATE PANEL'S DETERMINATION HOLDING OTHER SIMILARLY SITUATED SALES REPRESENTATIVES ARE EMPLOYEES OF APPELLANT IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD AND IN ACCORD WITH APPLICABLE LAW.

Appellant further argues that the Panel's decision should be limited only to Rain's employment and not be extended to all like sales representatives. (App. Br'f p. 4.) Appellant asserts that to do so is "tantamount to an impermissible advisory opinion." (App. Brief. p. 19.) The Court has held it renders an advisory opinion when commenting on an issue would have no practical effect on the outcome of the case. Horry County v. Parbel, 378 S.C. 253, 264, 662 S.E.2d 466, 472 (Ct. App. 2008) overruled on other grounds by State v. Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011). Here, the Department is tasked with the duty to determine when an employer-employee relationship exists. Such a determination decides whether an employer is required to pay contributions into the unemployment compensation system. See S.C. Code Ann. § 41-27-230(1)(b) Therefore, any decision by the Court regarding those sales representatives similarly situated does have practical effect. As such, this argument has no merit and should be rejected.

The Court in Kilgore Group, supra, adopted the holding of the Utah Court of Appeals that an employer shoulders the burden of producing the employees it maintained operated under a different relationship than the employee who testified. See Id., 313 S.C. at 69, 437 S.E.2d at 50 (1993) citing Ellison, Inc. v. Board of Review, 749 P.2d 1280 (Utah Ct.App.) cert. denied, 765 P.2d 1278 (Utah 1988). Appellant now argues that sufficient evidence does exist in the record as a whole to meet the burden stated above. However, Appellant never raised this assertion anywhere in its pleadings before the ALC. The Court has held "issues or arguments that were not raised to and ruled on by the [ALC] ordinarily are not preserved for review." Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). Therefore, this argument is not preserved and should be rejected.

In *arguendo*, the question of whether the evidence shows that other sales representatives are employees is a question of fact for the Panel. See Merck, 290 S.C. at 461, 351 S.E.2d at 339 ("In reviewing the [Panel]'s decision, the [] court must affirm the factual findings of the [Panel] if they are supported by substantial evidence.") The Panel reviewed the evidence in the record as a whole and concluded:

> The record docs not support a limited finding that an employer-employee relationship existed only as to [Rains]. It is sufficiently established the right to control the manner in which the sales services were performed extended to all like sales representatives, and it strains credulity that [Rain]'s relationship with CSSC was an aberration.

(R. pp. 187-192.) These findings are supported by substantial evidence on the record as a whole and, as such, are binding on the Court.

Appellant's Brief consists merely of recitations of contrary evidence or attempts to persuade this Court that the evidence relied upon is nonexistent, unreliable and/or misconstrued. The Court has held when there is substantial evidence to support the Panel's decision, any

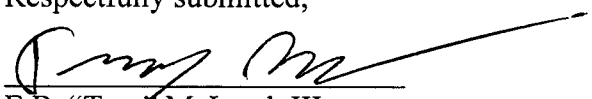
"contrary evidence is inconsequential." Smith v. NCCI, Inc., 369 S.C. 236, 252, 631 S.E.2d 268, 276 (Ct. App. 2006). Appellant assertion that Rains testimony is "inaccurate and unreliable" is irrelevant and not for this Court to decide as "questions of witness credibility [are] defer[red] to the judgment of the agency." Milliken & Co. v. S. Carolina Employment Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996). Ultimately, the "appellate scope of review in this action is limited to determining the existence or not of substantial evidence supporting the factual findings of [the Panel]." Smoky Mountain Secrets, Inc. v. S. Carolina Employment Sec. Comm'n, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995). Since the Panel's finding "is not clearly erroneous," this Court must affirm the decision of the ALC upholding the Panel decision. Id. 318 S.C. at 457, 458 S.E.2d at 430. Substantial evidence has been defined as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Id. "Substantial evidence is something less than the weight of the evidence." DeGroot v. Employment Security Commission, 285 S.C. 209, 328 S.E.2d 668, 669 (S.C.App. 1986).

Here, based on the evidence provided by both parties, substantial evidence supports the conclusion that Appellant's sales representatives are employees rather than independent contractors.

CONCLUSION

The decisions of the Appellate Panel and the ALC are supported by substantial evidence on the record as a whole and are in accord with applicable law, therefore, the findings are binding on the Court and the decision should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0294-AP

Cellular Sales of South Carolina, LLC, Appellant,

v.

South Carolina Department of Employment and Workforce, Respondent.

PROOF OF SERVICE

I certify that I have served the *Final Brief of Respondent* on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on October 2, 2013, to the following address:

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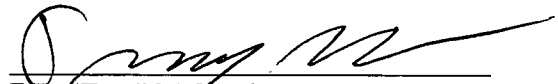

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ATTORNEY'S CERTIFICATION THAT FINAL REPLY BRIEF COMPLIES WITH RULE 211(B).

Respondent certifies, through its undersigned attorney, that Appellant's Final Reply Brief complies with Rule 211(b).

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