

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Court of Common Pleas
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2013-002744

Timothy D. Revels,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Sherman College of
Chiropractic,

Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

1. Was it an abuse of discretion for the Administrative Law Court to dismiss Mr. Revel's appeal based on the technicality of service of the Notice of Appeal, when South Carolina Department of Employment and Workforce had almost immediate actual notice of the Notice of Appeal and showed no prejudice from lack of service?

RESPONDENT'S RESTATEMENT OF THE ISSUE ON APPEAL

1. Did the Administrative Law Court correctly dismiss the appeal because the court lacked appellate jurisdiction due to Appellant's failure to serve the Notice of Appeal on the South Carolina Department of Employment and Workforce, as required by South Carolina Code Annotated §41-35-750 and the South Carolina Administrative Law Court Rules?

STATEMENT OF THE CASE

Appellant Timothy D. Revels (“Appellant”) applied for unemployment insurance benefits with the South Carolina Department of Employment and Workforce (“DEW”), which were denied by the claims adjudicator’s determination. (Appellate Panel Decision, p.1). Appellant appealed to DEW’s Appeal Tribunal, which held Appellant eligible. Respondent Sherman College of Chiropractic (“Sherman College”) appealed the decision to DEW’s Appellate Panel. (Appellate Panel Decision, p.1). The Appellate Panel reversed the Appeal Tribunal and found Appellant discharged for cause and disqualified his benefits for eighteen weeks on September 25, 2013. (Appellate Panel Decision, p.1, 3).

Appellant filed a Notice of Appeal with the South Carolina Administrative Law Court (“ALC”) on October 22, 2013, and Appellant served a copy on Counsel for Sherman College. (Notice of Appeal). Appellant failed to serve DEW.

The ALC filed a Notice of Assignment on October 25, 2013. (Notice of Assignment). The Court sent a copy of the Notice of Assignment to Appellant, Sherman College, and to DEW.

DEW filed a Notice of Special Appearance and Motion to Dismiss on November 14, 2013. Sherman College filed a Joinder in Motion to Dismiss on November 18, 2013. The ALC granted DEW’s motion to dismiss due to lack of jurisdiction on November 26, 2013.

Appellant seeks judicial review before the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

Appellant worked for Sherman College from March 13, 1995 to March 18, 2013. His most recent position with Sherman College was vice president of business and finance. (Appellate Panel Decision, p.1). He was denied benefits by the claims adjudicator, which he appealed to the Appeal Tribunal. The Appeal Tribunal reversed the determination. (Appellate Panel Decision, p.1). Sherman College appealed to the Appellate Panel, which reversed the Appeal Tribunal's Decision. (Appellate Panel Decision, p.1).

Included in the Appellate Panel's Decision was the Notice of Mailing of Appellate Panel Decision. The Notice of Mailing provided instructions on the procedure for filing an appeal with the ALC. The Notice of Mailing specifically states that in order to "obtain judicial review of this decision, you must comply with the requirements of S.C. Code Ann. § 41-35-750 and the Rules of Procedure of the Administrative Law Court." (Notice of Mailing of Appellate Panel Decision). The Notice further states "...a Petition for Judicial Review must be filed with the Court and served on all parties and SCDEW within thirty (30) days from the date of mailing of the agency's final decision." (Notice of Mailing of Appellate Panel Decision). The Notice further instructs an appellant that:

Service of the Petition to DEW must be addressed and mailed to:

**Office of General Counsel
S.C. Department of Employment and Workforce
Post Office 8597
Columbia, SC 29202**

(Notice of Mailing of Appellate Panel Decision).

Appellant, however, failed to: (1) serve DEW with the Notice of Appeal; (2) name DEW as a party in the Notice of Appeal; and (3) list DEW on the Certificate of Service. (Notice of

Appeal; Joinder in Motion to Dismiss, p.1). DEW found out the matter was filed with the ALC when it received a Notice of Assignment from the ALC dated October 25, 2013.

DEW made a special appearance and filed a motion to dismiss. (Notice of Special Appearance and Motion to Dismiss). Included in the motion was an affidavit confirming that DEW had not received a Notice of Appeal. (Notice of Special Appearance and Motion to Dismiss, Exhibit E). Sherman College filed a joinder and confirmed that the Certificate of Service "...lists only counsel for Respondent Sherman College as being served with the Notice of Appeal." (Joinder in Motion to Dismiss, p.1).

The ALC granted DEW's motion and dismissed the appeal with prejudice. (Order of Dismissal). The ALC acknowledged Appellant timely filed the Notice of Appeal to the Court, but "he did not cross the mandatory jurisdictional threshold of timely serving the Notice of Appeal on a necessary party." (Order of Dismissal, p.2). The ALC found, "this Court has no choice but to find that Appellant failed to properly invoke this Court's jurisdiction and to conclude that this matter must be dismissed." (Order of Dismissal, p.2).

ARGUMENT

Standard of Review

DEW is an agency and subject to the Administrative Procedures Act. South Carolina Code § 1-23-310 (Supp. 2013). The administrative procedures of the agency include an appeal to the Appeal Tribunal and further appeal to the Appellate Panel. S.C. Code Ann. § 41-35-680 (Supp. 2013); S.C. Code Ann. §41-35-710 (Supp. 2013). Once the administrative remedies available within an agency are exhausted, the aggrieved party is entitled to a judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2013); S.C. Code Ann. §41-35-740 (Supp. 2013). A notice of appeal must be filed and served “as provided in the South Carolina Appellate Court Rules.” S.C. Code Ann. §1-23-380 (Supp. 2013).

The South Carolina Court of Appeals has found “[t]he 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. Carolina Dep't of Motor Vehicles, 380 S.C. 600, 604-05, 670 S.E.2d 674, 676 (Ct. App. 2008) (internal citation omitted). This Court has noted that it can only reverse the ALC “if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Olson v. South Carolina Dept. of Health and Environmental Control, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

Unless there is a clearly erroneous application of the law, the ALC’s decision will be upheld if there is substantial evidence to support its finding. Substantial evidence has been defined as:

[N]ot a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-36; 276 S.E.2d 304, 306-07 (1981).

The Administrative Law Court's decision should be affirmed, as a matter of law, because substantial evidence supports the Court's finding Appellant failed to invoke the Court's jurisdiction and, therefore, the matter must be dismissed.

Procedures for the ALC are outlined in the Rules for the Administrative Law Court ("RALC"). Rule 33 clearly states that "[i]n appeals from decisions of the Department of Employment and Workforce, the notice of appeal must be filed and served within thirty (30) days of the date of the decision of the Department of Employment and Workforce Appellate Panel." RALC, Rule 33. Rule 33 also requires a Notice of Appeal include "a general statement of the grounds for appeal as provided in S.C. Code Ann. §1-23-380(A)(6)." RALC, Rule 33.

In order to obtain review of the Appellate Panel's decision, an appellant within thirty days of the mailing of the Appellate Panel's decision "may initiate an action in the administrative law court against the department for the review of its decision, in which action every other party to the proceeding before the department must be made a defendant." S.C. Code Ann. §41-35-750 (Supp. 2013). Appellant failed to name DEW in its Notice of Appeal, and Appellant failed to serve DEW within thirty days of the mailing of the Appellate Panel's Decision. (Notice of Appeal; Joinder Motion to Dismiss; Notice of Special Appearance and Motion to Dismiss, Exhibit E).

Case law supports the ALC's decision. "Service of the notice of appeal is a jurisdictional requirement...." Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d. 206, 207 (1985). Compliance with the rules and statutes governing an appeal is a matter of conveying appellate jurisdiction to a court, not a mere technicality. Allison v. W.L. Gore and Associates, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011)(internal citations omitted).

Further, the Supreme Court has found that an appellate court that lacks jurisdiction does not have discretion to assist the party by “extending or ignoring the deadline.” Elam v. S.Carolina Dep’t of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (citing Mears, 287 S.C. 168, 337 S.E.2d 206 (1985)).

In order for Appellant’s matter to be heard by the ALC, the ALC must have appellate jurisdiction. Because Appellant failed to comply with South Carolina Code Ann. §41-35-750 and Rule 33, he did not meet the mandatory jurisdictional threshold. Therefore, appellate jurisdiction was not conveyed to the ALC, and the ALC did not abuse its discretion and was not arbitrary and capricious in dismissing this matter.

Appellant argues that the ALC’s decision was arbitrary and capricious and an abuse of discretion because DEW received ALC’s Notice of Assignment three days after the Notice of Appeal was due. (Initial Brief of Appellant, p. 3). The Appellant described the ALC’s dismissal as “unduly harsh” for “such an insignificant technicality.” (Initial Brief of Appellant, p. 4). Appellant argued the ALC abused its discretion by “ignoring” DEW had notice, regardless of service. (Appellant’s Initial Brief, p. 4). However, the Supreme Court has explained that abuse of discretion is an opinion that there was an “error of law in the circumstances.” Macauley v. Query, 193 S.C. 1, 7 S.E.2d 519, 521 (1940) (internal citations omitted).

Appellant also argued that DEW did not show prejudice due to lack of service of the Notice of Appeal, because DEW received notice through the Notice of Assignment. (Initial Brief of Appellant, p.3-4). A Notice of Assignment is distinguishable from a Notice of Appeal as it does not provide a statement of the grounds for the appeal, which Rule 33 requires in a Notice of Appeal. RALC, Rule 33.

The matter before the ALC was an issue of appellate jurisdiction. If Appellant did not properly serve the Notice of Appeal, the ALC does not have appellate jurisdiction to proceed with the case. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 343-44, 713 S.E.2d 278, 283-84 (2011) (internal citation omitted). It is not unduly harsh to dismiss an appeal for failure to serve the notice of appeal, because the ALC does not have the “authority to extend or expand the time in which the notice of intent to appeal must be served.” Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (internal citations omitted). “A motion to be relieved from a failure to timely appeal is not one to set aside a judgment, order or proceeding but is, in effect, an application to extend the time for appeal so as to give the court jurisdiction; for, without a timely notice of appeal, the court would have no jurisdiction.” Burnett v. South Carolina State Highway Dept., 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969). Where an appellant fails to serve the notice of appeal pursuant to the rules and appellate jurisdiction has not been conveyed, the court is divested of subject matter jurisdiction and the appeal must be dismissed. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (internal citations omitted).


Appellant failed to serve the Notice of Appeal in a timely manner on DEW, which was a jurisdictional requirement for the ALC. S.C. Code Ann. § 41-35-750 (Supp. 2013); RALC, Rule 33. Therefore, the ALC did not have appellate jurisdiction and the Appellate Panel decision is final, and the ALC should be affirmed.

CONCLUSION

Because Appellant failed to serve the Notice of Appeal upon DEW, a necessary party, appellate jurisdiction was not conveyed to the ALC. Therefore, the ALC’s decision to dismiss this matter should be affirmed.

SIGNATURE PAGE TO FOLLOW

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Maura Dawson Baker", written over a horizontal line.

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February 24, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 13-ALJ-22-0508-AP
Appellate Case No. 2013-002744

Timothy D. Revels,

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v.

South Carolina Department of Employment
And Workforce and Sherman College of Chiropractic,

Respondents.

PROOF OF SERVICE

I certify that I have served the **Respondent's Designation of Matter to Be Included In The Record On Appeal** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on February 24, 2014, to the following address:

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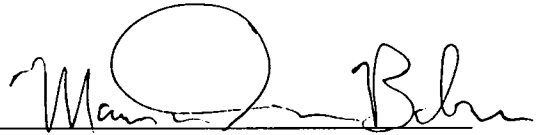
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SC Court of Appeals

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A handwritten signature in black ink, appearing to read "Maura Dawson Baker". The signature is written in a cursive style with a large, prominent "O" in the middle.

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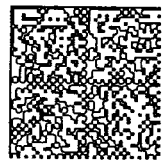
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February 24, 2014

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