

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Cellular Sales of South Carolina, LLC,

Docket No. 12-ALJ-22-0294-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce,

Respondent.

RECEIVED

MAY 13 2013

SC Court of Appeals

STATEMENT OF THE CASE

Cellular Sales of South Carolina, LLC, (Appellant) appeals the decision of the South Carolina Department of Employment and Workforce (Department), finding that the Claimant and all like sales representatives for Appellant are classified as employees and that their wages are subject to unemployment tax. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2012). Upon consideration of the record and briefs, this Court affirms the Department's decision.

BACKGROUND

Nadezda Rains (Claimant) worked for Appellant as a sales representative from October 20, 2007 until the work relationship was terminated on November 1, 2008. Claimant subsequently filed an application for unemployment benefits with the South Carolina Employment Security Commission (Commission). Thereafter, the Appeal Tribunal issued a formal notification to Appellant and Claimant that the Commission considered Claimant to be eligible for unemployment benefits.

On December 11, 2008, Appellant timely responded to the notification of the payment of benefits to inform the Commission that Claimant, through her business entity, Rains, LLC, was an independent contractor for Appellant and thus, was ineligible for unemployment benefits. On April 8, 2009, the Commission issued a determination that Claimant was an employee and not an independent contractor. Upon receipt of this determination, Appellant timely requested administrative review of the Commission's determination.

FILED

April 11, 2013

SC ADMIN. LAW COURT

On March 18, 2011, the Appeal Tribunal held an evidentiary hearing and the Claimant, a representative for the Appellant, and the Department appeared at the hearing. The Administrative Hearing Officer issued an Administrative Ruling on May 4, 2011 that Claimant and similarly-situated sales representatives should be classified as employees and not independent contractors.

Appellant timely appealed this decision to the Appellate Panel on June 3, 2011. Oral arguments were held on May 9, 2012. The Appellate Panel issued its decision on May 25, 2012, affirming the Hearing Officer's determination with respect to Claimant's status as an employee and the determination that other similarly-situated sales representatives were also employees. The Appellant sought review of the Appellate Panel decision in this Court on June 22, 2012.

FACTS

Appellant is a limited liability corporation which operates a business to promote and sell products and services of a national wireless communications provider. Claimant worked as a sales representative for Appellant prior to being separated from her employment. Appellant maintains that it contracted with Claimant as an officer of her own corporation for the performance of her work as a sales representative. Appellant further maintains that it did not employ individuals as sales representatives, but contracted with separate entities to sell the products and services of the national wireless carrier. Pursuant to an agreement between the parties dated January 8, 2008, Appellant only engaged the services of corporations or limited liability companies to serve in the capacity as sales representatives.

On January 7, 2008, Claimant formed a limited liability company, Rains, LLC, pursuant to the directives of Appellant, and was assigned an employer identification number. Claimant did not have a license to operate a business while working for Appellant, and believed that she was working under Appellant's business license. Appellant contends that Claimant and all other sales representatives had exclusive control over their work schedule, performed without supervision, and set their prices which determined how much commission was earned. Appellant further states that sales representatives performed in the sales position from their own sales background and experience. Training was provided by Appellant on its computer system and on its commission structure, and the national carrier provided product information and promotional materials. Appellant maintained a physical business location where sales

representatives worked in shifts. At the location, sales representatives could accommodate walk-in customers or meet customers for appointments. Claimant stated that she was instructed in at least one instance, to stand outside the store to publicize the store's promotional events.

Claimant performed her job duties solely at the Appellant's store location. There was no supervisor on site, but there were periodic visits to the store by a regional manager. Claimant stated that sales representatives signed up for shifts to work in the store, and a schedule was posted by Appellant. Claimant checked the posted schedule each week because some weeks she was not scheduled to work the shift times that she had originally signed up for. If Claimant could not be present for her shift, it was expected that she find another sales representative to cover the shift. Claimant testified that if sales representatives swapped shifts too often or were not present at the store for their entire shift, it resulted in Appellant assigning a less desirable time slot in a subsequent schedule. Appellant acknowledged that store privileges could be removed, but Appellant maintains that Claimant could still perform outside sales. When Claimant's job performance was deemed unsatisfactory by Appellant, Claimant was contacted by phone or email. Appellant did not conduct formal performance reviews or evaluations of the sales representatives.

Appellant provided all inventory located at the store. Appellant required inventory to be checked multiple times daily. Claimant was required to set up inventory displays and return damaged inventory to Appellant's corporate offices. Computers and general office supplies located at the store were provided by Appellant. When away from the store, Claimant used her personal computer to access the company network. Payment from a customer was collected and processed by Claimant, and then the form of payment was entered in Appellant's computer system. Claimant maintained her own money bag. Within a time specified by Appellant, Claimant was required to deposit money that was collected from customers into Appellant's account, and fax copies of the deposit slips to Appellant. Upon verification of the sale from the national carrier, payment was disbursed to Appellant. The sales representatives' commission was determined and paid by Appellant.

Appellant reported Claimant's income on an Internal Revenue Service Form 1099, in the name of Rains, LLC. Appellant did not withhold taxes from the Claimant's earnings and did not reimburse for expenses. Because Claimant worked solely from Appellant's store, she did not

incur business expenses. Claimant's earnings were paid to Rains, LLC, and pay in the form of a draw was available, but Claimant elected straight commission pay. Claimant's income was based on her sales performance which included retail sales of phones and accessories as well as service plans and feature upgrades. Appellant maintains that sales representatives could set their own price, however Claimant states that Appellant provided its recommended pricing amount to go by and gave specific instructions for pricing some products. If Claimant sold a limited variety of products or items were sold at a minimum price, Claimant was contacted by a manager. Claimant received instruction on how to sell slow-selling products, and paid a percentage of fees charged to a customer for restocking a returned item as well as activating or programming phones. Sales representatives were required to repay Appellant their commission if a customer cancelled service.

Appellant maintained that sales representatives were not prohibited from working for other companies, but they could not share confidential information or work in sales for a competitor from the same national carrier. Claimant did not sell for any other business while working for Appellant. The agreement at the time of hire did not include provisions for terminating the relationship. Appellant asserts the contract could be terminated by either party at anytime. Claimant's separation was initiated by Appellant. Claimant maintains the reason for her termination was unknown to her, and was simply informed by the area manager that her services were no longer needed.

ISSUES ON APPEAL

1. Did the Department err in finding that Claimant is an employee rather than an independent contractor for the purpose of South Carolina law, and is that decision affected by error of law or clearly erroneous in view of the evidence in the Record on Appeal?
2. Did the Department err in finding that other similarly-situated sales representatives of Appellant are also employees rather than independent contractors, and is that decision affected by error of law or clearly erroneous in view of the evidence in the Record on Appeal?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, the predecessor of the Department, was an agency within

the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See, S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2012); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) of the South Carolina Code (Supp. 2012) provides the standard used by appellate bodies to review agency decisions. See, § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section states:

The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996).

Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 467 S.E.2d at 917.

DISCUSSION

Appellant argues that the Department erred in concluding that an employer/employee relationship exists between Claimant and other similarly-situated sales representatives. The Court disagrees.

Determination of Claimant as Employee

S.C. Code Ann. § 41-27-230 provides that, in determining whether an employee-employer relationship exists between an individual and an employer, the common law rules apply:

Employment means:

Any service performed . . . for wages under a contract of hire, written or oral, expressed or implied . . . by:

. . .

(b) 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. § 41-35-120(1)(b) (Supp. 2012).

In South Carolina, the determination of whether an individual is an employee or independent contractor “focuses on control, specifically whether the purported employer had the right to control the claimant 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). With respect to the right of control, South Carolina courts have utilized a four-factor test in viewing the work relationship in its entirety: “(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire.” Id. (citing Workers’ Comp. Comm’n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.3d 302 (1995)); Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 68, 437 S.E.2d 48, 49- 50 (1993).

The test of whether an employee-employer relationship exists is not whether the actual control was exercised; rather, the test is “whether there exists the right and authority to control and direct the particular work or undertaking.” Kilgore Group, Inc., 313 S.C. at 68-69, 437 S.E.2d at 50. When determining an individual’s employment status, the court will also look to the individual’s and employer’s written agreement. Wilkinson, 382 S.C. at 299, 676 S.E.2d at 702 (quoting Kilgore Group, 313 S.C. at 68-69, 437 S.E.2d at 50 (1993) (noting that when “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.’”).

In this matter, the Appellate Panel determined that the record established that Appellant exercised sufficient control to establish an employer-employee relationship. Specifically, the Appellate Panel found that all four factors of the common law test reflected that the sales representatives were employees of Appellant rather than independent contractors as argued by Appellant. Appellant alleges that the Appellate Panel erred in its application of the right of control facts and that the decision is clearly erroneous in light of the substantial evidence that Appellant did not have a right of control over Claimant. The Court will individually address each of the factors and the pertinent evidence relating to each.

Direct Evidence of the Right to Control

The Appellate Panel found that the evidence showed actual control was exercised in several aspects of the sales representative position. The panel rested this decision on the evidence in the record that Claimant received instruction on selling specific products and was counseled when performance was deemed unsatisfactory. Appellant also exercised control over shift scheduling and provided pricing guidelines. The Appellate Panel also found that Claimant created Rains, LLC only to satisfy Appellant’s requirement.

Appellant asserts that it had no supervision over Claimant’s sales entity or her daily activities. Appellant alleges that it had no members of management regularly onsite and that regional managers visited stores once every one or two weeks. Appellant also cites the latitude Claimant was given with pricing, discretion of hours and location of where work was completed, and the ability to conduct its own marketing and advertising as factors in determining that she was an independent contractor.

In this case, there is substantial evidence in the record on appeal that demonstrates that Appellant had actual control over the employees. While there were no members of management at the location at all times, the activities of the sales representatives were monitored by cameras at the location. In addition to this, the sales representatives received specific instruction on selling and were also counseled when performance numbers were below expectations. While the sales representatives were granted latitude with pricing, testimony in the record reflects that Appellant provided pricing guidelines and questioned sales representatives when these were not followed.

The scheduling of employees is another area in which Appellant exercised control over the sales representatives. Testimony reflects that while workers could sign up for scheduled times, the final schedule was posted by Appellant. Claimant also testified that the assigning of undesirable times was used as a method of punishment.

Appellant alleges that it dealt only with Rains, LLC and therefore was not directly employing Claimant. Claimant, however, testified that Rains, LLC was formed for the sole purpose of satisfying Appellant's employment requirement. Appellant's employment contract stated that she had ninety (90) days after starting the business to create an LLC or the contract would be terminated. Appellant offered the service of drafting the LLC to all employees in order to comply with the terms of the employment contract. It is clear from the transcript that Appellant had the right to control and direct Claimant in her work.

Furnishing of Equipment

The Appellate Panel found that Claimant 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 the Claimant operated under the business license of Appellant which covered sales representatives while working in the store.

Appellant alleges that while the findings of the Appellate Panel are accurate, the fact that Claimant could have worked outside the storefront was ignored. Appellant claims that the record supports the assertion that to make sales outside the storefront, sales representatives purchased the inventory, furnished their own computers and cell phones, and utilized independent business

licenses.¹ In addition to these requirements, Appellant also points to the evidence in the record which asserts that salesmanship was the primary tool used for the job and the reason they required prior sales training to be hired. While Appellant admits that equipment, such as an in-store computer terminal and general supplies were provided, but argues this is insufficient to prove right of control.

To support this position, Appellant cites South Carolina Workers' Compensation Comm'n. v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995). In Covington, the Supreme Court held that even though the employer supplied the employee with business forms and office space, he was still an independent contractor. However, the employee in Covington was required to purchase certain materials necessary for the performance of his work as well as his own liability insurance. Also, the employee in Covington was a real estate agent who had wide latitude to list property and paid for his own advertising and multiple listing books. In the instant case, 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.

Method of Payment

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.

Appellant asserts that it is undisputed that sales representatives were paid through their companies and not directly to the individual, and that all sales representatives were responsible for their own taxes. Appellant alleges that the Appellate Panel ignored the fact that sales representatives paid their own expenses and were allowed to work multiple jobs during the employment. While it is true that Appellant did not reimburse sales representatives for expenses

¹ Appellant asserts that all sales representatives were required to obtain their own independent business licenses for the purpose of being able to sell outside the store.

incurred, the Claimant had little or no work-related expenses as almost all of the work was done out of Appellant's physical location. The payment to Claimant was issued in an IRS Form 1099 to the company; however, testimony from Claimant clearly reveals that this was created strictly for the purpose of compliance with the employment contract.

There is substantial evidence in the record which supports the Appellate Panel's finding that, "while the method of payment in this case does not disprove an employer/independent contractor relationship, it is evidence that the Claimant created Rains, LLC at the direction of [Appellant]. [Claimant] 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 [Appellant's] requirement." Accordingly, the method of payment further establishes the control of the Appellant in the work relationship.

Right to Fire

The employment contract between Appellant and sales representatives did not address the termination of the parties' relationship. The Appellant Panel found that the Claimant was hired for an indefinite period of time and that the separation occurred when Appellant informed the Claimant that her services were no longer needed. 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. There is substantial evidence that Appellant had the "right to fire" sales representatives and did so in this case.

Determination that Other Similarly-Situated Sales Representatives of Appellant are Also Employees Rather than Independent Contractors

Appellant argues that the decision of the Appellate Panel with respect to similarly-situated sales representatives is affected by error of law and clearly erroneous in light of substantial evidence to the contrary. The Court disagrees.

Appellant asserts that the decision of the Appellate Panel, with respect to similarly-situated sales representatives, is erroneously based on the Claimant's description of her own working relationship with Appellant. Appellant claims that there is substantial evidence in the record that she had significant discretion in virtually every aspect of the working relationship,

even though she chose not to use it. Appellant also alleges that neither the Claimant nor the Respondent offered any testimony regarding the terms and conditions of their relationship with other sales representatives beside the Claimant. Appellant argues that by doing this, the Appellate Panel is issuing an impermissible advisory ruling. “It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.” Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

The determination of whether the relationship of independent contractor has been established in each case depends largely upon its own factual situation, subject to certain established general principles. The general test applied is that of control by the employer. It is not the actual control then exercised, 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. Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). The Department is tasked with the requirement of determining when the employer/employee relationship exists. See S.C. Code Ann. §§ 41-29-110 and 41-27-210 through 41-27-280 (2003 and Supp. 2012). Therefore, the rendering of that decision has practical effect, which prevents it from being classified as an advisory opinion.

In Kilgore Group, the Supreme Court of South Carolina adopted the holding of Utah Courts, which held that the employer shoulders the burden of producing evidence showing that its other similarly-situated employees operated under a different relationship than the employee who testified. Kilgore Group v. South Carolina Employment Securities Commission, 313 S.C. at 69, 437 S.E.2d at 50 (1993) quoting Ellison, Inc. v. Board of Review, 749 P.2d 1280 (Utah Ct. App.) cert. denied, 765 P.2d 1278 (Utah 1988). In the present case, Appellant presented no such witnesses and did not introduce any testimony distinguishing the work relationship of other sales representatives from that of Claimant. Based on the evidence contained within the record on appeal as provided by both parties; there is substantial evidence to uphold the finding that sales representatives of Appellant are employees rather than independent contractors.

A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure without adequate determining principles, or is governed by no fixed rules or standards. Deese v. S.C. Bd of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (S.C. App. 1985). The Court of Appeals found in Deese

that the Board's decision was not arbitrary and capricious, notwithstanding allegations that others similarly situated had received lesser sanctions because the suspension of the doctor's license was within sanctions established by law for the dentist's "extensive" violations. The court found that as judges, it lacked the competence to weigh and evaluate the record with that same expertise. Id. Additionally, in analyzing whether a decision is arbitrary, courts have often reviewed whether the decision is supported by "substantial evidence" to determine if "there is evidence that would allow reasonable minds to reach the conclusion the administrative agency reached." Ruocco v. S.C. State Bd. of Registration for Professional Engineers and Land Surveyors, 314 S.C. 111, 114, 441 S.E.2d 829, 831 (1994). If the decision is supported by "substantial evidence" and is within the parameters of the Appellate Panel established by law for determining employee's status, the Appellate Panel could not have acted arbitrarily.

In this case, the Appellate Panel based its finding that Claimant was an employee on the testimony which demonstrated that Appellant exercised control over the day to day activities. I find that the substantial evidence in the record supports this finding, and that there was a rational basis for the finding. Accordingly, I conclude that the Appellate Panel's decision classifying Claimant and all other similarly-situated sales representatives as employees was not arbitrary, capricious, or an abuse of discretion.

ORDER

IT IS THEREFORE ORDERED that the Appellate Panel's decision is **AFFIRMED**.
AND IT IS SO ORDERED.

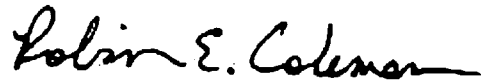


Deborah Brooks Durden
Administrative Law Judge

April 11, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

April 11, 2013
Columbia, South Carolina

FILED

April 11, 2013

SC ADMIN. LAW COURT