THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2012-ALJ-22-0209-AP
Appellate Case No. 2013-000774

Rest Assured, LLC, ...Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The Administrative Law Court erred in law and in fact by finding that individuals working as personal care aides for Rest Assured were employees pursuant to South Carolina law.

II. The Administrative Law Court erred by not allowing Rest Assured to supplement the record.

STATEMENT OF THE CASE

On March 2, 2006, The South Carolina Employment Security Commission (SCESC) (currently known as South Carolina Department of Employment and Workforce (SCDEW)), issued a determination that Appellant Rest Assured, LLC ("Rest Assured") had an employer-employee relationship with certain in-home personal care aides who had been designated as independent contractors. (R. pp. 49-50).

On April 3, 2006, Rest Assured appealed this determination for administrative review to the SCESC. (R. p. 51). The appeal was acknowledged by the SCESC on April 6, 2006. (R. p. 52). A hearing was held on September 12, 2006, and on February 16, 2007, the Administrative Hearing Officer, Chauntel Bland, issued his opinion and upheld the determination. (R. pp. 35-40).

On March 16, 2007, Appellant filed an application to appeal the Administrative Ruling to the full Employment Security Commission. (R. pp. 200-201). Four years later, on March 28, 2011, Appellant was informed by the now SCDEW that the appeal had been scheduled for review. (R. p. 202).

Appellant's counsel, which had changed since the February 16, 2007, Administrative Ruling, submitted a written argument and requested to appear before the Appellate Panel to make a full argument. (R. pp. 203-214).

An appeal hearing was noticed for May 11, 2011. (R. p. 215). At the hearing on May 11, 2011, undersigned counsel for Appellant made oral arguments to the Appellate Panel. (R. p. 225). Subsequently, the SCDEW issued an Appellate Panel Decision dated May 31, 2011, affirming the February 16, 2007 Administrative Ruling. (R. pp. 31-34).

On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. (R. pp. 216-223). This appeal was filed in Richland County pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and Rule 74 of the South Carolina Rules of Civil Procedure.

On July 11, 2011, the SCDEW filed a Notice of Special Appearance and a Motion to Dismiss the Richland County Court of Common Pleas action based on an alleged failure to file the appeal in the Administrative Law Court. (R. p. 226). In response to the Motion to Dismiss, Rest Assured filed a Motion to transfer this appeal to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law. *Id.*

On March 27, 2012, the circuit court issued an order denying the motion to dismiss and transferring the case to the Administrative Law Court ("ALC") pursuant to Rule 204, SCACR, and South Carolina case law. (R. pp. 224-230). The SCDEW appealed this decision to the South Carolina Court of Appeals, but the appeal was dismissed.

The ALC accepted this case and issued an Order Governing Procedure on October 19, 2012. (R. p. 10). On November 8, 2012, the SCDEW filed a motion to dismiss the appeal before the ALC based on lack of jurisdiction. (R. p. 2). The ALC issued an order on December 19, 2012 denying the motion to dismiss. (R. p. 2).

On March 7, 2013, Rest Assured moved for leave to supplement the record with a letter dated May 8, 2008, from the Compliance Review Officer, South Carolina Department of Health and Human Services, to Rest Assured, LLC. (R. pp. 272-273).

On March 14, 2013, after briefing by both parties but without oral argument, the ALC issued an order affirming the decision of the SCDEW Appellate Panel. (R. pp. 9-27). Also on March 14, 2013, the ALC denied Rest Assured's motion to supplement the record on appeal. (R. pp. 6-8).

On March 25, 2013, Rest Assured filed a Motion for Reconsideration of the Order Denying the Motion to Supplement the Record on Appeal. (R. pp. 276-278). The ALC denied this motion on April 15, 2013. (R. pp. 1-5).

On April 15, 2013, Rest Assured filed this appeal of the Order affirming the SCDEW Appellate Panel, the Order Denying Motion to Supplement Record, and the Order Denying Motion for Reconsideration to supplement the record on appeal. (R. pp. 279-311). Both issues are now before this Court.

FACTS

Rest Assured is a business acting as a placement firm for in-home care services. (Employers Status Report). Appellant places personal care aides ("PCAs") into clients' homes to help with the clients' daily care. (R. p. 76, ll. 12-17; R. p. 117, ll. 17-20). The PCAs provide "custodial care" to the clients that consist of duties such as changing clothes, bathing, combing hair, meal preparation, and light housekeeping. (R. p. 76, ll. 12-17).

Rest Assured originally treated the PCAs as employees. (R. p. 142, ll. 1-3). However, Rest Assured and the PCAs themselves determined that they both desired independent contractor treatment of the PCAs. (R. p. 142, l. 11 - p. 143, l. 7). Rest Assured provided literature on the difference between an employee and an independent contractor and provided access to an accountant to answer any questions. *Id.* The PCAs

made the informed decision to be treated as independent contractors. *Id.* After this decision was made, Rest Assured stopped providing equipment, bonuses, employment awards, and started issuing 1099s. (R. p. 143, ll. 8-13).

Rest Assured maintains a registry of approximately 250 PCAs (the "Registry"). (R. p. 118, ll. 13-19). The PCAs approach Rest Assured and sign up for the Registry by providing their qualifications and the times that they are available to work. (R. p. 84, ll. 1-3). Most of the PCAs have other full-time or part-time employment outside of any services they are performing through Rest Assured. (R. pp. 154-165). Rest Assured has an independent contractor agreement with each of the PCAs. (R. pp. 45-48). The PCAs are free to negotiate their contract rate with Rest Assured for each individual client. (R. p. 75, ll. 9-20).

Rest Assured obtains clients from three primary sources, Medicaid, the U.S. Department of Veteran Affairs ("VA"), and private pay individuals. (R. p. 118, ll. 1-10). When these sources have a client in need, they contact Rest Assured and provide a list of services the client requires and the times a PCA is needed. (R. p. 138, ll. 13-19). Rest Assured's client care liaison then searches the Registry to match any PCAs that meet the skills required and times available. (R. p. 83, l. 17- p. 84, l. 3; R. p. 119, ll. 6-8).

Once the matching PCAs are identified, they are sent to the home of the client to be interviewed by the client. (R. p. 119, ll. 6-17). The client then picks which PCA they want to provide the services. *Id.* Rest Assured has no influence on which PCA is chosen. (R. p. 119, l. 18 - p. 120, l. 2). The PCA can accept or deny the position, and it is totally up to the PCA to determine his/her own hours. (R. pp. 45-48; R. p. 78, ll. 11-13).

Once the PCA is chosen by the client, the PCA will begin to provide services to the client. There is no supervision by Rest Assured in the performance of these services. (R. p. 92, ll. 1-2). Rest Assured does not care how the services are performed, or which means and methods the PCA decides to utilize. (R. p. 87, ll. 9-20). A PCA is only removed from a particular job at the request of the client. (R. p. 112, l. 6 – p. 113, l. 6). Rest Assured then places the PCA back on the Registry. *Id.* A PCA has never been dismissed from a job for any reason other than client dissatisfaction. *Id.*

Rest Assured provides no supplies or equipment to the PCA. (R. p. 99, ll. 9-20). No gloves, hand wash, cups, medical supplies, or uniforms are provided by Rest Assured. (R. p. 99, l. 9 – p. 100, l. 10).

Many of the PCAs work for other in-home care providers while also working for Rest Assured. (R. p. 108, ll. 5-13). Rest Assured does not withhold any taxes, and provides an IRS Form 1099 to each PCA at the end of the year. (R. p. 111, l. 7; R. p. 112, ll. 1-2). Other in-home care providers also treat their PCAs as independent contractors, including the South Carolina Department of Disability and Special Needs, South Carolina Department of Health and Human Services, and Medicaid. (R. p. 128, l. 16 – p. 129, l. 4; R. p. 135, ll. 1-7; R. pp. 195-196; R. p. 197).

ARGUMENT

I. The Administrative Law Court erred in law and in fact by finding that individuals working as personal care aides for Rest Assured were employees pursuant to South Carolina law.

The ALC affirmed the decision of the SCDEW Appellate Panel, finding that the relationship between Rest Assured and its PCAs was that of an employer-employee for unemployment tax purposes because Rest Assured exercises sufficient control over its

workers. The ALC erred and/or abused its discretion in holding that the Rest Assured PCAs were employees. This finding by the ALC ignored the evidence in the record and is not supported by the substantial, reliable, or credible evidence in the record. Additionally, the finding is an error of law, clearly erroneous in the view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by an abuse of discretion. Accordingly, this Court should reverse the decision of the ALC.

Pursuant to the South Carolina Labor and Employment Act, the SCDEW uses, among other specific provisions, common law rules to determine whether an employer-employee relationship exists versus an independent contractor relationship. S.C. Code Ann. § 41-27-230(1)(b) (1976). The common law rules regarding the employee/independent contractor analysis have developed in the context of a wide spectrum of agencies. For example, many workers' compensation cases cite to employment security cases for propositions regarding the employee/independent contractor relationship, and vice versa. As such, our guidance will necessarily draw from a number of cases outside of the SCDEW/SCESC context.

Even so, the settled law in South Carolina is that the determination of whether a worker is an employee or an independent contractor focuses on the issue of control; specifically, whether the purported employer had the right to control the worker in the performance of his work. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (citing *South Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995)*; *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971)). In evaluating the right

to control, the court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) the furnishing of equipment; (3) the method of payment; and (4) the right to fire. *Id.* (citing *Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970); *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000)). In *Wilkinson*, the South Carolina Supreme Court overturned its traditional employee-friendly analysis, and returned to a "jurisprudence that evaluates the four factors with equal force in both directions." *Wilkinson,* 382 S.C. at 299, 676 S.E.2d at 702.

When a court's or an agency's employment determination is challenged, the court will begin its analysis with the terms of the agreement itself. *Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702 ("In evaluating the four factors, we are guided initially by the parties' independent contractor agreement."). However, the court is ultimately guided by the parties' conduct "which mirror[s] the terms of the contract." *Id.* (citing *Kilgore Group, Inc. v. S.C. Emp't Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (noting that "in determining the nature of [the parties'] relationship," the contract "has considerable weight," but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive")). "Though the parties do not control the legal effect of the contract, the primary test of the contract's character is the intention of the parties, which is to be gathered from the whole scope of the language used." Anderson, *Master and Servant – Test for Independent Contractor v. Employee*, S.C. Requests to Charge - Civil, § 5-12 (2002); see also *Todd's Ice Cream,*

Inc. v. S.C. Emp't Sec. Comm'n , 281 S.C. 254, 258, 315 S.E.2d 373, 376 (Ct. App. 1984). Therefore, it is instrumental to look at the terms of the contract with the PCAs.

1. Direct Evidence of Control

The control principle provides that "if the employee is not free to do much of what he could otherwise do, he is an employee and not an independent contractor." *Nelson v. Yellow Cab Co.* 349 S.C. 589, 564 S.E.2d 110 (2002). As direct evidence of the right to or the actual exercise of control, courts have considered whether the employer inspects the work in progress, the terms of any written or oral contracts and, for temporary workers, the chain of contractual authority that leads from the worker to the employer and from the employer to the client business that exercises control and direction on the job site. *Kilgore Group, Inc. v. South Carolina Emp't Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993); *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996).

When jobs are subject to change during their execution according to the customer's wishes which are communicated to the employer, who then gives appropriate instructions to the worker, with which the latter is obligated to comply, the worker is likely to be considered an employee. *Chavis v. Watkins*, 256 S.C. 30, 180 S.E.2d 648 (1971). This is because the agent lacks autonomy to deal with the customer directly. With regard to the Rest Assured PCAs, any changes to the scope of work are discussed directly with the client and the PCA. The client does not tell Rest Assured that changes are needed to certain services; rather those matters are discussed directly with the PCA.

It is important to note that the direct control element applies to the PCAs' "custodial care" services. Despite control over extraneous aspects of the PCAs work,

such as the dates and times when work is offered and collection of compensation, Rest Assured exercises no control over the actual method of service. Accordingly, the PCA is more likely a free agent.

The more similar Rest Assured's role is "to that of a broker or other middleman," the more likely a court will not find sufficient control to create an employment relationship. See, e.g., *Rhoney v. Fele*, 134 N.C. App. 614, 619, 518 S.E.2d 536, 539 (N.C. App. 1999). As such, the provision in the independent contractor agreement that states that the PCA and the client set their hours of work, without input by Rest Assured, weighs heavily in favor of independent contractor status. See, e.g., *In re Serino*, 190 B.R. 778 (Bankr. M.D. Pa. 1995).[1] Further, an employment relationship is not indicated where the employer does not require any specific number of hours worked. *Id.* The PCAs for Rest Assured do not fall within the scope of employees.

a. Written Agreement

The ALC agreed with Rest Assured that the independent contractor agreements with the PCAs should be given considerable weight. ("In this case, because the parties complied with the terms of the contract, the contract is given considerable weight."). (R. p. 15). "The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight." *Kilgore Group, Inc. v. South Carolina Emp't Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 50 (1993). Importantly, the PCAs signed contracts which acknowledged that they were independent contractors.

[1] The ALC declines to consider *In re Serino* because there was "sufficient South Carolina common law." (R. p. 27). However, the ALC also makes the inconsistent argument that the South Carolina Supreme Court has cited a "Pennsylvania case in support of its analysis as to the direct evidence of the right to exercise control factor." (R. p. 22). There is no case is South Carolina that addresses in-home caregivers. Thus the decision of the ALC to ignore *In re Serino*, a case that is almost factually identical to the case at hand, was in error.

(R. pp. 45-48). Further, the contract specifically provided that "[b]y accepting assignment(s) as a subcontractor, it is under the assumption of Rest Assured that you are your own business representative." (R. p. 48).

The substantial evidence in the record reveals that Rest Assured did not have the right to control the PCAs. The written contract clearly provides that the PCAs' "schedule and hours are determined by [the PCA]" and that the PCA "will determine the method, details and means of performing the Services upon receiving the care plan for the patient." (R. pp. 45-48). These contract provisions were confirmed by the actions of Rest Assured and the PCAs.

When a new patient needs services, the client (Medicaid or VA) contacts Rest Assured with a care plan. This care plan lists the services that need to be provided to the patient (bathing, housekeeping, etc.) and lists the times a PCA is needed. Rest Assured then matches these services and times with available PCAs. The PCA is then given the ultimate control over their work and allowed to accept or deny the job. Once they accept the job, it is up to the PCA to determine the exact means and methods for bathing, housekeeping, etc. This is consistent with the independent contractor agreement, and indicates that Rest Assured does not have direct control over the PCA.

b. Delegation of Control

The ALC relies heavily on the allegation that Rest Assured has somehow delegated its authority to control the PCAs to the patients. (R. pp. 9-27). However, the analysis by the ALC of this topic is misguided and misconstrues the facts. Accordingly, the ALC erred by finding that "Rest Assured delegates most of its authority to its clients." (R. p. 17).

The ALC attempts to argue that control is somehow imputed to Rest Assured under *Kilgore*, 313 S.C. 65, 427 S.E.2d 48. However, *Kilgore* is distinguishable from the case of Rest Assured. In *Kilgore*, a temporary employment company would supply temporary workers to various businesses. *Id.* at 67. These businesses would then dictate the day-to-day activities of the workers and direct the workers as to the specifics of their jobs and tasks. *Id.* The South Carolina Supreme Court ruled that this direction and control was imputed to the temporary agency because the clients control was "derived solely from their contracts with Kilgore." *Id.* at 69.

The case of Rest Assured is the polar opposite of *Kilgore*. Rest Assured first contracts with providers such as Medicaid, VA, and SCDHHS. These are the clients of Rest Assured. Rest Assured then receives a Care Plan from those providers which specifies what services are to be provided to the third-party patient. (R. p. 138, l. 13 - p. 139, l. 14). Based on the availability schedules provided by the PCAs, Rest Assured matches possible PCAs with the patient. After a PCA is chosen it is totally up to the PCA to determine the means and methods to provide the specified services to the patient. In fact, the record is clear that the nature of the relationship between the PCA and the patient is controlled by the PCA. (R. p. 138, ll. 8-12).

In *Kilgore*, the job duties were determined after the temporary worker arrived at the job, and then the worker was instructed on exactly what to do and how to do it. In the case of Rest Assured, the services to be provided are determined <u>before</u> the PCA gets to the job. Accordingly, the PCA has the ultimate control because the PCA can deny the job if the services or hours are not desirable. Once the PCA accepts the job, they are in control of the means and methods of performing the requested services.

Further, Rest Assured's contract is with the provider, i.e. Medicaid and others, not the third-party patient. The client (Medicaid, VA) does not control the PCAs. The PCAs are given a specific Care Plan, allowed to accept or deny the assignment, and then allowed to perform the services as they see fit. This is in direct contrast to *Kilgore* where the clients contracted directly with the agency, hired the worker, and then directed all of the actions of the worker. Further, the Court in *Kilgore* relied on testimony that the temporary workers were treated exactly the same as the permanent workers of the client and controlled in the same manner. *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. In this case, the PCAs were not treated as employees or controlled by either Rest Assured or the client.

The ALC states that "the PCAs did not have complete control over their hours and methods of performing services." (R. p. 19). The ALC bases this theory on the incorrect fact that the clients dictate the hours worked, and that Rest Assured participates in developing the care plan for the client. Rest Assured is given a care plan by Medicaid or the VA. This dictates the hours and services to be provided. Just as a building contractor would provide a subcontractor with a list of specifications for a wall being built, the care plan provides a list of services to provide. However, it does not provide <u>how</u> those services are to be provided. Additionally, these hours and services are set prior to the PCA accepting the job, and thus the PCA is given the ultimate control with the ability to deny the job.

This case is far more analogous to the case of *Wilkinson*, 382 S.C. 295, 676 S.E.2d 700. In *Wilkinson*, the Supreme Court of South Carolina found that a long-haul truck driver was an independent contractor, not an employee. *Id.* The Court based its

decision on the driver's choice to become an independent contractor, the contract term that provided for the "means and methods" to be determined by the driver, and the fact that the driver could refuse any assignment. *Id.* at 301-02. Similarly, Rest Assured's PCAs also chose to be independent contractors, there is a specific contract term that the PCA will determine the "means and methods," and the PCA is free to choose their own hours and refuse any assignment. (R. p. 78, ll. 11-13; R. p. 142, l. 11 – p. 143, l. 7; R. pp. 45-48).

In *Wilkinson*, the Court also found that a strong regulatory presence did not reflect control by the driver's motor carrier. 382 S.C. at 303, 676 S.E.2d at 704. This included the only "equipment" that was furnished to the driver, the company's logo on his truck. *Id.* Similarly, the only thing furnished by Rest Assured is its name badge with the company logo. Rest Assured is highly regulated by the In-Home Care Providers Act which provides in part that Rest Assured must screen PCAs for certain "personal information, completion of a minimum education requirement, completion of minimum training and continuing education requirements, and screening for communicable diseases." S.C. Code Ann. § 44-70-40 (1976). The Act also requires that Rest Assured perform background checks on each of the PCAs. S.C. Code Ann. § 44-70-60 (1976). Lastly, draft regulations by the Department of Health and Environmental Control require the PCAs to wear identification badges. DHEC Reg. 61-121-501(J). Clearly, this strong regulatory presence cannot be equated to control by Rest Assured.

The *Wilkinson* Court also found that the driver was paid per mile and issued a 1099 which was consistent with an independent contractor agreement. 382 S.C. at 303, 676 S.E.2d at 704. Similarly, Rest Assured issues 1099 to all the PCAs and "withholds

no taxes." (R. p. 45-48). Also, each PCA is free to negotiate their rate for each separate assignment/job. (R. p. 75, ll. 9-20). This is strongly indicative of an independent contractor relationship.

Lastly, the *Wilkinson* Court held that there was no right to fire because "termination of the parties' relationship was controlled by their agreement" and "either party could terminate the contract upon 30 days' notice." 382 S.C. at 304, 676 S.E.2d at 704. Similarly, the relationship between Rest Assured and the PCAs is governed by the agreement. The provisions of the Independent Contractor Agreement with the PCAs specifically provide the causes for termination and provide that either party can terminate the agreement. (R. pp. 45-48). Accordingly, Rest Assured does not have a right to fire the PCAs.

c. PCAs' Other Employment

The independent contractor agreement with the PCAs provides, "Rest Assured is aware that subcontractors work for a variety of agencies and/or clients" and also encourage the PCAs to work for other agencies. (R. pp. 45-48). In fact, at the hearing, Rest Assured handed up a document that showed that of Rest Assured's roughly 250 PCAs, over 90% of them work for other agencies as well. (R. pp. 186-194). The fact that most of the PCAs work for other providers is another factor indicating independent contractor status. See, e.g., *Rhoney v. Fele*, 134 N.C. App. 614, 619, 518 S.E.2d 536, 539 (Ct. App. 1999) (listing as a factor supporting a finding that a registered nurse was an independent contractor to a placement service that the nurse "could and did provide nursing services through other placement services. . . .").

Regarding the in-home nursing field specifically, one Pennsylvania case notes that where nurses are allowed to offer their services to the general public and to other registry services during the same period that they are available for placement by an agency, this suggests independent contractor status. *In re Serino*, 190 B.R. 778, 783 (Bankr. M.D. Pa. 1995). The record provides that the majority of PCAs with Rest Assured also work for similar personal care agencies and are therefore not the employees of Rest Assured.

d. Training and Supervision

Rest Assured encourages the PCAs to obtain training and stay current on all of the procedures they are required to perform. (R. p. 136, ll. 5-16). However, Rest Assured does not make this training mandatory. *Id.* Occasionally, "but very rarely," Rest Assured does offer optional training at their offices. *Id.* This "rare" optional training is not enough to indicate some control over the 250 PCAs working with Rest Assured. The ALC agreed, finding "that Rest Assured's offering of optional training is not indicative of control over its PCAs. The Appellate Panel erred in its finding to the contrary." (R. p. 21).

Rest Assured calls the client every four months just to make sure the quality of services are up to standard and that the client is satisfied. (R. p. 135, l. 17 – p. 136, l. 4). Rest Assured does not provide any supervision over the PCAs or control the means and methods of the PCAs. (R. p. 87, ll. 9-20; R. p. 92, ll. 1-2). In fact, the independent contractor agreement specifically provides that the PCA "will determine the method, details and means of performing the Services upon receiving the care plan for patient." (R. p. 45).

The health care industry, unlike other service providers, is heavily regulated and monitored by governmental agencies. Calls every four months by Rest Assured are required to ensure that the PCAs are complying with state and federal health codes. "[R]equiring a worker to comply with the law is not evidence of control by the putative employer." *Wilkinson*, 382 S.C. at 302, 676 S.E.2d at 703 (quoting *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 762 A.2d 328, 335 (Pa. 2000) ("employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status.")). Stated differently, "a strong regulatory presence equates with control by the government, not the putative employer." *Id.* This is especially true for Rest Assured whose main sources are the government, i.e. Medicaid and the VA.

e. Sporadic Work

If an individual's work is sporadic rather than regular and the individual is able to accept or reject a job assignment offered by Rest Assured, a court is more likely to find the requisite autonomy of an independent contractor. See, e.g., *Rhoney v. Fele*, 134 N.C. App. 614, 619, 518 S.E.2d 536, 539 (N.C. App. 1999). The PCAs are allowed to totally dictate their own schedules and which jobs to accept or reject. Rest Assured does not control the PCAs.

Additionally, a typical independent contractor provides skilled labor, including registered nurses. *Hospital Res. Personnel, Inc. v. United States*, 860 F. Supp. 1554 (S.D. Ga. 1994); *Critical Care Register Nursing, Inc. v. United States*, 776 F. Supp. 1025 (E.D. Pa. 1991). Rest Assured only acts as a broker of these PCAs, and they do not employ them.

2. Furnishing of Equipment and Transportation

Another factor in the employee/independent contractor analysis is the furnishing of equipment and tools. H.W. Funderburk, Jr., *Independent Contractors, Temporary Workers: More Myth than Reality*, 11-FEB S.C. Law. 15 (January/February 2000) ("The third factor is the furnishing of equipment by the employer."). Such equipment includes tools, materials, supplies, office space, clerical support, uniforms, business cards, order forms, and price lists. *South Carolina Indus. Comm'n v. Progressive Life Ins. Co.*, 242 S.C. 547, 131 S.E.2d 694 (1963) (agents were provided supplies, including forms, rate scales, policies, lapse schedule and instruction manual).

Rest Assured's Independent Contractor Agreement explicitly states that the PCA is responsible for all supplies and transportation and associated operating costs incurred to provide services. (R. p. 45). Moreover, the PCAs are responsible for maintaining their own licenses and obtaining training each year. *Id.* Rest Assured does not provide any equipment or supplies to the PCA. (R. p. 99, ll. 9-20). This factor weighs heavily in finding the PCAs are independent contractors.

The ALC again attempts to impute the actions of the patient to Rest Assured. The ALC held that the "finder of fact could have found that the clients [patients] provide nearly all of the equipment to the PCAs and that what the PCAs supply is negligible." However, the finder of fact found that "Equipment is not furnished." (R. p. 34).

The ALC improperly attempted to substitute its own theory of equipment furnishing when the SCDEW had already found that the "Equipment is not furnished." *Id.* This fact heavily favors a finding that the PCAs are independent contractors. Yet, the ALC erred when it held that the furnishing of equipment was substantial evidence "of an

employer-employee relationship." (R. p. 23). The record and the finding of fact by the SCDEW all indicate that the equipment was not furnished, and thus an independent contractor relationship existed.

3. Method of Payment

The ALC held that "[a]lthough the factor of method of payment presents another close call in a case of close calls, I nevertheless find that there was substantial evidence to support the Appellate Panel's finding that Rest Assured's method of payment favored an employer-employee relationship." In fact, the evidence related to payment weighs substantially in favor of an independent contractor.

The personal care aide profession makes it impossible for there to be any compensation system other than the one employed by Rest Assured. Rest Assured acts simply as a broker service, matching the clients with the PCAs. Rest Assured makes its money by taking a cut of the PCA rate which is essentially a finders/matching fee. Rest Assured does not participate in the relationship with the PCA and the client, but simply matches their skills, requirements, and schedule.

Each of the PCAs negotiates their rate with Rest Assured based on the specific client. (R. p. 75, ll. 9-20). Accordingly, one PCA may have different rates for different clients. This method of pay is indicative of an independent contractor, as the PCA is not being paid a set rate for all of their work. The rate is negotiated on a client by client basis.

Further, Rest Assured does not withhold any of the PCAs' taxes, and it provides an IRS form 1099 to each PCA at the end of the year. This is indicative of an independent contractor relationship. *Wilkinson*, 382 S.C. at 303, 676 S.E.2d at 704.

The ALC and the SCDEW Appellate Panel erroneously found that because Rest Assured provided workers' compensation insurance, it indicated an employee relationship. According to South Carolina workers' compensation law, Rest Assured is liable for the work related injuries of the PCAs because they are considered statutory employees. S.C. Code Ann. § 42-1-410 (1976). Accordingly, Rest Assured must provide workers compensation insurance to cover the risk associated with these injuries. The independent contractor agreement specifically states that the "Company agrees to provide worker's compensation insurance for Personal Care Aide Contractor as statutory employee." (R. pp. 45-46)(emphasis added). Because Rest Assured is required by South Carolina law to cover these PCAs for workers' compensation, this fact cannot be used as a way to claim an employee relationship. Accordingly, all of the method of payment facts point to an independent contractor relationship.

4. Termination Provision – the right to fire.

Both Rest Assured and a PCA may terminate the agreement at any time prior to completion. As noted by the *Wilkinson* court, an important consideration regarding the "right to fire" is "the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term 'fire,' for it embraces the employment relationship." *Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704. The *Wilkinson* Court ultimately concluded that where termination was controlled by the terms of their agreement, and the putative employer did not retain the "right to fire," a finding of an independent contractor arrangement was warranted. *Id.*

Accordingly, it is important to note that Rest Assured has no control over the means and methods of the PCAs work. *See Youngblood v. N. State Ford Truck Sales*,

364 S.E.2d 433, 437 (N.C. App. 1988). ("The right to fire is one of the most effective means of control. An independent contractor is subject to discharge only for cause and not because he adopts one method of work over another. An employee, on the other hand, may be discharged without cause at any time."). Rest Assured does not retain the right to fire the PCA; rather it only retains the right to terminate the agreement. The PCA also retains the same right. Rest Assured is acting only as a personal aide broker, connecting the PCA and the client. A termination of the agreement would only mean the PCA would no longer be placed into the pool of eligible applicants for a job.

Rest Assured does not fire the PCA. The PCA is only taken off a job if the client requests it. Rest Assured has no control over whether the PCA remains on a job or not. If a PCA is taken off of a job they are placed back on the Registry and the independent contractor agreement remains in effect. The removal of a PCA from a job at a client's request has no bearing on the independent contractor agreement.

The right to fire as it relates to an employment relationship centers on whether that right creates some control in the alleged employee. However, in Rest Assured's case, it provides no right to control. The relationship between Rest Assured and the PCAs is governed by the agreement. The provisions of the Independent Contractor Agreement with the PCAs specifically provide the causes for termination and provide that either party can terminate the agreement. (R. p. 46). Accordingly, Rest Assured does not have a right to fire the PCAs which implies an independent contractor relationship.

5. Control in the Home Healthcare Context

A 1995 bankruptcy case provides additional guidance for home health agencies such as Rest Assured. In *In re Serino*, the court found that a nursing registry operator

was not the employer of nurses for federal withholding tax purposes. 190 B.R. 778 (Bankr. M.D. Pa. 1995). Even though the nurses were paid on an hourly basis and made little investment in their trade apart from education, the nurses controlled the nurse-patient relationship. *Id.* This was true even though the agency provided nurses with workers' compensation insurance for a short period of time, and the agency would suffer complete loss of income without the nurses' services. *Id.*

Where, as here, the patients and nurses, rather than the agency, set working hours and no work occurs at the agency's office, nurses furnish their own tools, and are not given benefits other than compensation for services rendered, the court found the requisite indicia of control lacking to find an employment relationship. *Id.* This case is directly on point with the case of Rest Assured. The court in *In re Serino* specifically held that the reasons given by the SCDEW Appellate Panel as reasons for an employee relationship were not valid in the home healthcare context.

This is because the home healthcare industry is very different than many other industries. Rest Assured provided evidence that treating the PCAs as independent contractors is the industry standard. (R. p. 128, l. 16 – p. 129, l. 4; R. p. 135, ll. 1-7; R. p. 196; R. p. 197; R. p. 198). In fact, both the State of South Carolina and Medicaid treat their PCAs as independent contractors. *Id.* Rest Assured modeled its business platform on the program created by the South Carolina Department of Disability and Special Needs ("SCDDSN") which treats its PCAs as independent contractors. (R. p. 116, ll. 5-13).

The high number of clients, PCAs, and turnover in this industry require that the PCAs be treated as independent contractors. Accordingly, the SCDEW is setting a bad

precedent by claiming the PCAs are subject to unemployment. A PCA's job is sporadic and intermittent, and to claim that a PCA is entitled to unemployment every time a temporary job ends would create a nightmare for the employer and the SCDEW.

Rest Assured is also authorized by the South Carolina Legislature to treat its PCAs as independent contractors. Rest Assured, as an In-Home Care Provider, is governed by the "Licensure of In-Home Care Providers Act" (the "Act"). S.C. Code Ann. § 44-70-10 (1976). The Act provides:

> "In-home care provider" means a business entity, corporation, or association, whether operated for profit or not for profit, that for compensation directly provides or makes provision for in-home care services through its own employees or agents or through **contractual arrangements with independent contractors** or through referral of other persons to render in-home care services when the individual making the referral has a financial interest in the delivery of those services by those other persons who would deliver those services.

S.C. Code Ann. § 44-70-20 (1976) (emphasis added). Rest Assured is modeled on the State of South Carolina's independent contractor arrangement provided by the Department of Disability and Special Needs. (R. p. 116, ll. 5-13).

This philosophy is also supported by federal law. The Fair Labor Standards Act of 1938 specifically provides for an exemption from minimum wage and overtime requirements for individuals providing companionship services to clients in their own homes. 29 U.S.C.A. § 213(a)(15). This federal law recognizes the difficulties faced in the companionship services industry, and provides an exemption. South Carolina law, federal law, case law from other jurisdictions, and the actions of the SCDDSN all support the proposition that the home health industry is distinct from other industries and PCAs should be treated as independent contractors.

II. The Administrative Law Court erred in not allowing Rest Assured to supplement the record.

On March 7, 2013, Rest Assured moved to supplement the record with a letter from the State of South Carolina which acknowledged receipt of Rest Assured's Independent Subcontractor agreement and approved the subcontractor agreement. (R. pp. 272-275). The ALC denied this motion and subsequently denied the motion for reconsideration. (R. pp. 6-8; R. pp. 1-5). This Court should overturn the ALC's denial and allow this important letter into the record.

South Carolina Code Ann. § 1-23-380(3) provides that:

> If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.

(Supp. 2012). Before a court can allow new evidence under § 1-23-380(3), the court must consider two factors: (1) the materiality of the additional evidence and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. *Brown v. Peoplease Corp.*, 5082, 2013 WL 1223380 (S.C. Ct. App. Mar. 27, 2013).

The letter dated March 8, 2008, and presented for supplementation is highly material to this case. The letter specifically evidences the State of South Carolina's approval of Rest Assured's use of independent contractors, the very question at issue in this case. (R. p. 274).

Appellant originally filed its appeal to the full South Carolina Employment Security Commission (ESC) (currently known as the South Carolina Department of

Employment and Workforce) on March 16, 2007. The appeal was not actually heard until four years later. The letter from DHHS had not been sent at the time the Appellant appealed to the full ESC. The significant delay in time to hear the appeal to the ESC led to the inadvertent oversight of the letter from DHHS. The letter was sent during the long delay caused by the restructuring of the ESC, and letter was not rediscovered until recently.

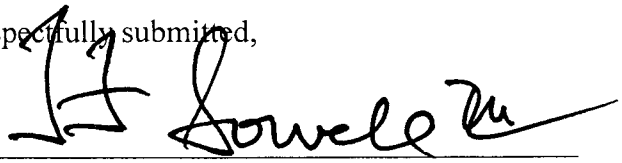
The supplementation of this letter would not prejudice the SCDEW as it is simply being used to support the position that the State of South Carolina has approved Rest Assured's use of subcontractors. This is a position that has been asserted by Rest Assured since the initiation of this case. Accordingly, because the evidence is material and there was good cause for the failure of its introduction, this Court should reverse the ALC and allow the March 8, 2008, letter into the record.

CONCLUSION

South Carolina looks mainly to the control exerted over the PCAs to determine their employment status. The preponderance of the evidence and the substantial evidence indicate an independent contractor relationship between Rest Assured and the PCAs. The PCAs are allowed to pick and choose their own schedule, accept or deny jobs, choose the means and methods to perform their jobs, and provide their own equipment and training. Rest Assured exerts no control over these PCAs. The PCAs chose to become independent contractors, and the agreement between Rest Assured and the PCAs clearly indicates the intention of the parties. Because Rest Assured exerts little to no control over the PCAs, this Court should reverse the decision of the ALC, and find that the PCAs are independent contractors for unemployment tax purposes. Further, the Court should

reverse the decision of the ALC denying the supplementation of the record with material evidence, and allow the letter of March 8, 2008 into the record.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 12-ALJ-22-0209-AP
Appellate Case No. 2013-000774

Rest Assured, LLC,.....Appellant,

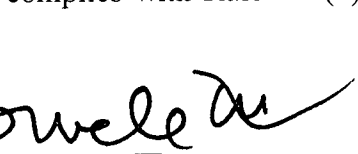
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

November 19, 2013



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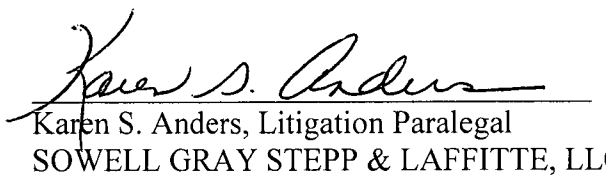
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Respondent South Carolina Department of Employment and Workforce by depositing a copy of it in the United States Mail, postage prepaid, on November 21, 2013 addressed to its attorney of record, Debra S. Tedeschi, Deputy General Counsel, S.C. Dept. of Employment and Workforce, Post Office Box 8597, Columbia, South Carolina 29202.



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