

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRM THE DEPARTMENT'S DECISION THAT APPELLANT IS AN EMPLOYER OF PERSONAL CARE AIDES FOR UNEMPLOYMENT TAX PURPOSES?

- II. DID THE ADMINISTRATIVE LAW COURT PROPERLY DENY APPELLANT'S REQUEST TO SUPPLEMENT THE RECORD?

STATEMENT OF THE CASE

Respondent South Carolina Department of Employment and Workforce (“SCDEW”) concurs in the Statement of the Case presented in Appellant Rest Assured’s brief.

FACTS

1. Rest Assured’s Business Practices

Rest Assured is a company that places in-home personal care assistants (PCAs) to care for elderly and disabled people. Rest Assured keeps its own registry of over 280 PCAs, of which 70 to 90 are used each week. (R.pp.41; 76-81). Rest Assured does not place the PCAs into its registry until they pass all background checks. (R.p.85). Rest Assured is connected to its clients by “dispatch requests” received from various government agencies, such as Medicaid, the U.S. Department of Veterans Affairs (VA), the South Carolina Department of Disabilities and Special Needs (DDSN), as well as from private paying individuals. (R.pp.117-118).

Once a dispatch request is received, Rest Assured assesses the client’s needs and then matches two potential PCAs, based primarily on their availability, to interview with the client. (R.p.80, lines 1-7; p.85, lines 2-13; p.95,lines 8-13). After the interviews, the client chooses the PCA for the job. (R.p.119-120). The PCA’s job duties may include bathing and grooming of the client, companionship and meal preparation for the client, as well as light housekeeping. (R.p.82, lines 1-17).

A PCA’s pay rate from Rest Assured is based on what the client is paying to Rest Assured. (R.pp.96-99). In other words, Rest Assured first negotiates with the client, and then the PCA negotiates with Rest Assured for an hourly rate. The client does not

directly pay the PCA. For the referrals from a governmental agency, Rest Assured sends the bill directly to the agency which in turn pays Rest Assured. (R.p.121, line 11-p.122, line 4). Rest Assured pays the PCA based on the PCA's weekly report of how many hours the PCA worked. (R.p.110). Even if the client fails to pay, Rest Assured still pays the PCA for the hours worked. (R.p.99, lines 1-8).

Rest Assured's director, Reatha Johnson, testified at the hearing that she offered and encouraged training for those on her registry, but she did not require it. (R.pp.95-96; 136). When asked if she supervised the PCAs, she stated she would visit the client home every four months for "quality control." (R.p.135, line 9-p.136, line 4). The PCAs are covered by workers compensation insurance. (R.p.103). Rest Assured does not provide any tools or supplies to the PCAs; instead, supplies are provided either by the client or the PCA. (R.p.99, line 9-p.100, line 6). Each PCA wears a name badge with Rest Assured's logo on the badge. (R.pp.100-101).

For unemployment tax purposes, Johnson originally reported her PCAs as employees, but at some point decided to treat them as "subcontractors." (R.pp.142-143). Explaining this decision, Johnson testified at the hearing that "it just was not beneficial to me as a company to consider them employees because of their turnover rate, and they jump from agency to agency." (R.p.142, lines 11-13).

After Johnson decided to treat the PCAs as subcontractors, rather than employees, the PCAs entered into an "Independent Contractor Agreement." (R.pp.166-168). The Agreement stated that the PCA agrees not to participate "directly or indirectly, in any capacity, in any business or activity that is in competition with" Rest Assured. (R.p.167).

Nonetheless, Johnson acknowledged that many of her PCAs regularly worked for other competing companies. (R.p.108; pp.186-194).

Furthermore, the right to terminate outlined in the written agreement stated that either Rest Assured or the PCA could terminate the contract at any time. For Rest Assured, the right to terminate could be based upon when a PCA engaged in conduct that “is harmful, detrimental, improper, or fraudulent to or for the business.” (R.p.167).

In reality, however, the power to terminate a PCA from an in-home job rested predominantly with the client. (R.p.88, lines 2-10; p.124, lines 9-11). After a client “fired” a PCA, Rest Assured generally would place the PCA right back into its registry for use on other jobs. (R.p.112, lines 6-15; p.153). The only instance where Rest Assured would terminate a PCA was when the PCA took a Rest Assured client to a competing company.

2. SCDEW’s Tax Status Determination

This unemployment tax status determination case was triggered by Rest Assured’s reclassification of the majority of its employees to “subcontractors” on its 2005 fourth quarter unemployment tax return, as well as by the filing of an unemployment claim by a former worker of Rest Assured. (R.pp.44; 73; 62-63; 127-128).

As a result, a Field Deputy investigated Rest Assured regarding its tax liability status and furnished a report. (R.pp.152-153). The Employment Security Commission thereafter issued a determination on March 2, 2006, finding Rest Assured’s workers should be classified as employees with their wages subject to unemployment tax. (R.pp.49-50).

On appeal, SCDEW's Appellate Panel affirmed this determination, finding Rest Assured exercises the control of its PCAs, and therefore, these workers are employees for unemployment tax purposes. (R.pp.31-34).

3. The Administrative Law Court Proceedings

Rest Assured appealed from SCDEW's final administrative decision to the Administrative Law Court (ALC). On March 7, 2013, after all briefs had been filed with the ALC but before the ALC had issued its decision, Rest Assured filed a Motion to Supplement the Record on Appeal. (R.pp.272-275). Rest Assured asked the ALC to supplement the Record with a **May 8, 2008** letter sent to Rest Assured from the South Carolina Department of Health and Human Services. This letter was not in existence at the time of the hearing (held on September 12, 2006), was not presented to SCDEW at any time after the hearing, and was not introduced to the SCDEW Appellate Panel before or after its 2011 decision.

The ALC denied Rest Assured's request to supplement the record with the 2008 letter. (R.pp.6-8). In a separate, well-reasoned, 19-page Order, the ALC affirmed SCDEW's decision to treat Rest Assured PCAs as employees for unemployment tax purposes. (R.pp.9-27).

Rest Assured thereafter filed for reconsideration, but that request was also denied by the ALC. (R.pp.276-278; pp.1-4).

ARGUMENT

Standard of Review

SCDEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding SCDEW's predecessor, the Employment Security Commission, subject to the APA).

In reviewing a determination on the employment status of workers, the standard of review to be applied by the Court is the substantial evidence rule under the APA. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 112, 439 S.E.2d 288, 289 (Ct. App. 1993), *rev'd in part on other grounds*, 318 S.C. 456, 458 S.E.2d 429 (1995). Under the APA:

[A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S. Carolina Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." *Id.* at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

[S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (substantial evidence is "evidence which,

considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency”).

Furthermore, the reviewing court “may not substitute its judgment ... as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-610(B) (Supp. 2011). “The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence.” *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the Appellant bears the burden “to prove convincingly that the agency's decision is unsupported by the evidence.” *Id.*

In the instant case, SCDEW determined that Rest Assured is the employer of PCAs, and therefore it must report these workers for purposes of unemployment tax. Under this Court's narrow scope of review, it is clear that SCDEW's tax status determination is supported by substantial evidence and the ruling is not affected by any error of law. The ALC correctly affirmed, and this Court likewise should affirm.

1. **The ALC correctly found that substantial evidence supports SCDEW's decision that Rest Assured possessed the right to control its PCAs and therefore is an employer for unemployment tax purposes.**

In a comprehensively well-reasoned 19-page order, the ALC correctly decided there is substantial evidence supporting SCDEW's finding that Rest Assured had the right to control its PCAs and therefore, Rest Assured is a liable employer for unemployment tax purposes. Accordingly, this Court should affirm.

Pursuant to statute, "employment" is defined to include any service performed by any individual "who, under the usual **common law rules** applicable in determining the employer-employee relationship, has the status of an employee." S.C. Code Ann. § 41-27-230(1)(b) (1986) (emphasis added). Under South Carolina common law, "the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has **the right to control** the servant in the performance of his work and the manner in which it is done." *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49-50 (1993) (emphasis added). The test is not whether the actual control is exercised, but rather "whether there exists the right and authority to control and direct the particular work or undertaking." *Id.* The four factors demonstrating the right of control are: (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Id.*

Any written contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight; however, "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." *Id.* In other words, the Court must be guided by whether the actual conduct of the employer and worker mirrors the terms of the contract. *Wilkinson v.*

Palmetto State Transp. Co., 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009). If the parties' conduct does not comport with the written agreement, the probative value of the agreement is much diminished.

Here, although the PCAs did sign an independent contractor agreement, it is clear the parties' conduct often did not reflect the written terms of the agreement. The substantial evidence shows that despite clear language in the contract barring PCAs from working for competitors, Rest Assured freely allowed its PCAs to work for other companies. (R.p.108; pp.186-194). Moreover, the written agreement indicated Rest Assured had the right to terminate, but the evidence at the hearing showed that the right to terminate a PCA from a job rested generally with the client. The written agreement's declaration that the PCAs were independent contractors, therefore, is far from dispositive.

More critical to the analysis is whether Rest Assured had the right to control its workers and actually exercised this right to control.

The ALC correctly found that the evidence of the record shows Rest Assured had the right to control the PCAs. First, it is Rest Assured who initially selects, i.e., matches, the PCA to the client. This is the ultimate right to control because only Rest Assured has the authority to send the PCA to the client. As noted by the ALC, because Rest Assured narrows the slate of possible PCA candidates and then delegates the ultimate choice of PCA to its client, Rest Assured has a right of control, and this negates the independence of the PCAs.

Furthermore, the evidence shows that Rest Assured's clients had abundant control over the way the PCAs performed their work. Under South Carolina law, this control must be imputed to Rest Assured. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50. The

facts in *Kilgore* involved temporary workers who were placed by Kilgore to perform work for Kilgore's clients, such as the State Newspaper. The *Kilgore* Court found the clients' "ability to exercise control over the workers' activities was derived solely from their contracts with Kilgore and Kilgore's contract with the workers. **Therefore, it can be inferred Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.**" *Id.* (emphasis added).

The instant case is indistinguishable from the facts in *Kilgore*. The PCAs, like the temporary workers in *Kilgore*, did not contract directly with the clients. Here, Rest Assured clearly possessed the right to control the PCAs' work performance via Rest Assured's own contractual relationship with its clients.

Rest Assured's reliance on federal bankruptcy law and North Carolina precedent is misplaced given that South Carolina common law controls this inquiry. *See* S.C. Code Ann. § 41-27-230(1)(b). Therefore, the fact that Rest Assured is akin to a temporary employment placement agency, with the right to control the PCAs' performance largely delegated to Rest Assured's clients, weighs heavily in favor of a finding that the PCAs are, in fact, employees rather than independent contractors. *Id.*

Accordingly, there is substantial evidence in the record supporting the conclusion that Rest Assured actually had the right to control its PCAs in a number of ways, most specifically in directing how, when, and where the work was performed.

There is also substantial evidence on the factor related to method of payment to support that Rest Assured's PCAs are employees. The PCAs' hourly pay is derived from the rate Rest Assured is paid by the client (or the agency referring the client). Therefore,

the method and amount of payment – an hourly rate that is not freely negotiated by the PCA, but rather agreed upon within the constraints of the rate that has already been agreed to between Rest Assured and the client – is more in Rest Assured’s control than the PCAs. The fact that the PCAs are paid by the hour, based on worksheets turned in to Rest Assured, and regardless of whether the client actually pays its bill, further indicates Rest Assured is the employer of the PCAs. This factor therefore also weighs in favor of the employer-employee relationship.

Rest Assured maintains that it acts “simply as a broker service,” and “does not participate in the relationship with the PCA and the client.” (App.Br, p.19). As found by both the SCDEW Appellate Panel and the ALC, these contentions are not supported by the evidence the record. Rest Assured directly negotiates with its clients regarding fees and is the entity that is directly paid (either by the client or the referring agency). In turn, Rest Assured then pays its PCAs. This method of payment factor weighs in favor of finding the PCAs employees, rather than independent contractors. Moreover, simply because there exists the possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *See Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. at 226, 467 S.E.2d at 917.

As to the furnishing of equipment, the evidence is shows that very little in the way of supplies is needed for the PCAs to perform their work. Moreover, while the PCAs may provide their own supplies, the evidence shows that the clients themselves also may provide the supplies needed for their in-home care. Therefore, the evidence on this factor is conflicting at best.

Regarding the right to fire, Rest Assured's Director clearly stated that the client had the ability to fire the PCA. Pursuant to *Kilgore*, this control is therefore properly imputed to Rest Assured. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50 (1993) (where the clients "believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance," this showed the workers were employees). Moreover, the language of the written agreement which gives both Rest Assured and the PCA a "right to terminate" evidences an intention to create an at-will relationship. (R.p.46). An at-will relationship favors an employer-employee relationship, rather than an independent contractor relationship. *See Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704 (at-will relationship indicates employee).

Curiously, Rest Assured seems to argue it does not have the right to fire but only "retains the right to terminate the agreement" which would mean the PCA would no longer be placed into its registry. This argument is untenable; certainly, if the PCA is no longer in Rest Assured's registry, the PCA has been fired by Rest Assured.

Furthermore, Rest Assured's argument that people who work temporary jobs or work sporadically are not entitled to unemployment benefits is without merit. Rest Assured's repeated references to industry and regulatory standards, as well as federal tax law, are misplaced based on South Carolina's statutory requirement that this issue be determined by state common law. Both the statutory and common law of South Carolina clearly support the proposition that an employer placing temporary employees is subject to unemployment tax liability when the substantial evidence supports **the right to control**. *Kilgore, supra; see also* S.C. Code Ann. § 41-27-230 (defining employment).

Rest Assured's arguments seem to indicate it believes the home health care industry should be exempt from unemployment taxations. If the Legislature wants to wholesale exempt this industry from unemployment taxation, then a statutory amendment is called for, not a judicial decision effectively creating such an exemption. *See* S.C. Code Ann. § 41-27-260 (Supp. 2012) (specifically defining "Exempted employment").

In sum, substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. at 366, 692 S.E.2d at 913. While there may be some pieces of evidence in the record that indicate an independent contractor relationship, there is unquestionably substantial evidence supporting the ALC's decision to affirm SCDEW's finding that Rest Assured's PCAs are employees. The possibility of drawing two inconsistent conclusions from the evidence does not mean the Appellate Panel's conclusion is unsupported by substantial evidence. *See, e.g., Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. at 226, 467 S.E.2d at 917.

Accordingly, this Court should affirm the ALC's order upholding SCDEW's decision.

2. The ALC correctly denied Rest Assured's request to supplement the record on appeal.

In March 2013, after all briefing had been completed, Rest Assured asked the ALC to supplement the Record with a **May 8, 2008** letter sent to Rest Assured from the South Carolina Department of Health and Human Services. This letter was not in existence at the time of the hearing (held on September 12, 2006), was not presented to SCDEW at any time after the hearing, and was not introduced to the SCDEW Appellate Panel before or after its 2011 decision. Clearly, the ALC correctly denied Rest Assured's motion to supplement the record on appeal as well as its subsequent motion for reconsideration.

Under the APA:

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. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code Ann. § 1-23-380(3).

The evidence Rest Assured sought to have admitted was not material to the issues before either the ALC or this Court. Merely because the Department of Health and Human Services wrote a letter (allegedly) acknowledging that Rest Assured had a subcontractor agreement with its PCAs has no bearing whatsoever on whether Rest Assured in fact has a right to control these PCAs. SCDEW is charged with making that factual finding for purposes of determining whether Rest Assured is an employer of the PCAs for unemployment tax reporting. Once that factual finding has been made by

SCDEW, it is the ALC and this Court that needs to determine whether there exists substantial evidence in the record to uphold that decision.

In addition to being immaterial evidence, the ALC properly found that Rest Assured failed to timely file its request and there was no good cause shown for the failure to introduce the evidence earlier than 2013.

CONCLUSION

In conclusion, for the reasons discussed above, this Court should affirm the ALC's Order which upheld the SCDEW Appellate Panel's decision that Rest Assured's PCAs are employees, and Rest Assured is therefore liable for unemployment tax purposes.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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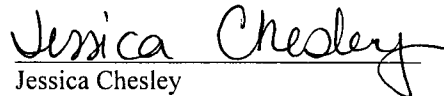
PROOF OF SERVICE

I certify that I have served the Respondent South Carolina Department of Employment and Workforce's Final Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on November 25, 2013, addressed to the parties at their addresses of record:

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