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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

Docket No. 21-ALJ-22-0448-AP

Appellate Case No. 2022-001433

Wendell D. Cooper,

Appellant,

v.

South Carolina Department
Of Employment and Workforce, and
School District of Greenville County,

Respondents.

**BRIEF OF RESPONDENT SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE**

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TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 4

Standard of Review 9

Arguments

 I. THE ADMINISTRATIVE LAW COURT DID NOT ERR BY APPLYING
 THE TWO ISSUE RULE BECAUSE THE APPELLATE PANEL
 EXPLICITLY BASED ITS DECISION HOLDING APPELLANT
 INELIGIBLE TO RECEIVE UNEMPLOYMENT BENEFITS ON
 MULTIPLE GROUNDS AND APPELLANT FAILED TO CHALLENGE
 THE GROUND THAT HE WAS UNAVAILABLE FOR WORK..... 10

 II. APPELLANT’S REMAINING ISSUES ARE NOT PROPERLY BEFORE
 THIS COURT ON APPEAL BECAUSE THEY HAVE NOT BEEN
 ADDRESSED BY THE ADMINISTRATIVE LAW COURT 18

Conclusion20

TABLE OF AUTHORITIES

CASES

<i>Gibson v. Florence Country Club</i> , 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)	9
<i>Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles</i> , 380 S.C. 600, 670 S.E.2d 674 (Ct. App. 2008)	10, 13
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010)	11, 13, 14
<i>First Union Nat'l Bank of S.C. v. Soden</i> , 333 S.C. 554, 511 S.E. 2d 372 (Ct.App.1998).	11
<i>Hyman v. S.C. Emp't Sec. Comm.</i> , 234 S.C. 369, 379, 108 S.E.2d 554, 559 (1959)	11, 15, 17
<i>Murphy v. NCAA</i> , 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018)	15
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	18, 19
<i>Elam v. S.C. Dept. of Transp.</i> , 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)	18

STATUTES

S.C. Code Ann. § 41-27-310 (2020)	1
S.C. Code Ann. § 41-35-110(5) (2020)	1
S.C. Code Ann. § 1-23-610(C) (Supp. 2023)	10
S.C. Code Ann. § 41-35-110 (2020)	11, 13, 14, 15, 21
S.C. Code Ann. § 41-35-20 (2020)	12, 20
15 U.S.C. § 9021	15, 19

OTHER AUTHORITIES

SCALC Rule 40	18
---------------------	----

STATEMENT OF ISSUES ON APPEAL

- I. DID THE ALC ERR IN APPLYING THE TWO ISSUE RULE WHERE THE APPELLATE PANEL'S DECISION HOLDING APPELLANT INELIGIBLE TO RECEIVE UNEMPLOYMENT BENEFITS WAS EXPLICITLY BASED ON MULTIPLE GROUNDS AND APPELLANT FAILED TO CHALLENGE THE GROUND THAT HE WAS UNAVAILABLE FOR WORK?

- II. ARE APPELLANT'S REMAINING ISSUES PROPERLY BEFORE THIS COURT ON APPEAL WHERE THOSE ISSUES HAVE NOT BEEN ADDRESSED OR RULED UPON BY THE ALC?

STATEMENT OF THE CASE

Appellant Wendell Cooper began working for the Greenville County School District (Greenville) on January 28, 2020. (ALC Record p.10). He filed an initial claim for regular unemployment compensation (UI) benefits on March 18, 2020. (ALC Record pp.9-12). The Department's claims adjudicator issued a determination May 1, 2020, holding Appellant indefinitely disqualified from receiving UI benefits, effective March 15, 2020, based on a finding he left work with a previous employer voluntarily and without good cause.¹ (ALC Record p.25). Appellant then filed a claim for federal Pandemic Unemployment Assistance (PUA) on May 5, 2020. (ALC Record pp.27-29). The Department's claims adjudicator issued a determination June 2, 2020, holding Appellant eligible to receive PUA benefits effective March 15, 2020. (ALC Record p.30). Appellant's

¹ At the time Appellant filed his initial claim for benefits on March 18, 2020, he had not earned eight times his weekly benefit amount with Greenville. As a result, his claim was adjudicated based on his separation from his most recent employer who had paid him at least eight times his weekly benefit amount (Spartanburg County Schools District #7) rather than Greenville. *See* S.C. Code Ann. § 41-27-310 (2020); *see also* S.C. Code Ann. § 41-35-110(5) (2020).

first benefit year expired on March 13, 2021, but Appellant continued to be eligible for PUA benefits due to the pandemic and Congress's extension of the CARES Act programs. The PUA program ended in South Carolina on June 26, 2021. On July 12, 2021, the Department's claims adjudicator issued a determination holding Appellant ineligible to use wages from Greenville to establish a UI claim, effective June 6, 2021, based on findings he was filing during a break between terms and he had reasonable assurance of returning to work after that break between terms. (ALC Record p.45). Also on July 12, 2021, the Department's claims adjudicator issued a determination holding Appellant ineligible to receive UI benefits, effective March 14, 2021, based on a finding he was not working all available hours with his current employer. (ALC Record p.47). Neither of these determinations negatively affected Appellant's eligibility for PUA benefits through the end of the program on June 26, 2021.

From July 13, 2021, to July 20, 2021, Appellant filed several appeals from the two claims adjudicators' determinations with the Department's Appeal Tribunal (Tribunal). (ALC Record pp.49-59). The Tribunal held a hearing on August 9, 2021, to discuss Appellant's appeals from the claims adjudicator's reasonable assurance determination. (ALC Record pp.65-87). On August 10, 2021, the Tribunal issued a decision affirming the claims adjudicator's determination and holding Appellant ineligible to receive UI benefits, effective June 6, 2021, based on a finding he was filing for UI benefits while on a regular break between academic terms and that Appellant had reasonable assurance of returning to work at the end of that break between terms. (ALC Record p.95-97). On August 15, 2021, Appellant appealed the Tribunal's August 10, 2021, decision to the Department's Appellate

Panel (Panel). (ALC Record pp.99-111). On August 30, 2021, the Tribunal held a hearing to discuss Appellant's appeals from the claims adjudicator's still working determination. (ALC Record pp.119-138). On September 2, 2021, the Tribunal issued a decision affirming the claims adjudicator's still working determination and finding Appellant was ineligible to receive UI benefits because he was not accepting available work with his current employer due to COVID concerns. (ALC Record pp.147-149). On September 11, 2021, Appellant appealed the Tribunal's still working decision to the Panel. (ALC Record pp.150-171). On September 22, 2021, the Panel issued a decision finding Appellant ineligible to receive UI benefits, effective June 6, 2021, through August 21, 2021, based on a finding he had been filing during a regular break between terms with reasonable assurance of returning to work at the end of that regular break period. (ALC Record pp.172-175). That decision modified the previous Tribunal decision because the break between terms had ended and Appellant had returned to work by the time of the Tribunal hearing; therefore, the Panel was able to put an end date on the disqualification. *Id.* On October 12, 2021, the Panel issued a decision finding Appellant was ineligible to receive UI benefits, effective March 14, 2021, based on a finding he was not accepting all available work with his current employer. (ALC Record pp.176-180). Appellant appealed both Panel decisions to the Administrative Law Court (ALC) and by Order dated January 5, 2022, the ALC consolidated both appeals into this single case. (ALC Order January 5, 2022). On September 6, 2022, the ALC issued an order affirming the Panel's decisions based on the application of the two issue rule. (ALC Final Order p.5). Appellant's appeal to this Court followed.

FACTS

I. Documentary Evidence

On June 16, 2021, Greenville responded to a Department request for information and indicated Appellant was currently filing during a break between academic terms, that Greenville intended to rehire Appellant at the end of that break, and that Appellant knew he was going to be rehired. (ALC Record p.42). Appellant provided a doctor's note dated June 11, 2021, which stated that Appellant's doctor had previously advised him to stay home during the duration of the COVID pandemic in 2020 and 2021 due to a "high risk of developing severe COVID disease." (ALC Record p.52).

II. Testimony

During the August 9, 2021, hearing, George Ward, testifying on behalf of Greenville, stated that Greenville schools closed for summer break on June 4, 2021, and would reopen on August 17, 2021, at the end of that break. (ALC Record p.77, lines 7-14). Ward further stated that Appellant had reasonable assurance of returning to work with the school system. (ALC Record p.77, lines 15-18). Greenville substitute teachers are not required to sign a contract every year. (ALC Record p.77, lines 19-25). Greenville uses an automated call system that calls substitutes when a school has a teacher absence. (ALC Record p.78, lines 13-19). Substitute teachers can remove themselves from the list by calling in and telling "Ms. Caster" that they would not be returning. (ALC Record p.78, lines 20-25). As of the date of the hearing, Appellant was still an active substitute teacher in Greenville's automated system. (ALC Record p.78, lines 26-28). Appellant testified that he had gone into the system and "paused" his ability to be called for substitute work until

he was cleared from his physician. (ALC Record p.84, lines 9-12). Appellant admitted he was still getting calls for substitute work with Greenville and that he wanted to return to subbing because he liked working with the kids. (ALC Record p.84, lines 12-22).

During the August 30, 2021, hearing, Appellant stated he began working for Greenville in January of 2020, and that he still worked for them as a substitute teacher. (ALC Record p.129, lines 1-6; p.132, lines 3-5). He stated he filed for benefits because he “had not returned to work yet from the doctor’s order.” (ALC Record p.129, lines 7-10). Appellant began self-quarantining on November 23, 2020, based on his doctor’s advice and returned to work with Greenville on August 23, 2021, also based on his doctor’s recommendation. (ALC Record p.130, line 9-p.131, line 25). There was work available to Appellant as a substitute teacher with Greenville during the time he self-quarantined. (ALC Record p.135, lines 5-8).

III. Panel Decision (September 22, 2021)

In its September 22, 2021, decision, the Panel found:

The evidence in this case establishes [Appellant]’s separation during the summer of 2021 was temporary in nature, due to a break between academic terms, and he had reasonable assurance from [Greenville] he could perform services in the same capacity as a substitute teacher in the 2021-2022 school year. Therefore, we find by law [Appellant] is ineligible to use his wages from [Greenville] to establish a claim during the 2021 summer break, June to August 2021. Although [Appellant] denies he was active on the substitute list, his “pause” in employment was due to his own actions and medical issues, and not to actions by [Greenville]. Consequently, [Appellant] is ineligible for benefits from June 6, 2021, to August 21, 2021, because without his school wages he does not have sufficient wages in his base period to be monetarily eligible for UI benefits.

(ALC Record p.3).

IV. Panel Decision (October 12, 2021)

In its October 12, 2021, decision, the Panel found:

Pursuant to the CARES Act Title II, Subtitle A, Section 2102, PUA payments are designed to provide assistance to the individual who is unemployed as a result of the COVID-19 pandemic and is not eligible for unemployment compensation but meets the PUA qualifying requirements.

S.C. Code Ann. § 41-35-110(5) requires a claimant's eligibility for regular unemployment insurance benefits to be based on the separation from the "most recent bona fide employer." The term "most recent bona fide employer" means the most recent employer from whom the claimant separated and earned at least eight times the weekly benefit amount of the claim.

S.C. Code Ann. § 41-35-60 is entitled "Weekly benefits for partial unemployment" and requires the payment of benefits to an eligible claimant who earns less than the weekly benefit amount of the claim.

S.C. Code Ann. § 41-35-110 requires as a condition of eligibility that an individual must be able to work, available to work, and actively-seeking work during each week for which benefits are claimed.

[Greenville] is [Appellant]'s most recent bona fide employer for the purposes of determining his eligibility for UI benefits effective March 14, 2021. The credible evidence shows [Greenville] has had work available for [Appellant], but [Appellant] has restricted his availability for work. While the PUA program was in place, [Appellant]'s medical issues and his concerns about COVID provided compensation. However, under the UI program requirements, [Appellant] was not available for work, and was not actively-seeking work during each claim week. Therefore, we hold [Appellant] ineligible for UI benefits effective March 14, 2021, upon finding he does not meet the eligibility requirements of the UI program.

In his appeal to the Appellate Panel, [Appellant] argues he quit employment in November 2020, when he informed [Greenville] he would not be accepting work. He also argues his UI claim should be effective June 27, 2021. We do not find these arguments or the other arguments in his appeal to have merit. [Appellant] did not request his name be removed from the substitute teacher list, and [Greenville] considered him as still employed. Further, even if [Appellant] were found to have been eligible for UI benefits due to the nature of his November 2020 separation, he would remain

ineligible under the UI program because he was not available for work and not actively-seeking work. As to the effective date of his claim, [Appellant] last filed a claim application on June 9, 2021, and the UI claim was backdated to March 14, 2021. The backdating has no effect on this claim for benefits.

(ALC Record p.7).

V. Appellant's Brief to the ALC

In his brief to the ALC, Appellant listed the following issues and arguments on appeal:

1. Respondents failed to apply the appropriate legal standards for individuals that are prevented from reaching their workplace due to the spread of Covid-19 and are under the care of a physician within the 15 U.S. Code § 9021(b)(ff)-Pandemic Unemployment Assistance guidelines.
2. Respondent failed to correctly apply the Federal Statute 26 USC Code 3304 (A)(6)(A)-Section(5)(A) – Federal Unemployment Tax Act (FUTA). Upon arriving at their determination, the Appellant was ineligible for unemployment insurance benefits (UI); due to being unemployed because of a break-in school term and having the assurance of employment the next school term.
3. Respondent failed to apply the appropriate legal standards under S.C. Code 41-Labor and Employment, Chapter 35- Section 41-35-130(A)(1). The Respondent was unable to acknowledge the effects of COVID 19 – and its impact of the disease on workers in the workplace. In particular, the impact of the illness on Greenville teachers' and the students' health and the health of the citizens of Greenville County according to the Center of Disease Control (CDC) health guidelines.
4. Respondent failed to apply the legal standards under S.C. Code 41-Labor and Employment, Chapter 35- Section 41-35-130(A)(3). Refusal of work without good cause.
5. Respondent failed to use the appropriate legal standards under S.C. Code 41-Labor and Employment, Chapter 35-Section 41-35-130(B)(3). The employer must provide the Department of Employment and Workforce (Department) with copies of the notices of an individual's refusal to accept an offer of work.

6. Respondent failed to use the appropriate legal standard under the Cares Act Federal 26 USC § 3304 (a)(11) and S.C. Code Ann § 41- 27-20 provide benefits for unemployed workers through no fault of their own.
7. Respondent failed to use the legal standard under the Care Act 15 USC. Code § 9021(b)(ff). The Appellant was entitled to UI benefits as a matter of law because he was unable to reach his place of employment due to the advice of a health care provider to self-quarantine related to health concerns

...

Did the Panel base their final decision upon unlawful procedures when they determined that the Appellant was ineligible for UI benefits?

Did the Panel make interpretation errors when applying state and federal laws in arriving at their final decision that the Appellant was ineligible for UI benefits?

(Appellant's ALC Brief pp.2-3). Appellant also included a list of statutes in a table of authorities which did not include any reference to S.C. Code Ann. § 41-35-110. (Appellant's ALC Brief p.3). Nowhere in Appellant's Brief to the ALC does Appellant substantively address the Panel's finding that he was ineligible for UI benefits because "under the UI program requirements, [Appellant] was not available for work, and was not actively-seeking work during each claim week." (Appellant's ALC Brief pp.1-12; ALC Record.p.7).

VI. ALC Decision

In its September 6, 2022, decision, the ALC found:

The Panel found Appellant was ineligible for UI benefits on two separate grounds. First, Appellant was ineligible because he was still employed by Employer since he failed to request his name be removed from the substitute teacher list. Second, the Panel found that even if Appellant was still an employee, Appellant was not available for work. Appellant failed to contest

the Panel's finding that he was unavailable for work and was not seeking work. Therefore, this finding by the Panel is the law of the case and the Court may not find otherwise. Since Appellant was not available for work during the weeks he claims, he is ineligible for UI benefits.

Appellant argues in his response to the Department's brief that he was prohibited from raising a new argument on appeal and could not address the Panel's finding he was unavailable for work. Appellant refers to the legal precedent that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellant misapprehends this legal precedent. The issue of Appellant's UI benefits eligibility was raised to the Panel and the Panel ruled upon that issue by finding Appellant was unavailable to work. Appellant had the opportunity to challenge this finding in his Notice of Appeal and brief and failed to do so. Therefore, the Court must accept this ground for the Panel's decision as the law of the case and find Appellant ineligible for UI benefits.

With respect to Appellant's remaining issues, the Court finds them manifestly without merit because Appellant's PUA eligibility, section 41-35-130, and section 41-27-20 have no bearing on Appellant's eligibility for UI benefits. "The administrative law judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit." SCALC Rule 40. Therefore, the Court declines to address Appellant's remaining issues.

(ALC Final Order pp.4-5).

STANDARD OF REVIEW

DEW 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 DEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgement for the judgement of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further

proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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. § 1-23-610(C) (Supp. 2023).

“The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.” *Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). “The ALC judge’s order should be affirmed if supported by substantial evidence in the record.” *Id.* “Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a scintilla of evidence.” *Id.* at 605, 670 S.E.2d at 676. “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” *Id.* at 605, 670 S.E.2d at 677.

ARGUMENTS

- I. **The Administrative Law Court did not err by applying the two issue rule because the Appellate Panel explicitly based its decision holding Appellant ineligible to receive unemployment benefits on multiple grounds and Appellant failed to challenge the ground that he was unavailable for work.**

“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed

ground will become the law of the case.” *Jones v. Lott*, 387 S.C. 339, 347, 692 S.E.2d 900, 903 (2010). “[A]n unchallenged ruling, **right or wrong**, is the law of the case and requires affirmance.” *Id.* (citing *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E. 2d 372, 378 (Ct.App.1998)) (internal citations omitted and emphasis added). Further, “the two issue rule is applicable in situations not involving a jury....” *Id.*

“An unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he... (3) is able to work and is available for work...and is himself actively seeking work....” S.C. Code Ann. § 41-35-110 (2020). “[A]vailability for work implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached. The burden is upon the claimant for benefits to show that he has met the benefit eligibility conditions and that he is available for work.” *Hyman v. S.C. Emp’t Sec. Comm.*, 234 S.C. 369, 379, 108 S.E.2d 554, 559 (1959).

In affirming the Panel’s decisions, the ALC found:

The Panel found Appellant was ineligible for UI benefits on two separate grounds.... Appellant failed to contest the Panel’s finding that he was unavailable for work and was not seeking work. Therefore, this finding by the Panel is the law of the case and the Court may not find otherwise. Since Appellant was not available for work during the weeks he claims, he is ineligible for UI benefits.

(ALC Decision pp.4-5). The ALC’s findings are supported by substantial evidence in the record, its conclusion is correct as a matter of law, and this Court should affirm.

Appellant was out of work due to his doctor’s medical advice to quarantine due to COVID-19 from November 20, 2020, until the time he was cleared by his doctor to return

to work on Monday, August 23, 2021. (ALC Record p.130, line 9-p.131, line 25). As Appellant concedes in his brief, the Department paid Appellant PUA benefits through the end of the CARES Act programs on June 26, 2021. (App.Br.p.8). Appellant received no benefits from the Department for the claim weeks of June 27, 2021, through August 21, 2021, and was fully employed as of August 23, 2021. (ALC Record p.130, line 9-p.131, line 25). As a result, Appellant is ultimately contesting his eligibility for regular UI benefits from June 26, 2021, through August 21, 2021.

Appellant appealed two Panel decisions to the ALC. (ALC Record pp.1-8). Both decisions addressed Appellant's eligibility for regular UI benefits over a series of claim weeks that included the period between the end of the PUA program and Appellant's return to work. *Id.* In its September 22, 2021, decision, the Panel found that Appellant was ineligible to receive benefits based on a finding he was an instructor filing for benefits during a regular break between school years and he had reasonable assurance of available work in the next academic year. (ALC Record p.3); *see also* S.C. Code Ann. § 41-35-20 (2020) ("Benefits based on service in an instructional...capacity in an...educational institution...must not be paid during the period between two successive academic years...if the individual has a contract or a reasonable assurance that the individual will perform services in this capacity for both these academic years...."). In its October 12, 2021, decision, the Panel, citing to S.C. Code Ann. § 41-35-110, found:

The credible evidence shows [Greenville] has had work available for [Appellant], but [Appellant] restricted his availability for work...[U]nder the UI program requirements, [Appellant] was not available for work, and was not actively-seeking work during each claim week. Therefore, we hold

[Appellant] ineligible for UI benefits effective March 14, 2021, upon finding he does not meet the eligibility requirements of the UI program.

(ALC Record p.7). Based on the explicit finding in the above section of the Panel decision, a reasonable person could conclude, as the ALC did, that the Panel based its decision holding Appellant ineligible for UI benefits on a finding that Appellant was unavailable for work during the period in question; therefore, the ALC's finding to that effect is supported by substantial evidence in the record. *See Original Blue Ribbon Taxi Corp*, 380 S.C. at 605, 670 S.E.2d at 676 (“Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a scintilla of evidence.”).

Because the Panel's decision holding Appellant ineligible to receive benefits was based on a finding that he was unavailable for work, Appellant was required to challenge that finding on appeal in order to avoid that finding becoming the law of the case. *See Jones*, 387 S.C. at 347, 692 S.E.2d at 903 (“[A]n unchallenged ruling, right or wrong, is the law of the case and requires affirmance.”). Appellant's brief to the ALC fails to substantively challenge that finding or include any reference to § 41-35-110 and a reasonable person could conclude that Appellant failed to contest the Panel's finding that he was unavailable for work. (Appellant's ALC Brief pp.1-12). As a result, the ALC's finding that Appellant failed to contest the Panel's finding is supported by substantial evidence in the record. *See Original Blue Ribbon Taxi Corp*, 380 S.C. at 605, 670 S.E.2d at 676.

Appellant's failure to challenge the finding that he was unavailable for work resulted in that finding becoming the law of the case through the operation of the two issue rule. *See Jones*. As a result, the ALC's application of the two issue rule is correct as a matter of law. Appellant argues the application of the two issue rule is improper because: 1) the ALC may not substitute its findings for the Department's findings; 2) Appellant appealed both decisions holding him ineligible and there are no other decisions he didn't appeal; and 3) Appellant has not had a jury trial. (App.Br.pp.5-6). Appellant's arguments are manifestly without merit. The ALC did not substitute any findings for the Department's findings. The exact reason for the two issue rule is to enforce the findings of the lower body when those findings are not challenged on appeal. The Panel found: "[U]nder the UI program requirements, [Appellant] was not available for work, and was not actively-seeking work during each claim week." (ALC Record p.7). The ALC made no additional or alternative factual findings related to Appellant's availability for work. Further, merely appealing both Panel decisions holding Appellant ineligible does not mean he actually challenged all the grounds for those decisions. The two decisions Appellant appealed held him ineligible to receive benefits based on multiple independently determinative grounds. Appellant failed to challenge the ground that he was unavailable for work and that finding is sufficient for affirmance. Finally, Appellant's argument that the application of the two issue rule is only applicable to jury trials is directly contradictory to settled law. *See Jones*, 387 S.C. at 347, 692 S.E.2d at 903 (2010) ("[T]he two issue rule is applicable in situations not involving a jury....").

Because the finding that Appellant was unavailable to work has become the law of the case by operation of the two issue rule, Appellant cannot be eligible for regular, state unemployment benefits during that period, regardless of any other issues he may raise to this Court. *See* § 41-35-110 (“An unemployed insured worker is eligible to receive benefits with respect to a week **only if** the department finds he... (3) is able to work and is available for work...and is himself actively seeking work...”)² (emphasis added). Appellant was unavailable for work during the period in question; that finding has become the unchallenged law of the case; and that finding requires affirmance.

Further, even if the finding that Appellant was unavailable for work had not become the unchallenged law of the case through the operation of the two issue rule, Appellant has repeatedly conceded in his briefs to this Court and the ALC that he was quarantined by his doctor, and thus unavailable for work, during the time period in question. *See Hyman*, 234 S.C. at 379, 108 S.E.2d at 559 (1959) (“[A]vailability for work implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached. The burden is upon the claimant for benefits to show that he has met

² Respondent notes Appellant has repeatedly attempted to argue that the CARES Act (or some other piece of federal legislation) somehow altered the eligibility requirements for state unemployment compensation benefits. That is not true, nor has it ever been true. *See* S.C. Code Ann. § 41-35-110; *see also* 15 U.S.C. § 9021. Nor, in fact, could it possibly be true. *See Murphy v. NCAA*, 138 S.Ct. 1461, 1477, 200 L.Ed.2d 854 (2018) (“[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.... [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”).

the benefit eligibility conditions and that he is available for work.”). Appellant stated in his

ALC brief:

Appellant was able to receive PUA benefits as the result of COVID-19 Pandemic relief because he was unable to reach his place of employment due to the advice of a health care provider to self-quarantine related to health concerns...Furthermore, the Respondents did not refute that the Appellant physician informed him to self-quarantine.

...

Appellant physicians recommended that he quarantine himself from a toxic environment such as Greenville schools due to his high risk of developing COVID disease.

...

On or about November 23, 2020, Appellant removed himself from the substitute list because of the number of reported Greenville COVID-19 cases. In conjunction with the Appellant’s physician’s orders to self-quarantine for health reasons.

...

The Appellant can only receive benefits from one program at a time. Accordingly, he would not be working all of the available work hours during the above time frame because his medical doctor advised him to self-quarantine due to the reported Greenville COVID-19 cases. The Appellant could not be placed on Greenville’s substitute list for August 2021 until his doctor released him to return to work.

...

The Appellant was unable to attend the mandatory summer sub training, which is required to be placed on Greenville’s August 17, 2021, sub list. Due to him being self-quarantined for medical reasons.

...

The Appellant’s doctor advised him to self-quarantine for health reasons in coordination with the CDC health guidelines.

...

On November 23, 2020, the Appellant's doctor advised him to self-quarantine, and he was released to return to work on August 23, 2021, with stipulation.

(Appellant's ALC Brief at p.4-6; 11-12). Even after the issue of Appellant's availability and the two issue rule was raised by Respondent to the ALC, Appellant continued to point out that he had been self-quarantined on the advice of his doctor and was unavailable for regular job functions:

The Appellant was Self-quarantined and Was Unable to Work Because of the Teacher's and Student's Contact with COVID-19.

...

Appellant never participated in a summary workshop because he was self-quarantined due to the rise in COVID-19.

...

Likewise, it is also incontrovertible that the Appellant's doctor told him to self-quarantine due to the increase in COVID-19 cases.

(Appellant's ALC Reply Brief p.5; p.6; p.8). Appellant similarly stated in his brief to this Court: "In this case, the Appellant can self-certify eligibility for COVID-19 reasons that he is unemployed or unable or unavailable to work as the result of his doctor's advice to self quarantine for health reasons." (App.Br.p.3). Appellant has readily and thoroughly conceded the point that he was quarantined by his doctor until he was returned to work on August 23, 2021. That quarantine prevented him from having an unrestricted exposure to his customary labor market, thus causing him to be unavailable for work under South Carolina law. *See Hyman*, 234 at 379, 108 S.E.2d at 559 (1959) ("[A]vailability for work

implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached.”). Even if Appellant’s lack of availability had not already become the law of the case through the two issue rule, Appellant was manifestly not available for work through his own repeated admission, that lack of availability prevents Appellant’s eligibility for regular UI benefits, and this Court should affirm.

II. Appellant’s remaining issues are not properly before this Court on appeal because they have not been addressed by the Administrative Law Court.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to **and ruled upon** by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added). ALC Rule 40 provides that “[t]he administrative law judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit.” The ALC affirmed the Panel’s decisions based solely on the two issue rule and declined to address any other issues raised by Appellant. (ALC Order pp.4-5). Following its ruling on the two issue rule, the ALC stated:

With respect to Appellant’s remaining issues, the Court finds them manifestly without merit because Appellant’s PUA eligibility, section 41-35-130, and section 41-27-20 have no bearing on Appellant’s eligibility for UI benefits. ‘The administrative law judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit.’ SCALC 40. Therefore, the Court declines to address Appellant’s remaining issues.

(ALC Order p.5). Appellant did not file any Motion for Reconsideration or Rehearing with the ALC and Appellant has never received a ruling from the ALC relating to any issue other than the two issue rule. *See* SCALC Rule 40 (“Prior to filing a Notice of Appeal from

the decision of an administrative law judge, a party must file a motion for rehearing stating with particularity the points supposed to have been overlooked or misapprehended by the court.”); *see also Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“A party *must* file [a motion for reconsideration] when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original). As a result, Appellant has abandoned all other issues on appeal and those issues are unpreserved. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (1998). Therefore, this Court should refuse to consider any other issues raised by Appellant.

Although this Court should not address Appellant’s unpreserved arguments, Respondent notes for the sake of clarity that Appellant’s unpreserved arguments also remain manifestly without merit. Most of Appellant’s arguments are based on his erroneous presumption that either the federal CARES Act or Department of Labor guidance related to the CARES Act somehow changed the eligibility requirements for state UI benefits. (App.Br.pp.3-5; pp.7-9). The eligibility requirements for UI benefits under state law have remained unchanged and Appellant’s arguments to the contrary are unavailing. The CARES Act created other benefit programs to provide for individuals who did not qualify for regular unemployment benefits. *See* 15 U.S.C. § 9021 (Defining a “covered individual” for the purposes of the PUA program: “[A]n individual who—(i) is **not eligible for regular compensation or extended benefits under State or Federal law...**” and “is otherwise able to work and available for work within the meaning of applicable State law, **except** the individual is unemployed, partially unemployed, or unable or unavailable to work because....”) (emphasis added). The CARES Act provided PUA benefits exclusively for

those who were not eligible for regular or extended unemployment benefits under state law. *Id.* Appellant received PUA benefits through June 26, 2021, specifically because he was not eligible for regular unemployment benefits under state law. Nothing changed about Appellant's circumstances just because the PUA program ended on June 26, 2021. As the Panel properly found, Appellant was still unavailable for work due to his doctor's orders, he was still not accepting available work as a substitute teacher, and he was still filing during a break between school terms. (ALC Record pp.1-8). Appellant's final argument related to filing while on a break between terms is similarly meritless. (App.Br.p.9). Appellant argues that the Department did not "establish reasonable assurance under the federal statute 26 USC Code 3304(A)(6)(A)(i)...." *Id.* Once again, Appellant confuses federal statutes with state law eligibility requirements. § 41-35-20 requires either a contract or reasonable assurance and defines reasonable assurance as a "written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term." Greenville never altered Appellant's job duties or compensation, as evidenced by Appellant's immediate return to work in the exact same capacity after being released by his doctor. These issues raised by Appellant are both unpreserved and meritless and this Court should refuse to consider them.

CONCLUSION

Appellant was quarantined by his doctor and not available for work. That fact is both the law of the case and manifest from Appellant's repeated admissions. The ALC found that the Panel based their decision holding Appellant ineligible to receive benefits on a finding that Appellant was not available for work. That finding is supported by

substantial evidence in the record. Similarly, the ALC's finding that Appellant failed to challenge that finding on appeal is also supported by substantial evidence in the record. Based on those findings, the unchallenged finding that Appellant was unavailable for work became the law of the case. Appellant's lack of availability for work prevents him from being eligible for regular UI benefits for the weeks in question. That alone is sufficient for this Court to affirm. However, Appellant also bases his entire case on the meritless arguments that various federal laws or guidance somehow altered the eligibility requirements for regular UI benefits under the state's unemployment laws and he therefore does not have to be available for work to receive compensation under the UI program. Contrary to those assertions § 41-35-110 remains unchanged and unmoved by either federal law or Appellant's protestations and continues to prevent Appellant's eligibility due to his unavailability for work. This Court should give no credence to Appellant's baseless arguments and should affirm the ALC's decision.

Respectfully Submitted,



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June 12, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge
Case No.: 21-ALJ-22-0490-AP

Appellate Case No. 2022-001433

Wendell Cooper,

Appellant,

v.

South Carolina Department of Employment and
Workforce and South Carolina Department of
School District of Greenville County,

Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter of Respondent SC Department of Employment and Workforce on the parties in this case by mail on June 12, 2023, addressed to the parties at their addresses of record:

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June 12, 2023



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