

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No.: 13-ALJ-22-0555-AP

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NOV 03 2014

SC Court of Appeals

Stephanie Stewart,

Appellant,

v.

South Carolina Department of Employment
and Workforce and Oconee County,

Respondent.

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE

Respondent, South Carolina Department of Employment and Workforce ("Department"), through its undersigned attorney, submits the following memorandum and points of authority in support of its *Motion to Strike Appellant's Application for Leave to Present Additional Evidence* (pending Motion) filed on October 23, 2014:

RELEVANT BACKGROUND

The issues on appeal articulated in the Order issued by the Administrative Law Court (ALC) on June 9, 2014 (Final Order), in this case addressed: (1) whether upon a review of the record on appeal as a whole, substantial evidence exists to support the Appellate Panel's (Panel) findings of fact and whether the Panel proper applied the law to those findings in its conclusions; and (2) whether the Panel abused its discretion in not remanding the case for the taking of additional evidence.

Additionally, prior to the Final Order Stewart, moved the ALC to allow the introduction of “newly discovered evidence” in a motion filed with the ALC on April 8, 2014, entitled *Application for Leave to Present Newly Discovered Evidence*. On May 8, 2014, the ALC issued its interlocutory order denying Appellants motion. (Exhibit A).

ARGUMENTS

i. Appellant’s Pending Motion Should Be Stricken in Its Entirety as an Improper Presentation of an Issue on Appeal.

The issue(s) presented in Stewart’s pending Motion are improperly couched as matters to be determined through motion. The issue(s) were raised and ruled on by the ALC, as such, the issues presentation via the pending Motion is improper and should be stricken. Appellant moved the ALC to accept “newly discovered evidence” which is the very same evidence Appellant now attempts to characterize as additional evidence before this Court. The ALC denied Stewart’s motion to include this evidence in the record. If Appellant takes exception to this denial, the argument (in its entirety)¹ properly should have been raised in her brief.

The Court has stated “to be considered on appeal, all issues must be argued by the appellant in its initial brief.” Carolina Renewal, Inc. v. S. Carolina Dep’t of Transp., 385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009)(quoting State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct.App.1996)); see also Fields v. Melrose Ltd. P’ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993)(“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”)

¹ Stewart, in her brief, attempts to append the pending Motion by reference. She states, “1) "Application for Leave to Present Newly Discovered Evidence", 2) "Addendum to Application for Leave to Present Newly Discovered Evidence", 3) "Motion to Reconsider and 4) "Appellant's Application for Leave to Present Additional Evidence", currently before this Court are fully incorporated by reference.” (App. Initial Br’f p. 13.). Even if this were proper, the inclusion of the pending Motion and its arguments would violate the page limits stated in Rule 208(b)(5), SCACR. The sum of all documents would be approximately seventy-two (72) pages which are twenty-two (22) more pages than allowed.

ii. The Record on Appeal May Not be Supplemented under Rule 212, SCACR with the Evidence Presented in the Pending Motion

In the event this Court construes Appellant's pending Motion as one to supplement the record under Rule 212(b), SCACR, the Department opposes this pending Motion on the grounds that the testimony and referenced documentation are not part of the record that was before the Appeal Tribunal, the Panel, nor the ALC. In fact, the ALC specifically rejected its inclusion in to the record.² Despite Appellant's implication that the Panel would have been interested in considering the evidence if it had been available, none of the information in question was introduced into evidence or otherwise provided to the Panel nor did Appellant move the Panel to direct the taking of additional evidence.³ Furthermore, Appellant at no time before or after the Panel's Decision moved for the Panel to consider the evidence in question.⁴ Accordingly it is not and should not be made part of the record of the case.

The Department does not doubt that the court of appeals can supplement the record in accordance with Rule 212, SCACR, if it chooses to do so. However, Rule 212 only allows supplementation of the record with "any part of the transcript of proceedings or other matter ***before the lower court or administrative tribunal*** to be sent up for its inspection and consideration." Rule 212(a), SCACR (emphasis added.); see also Norris v. Ferre, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993)(The record cannot be supplemented with matters that

² The ALC Order states, "Appellant admits in the request that she knew about the evidence prior to the Appellant Panel's decision, but did not raise the issue to the Panel or otherwise request that her case be remanded to the Appeal Tribunal to consider the new evidence.1 For the foregoing reasons, I find that Appellant's request to introduce new evidence, or alternatively remand the matter to the Department for a new evidentiary hearing, is denied." (Exhibit A)

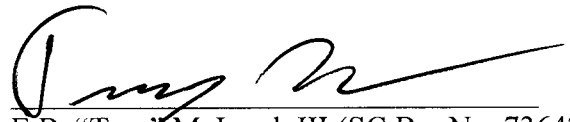
³ Under S.C. Code Ann. § 41-35-710, The Panel may "on its own motion affirm, modify, or set aside a decision of an appeal tribunal on the basis of evidence previously submitted in the case [or] direct the taking of additional evidence..."

⁴ SCRCF Rule 59(b) provides that "[i]n non-jury actions the motion [for a new trial] shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action ..."

were not presented to the trial judge.) Accordingly, supplementation of the record in the instant case would be improper as the evidence is not a part of the record of this case.

CONCLUSION

For the foregoing reasons, Appellant's Motion should be denied and stricken from the record.



E.B. "Trey" McLeod, III (SC Bar No. 73642)
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October 30, 2014

Exhibit A
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FILED

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Stephanie Staggers Stewart,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of Employment)
 and Workforce and Oconee County,)
)
 Respondents.)
 _____)

Docket No. 13-ALJ-22-0555-AP

ORDER

This matter is before the South Carolina Administrative Law Court (“ALC” or “Court”) pursuant a Notice of Appeal filed by Stephanie Staggers Stewart (“Appellant”) on November 18, 2013 seeking judicial review of a final decision rendered by the South Carolina Department of Employment and Workforce (“Department”). On April 8, 2014, Appellant filed an Application for Leave to Present Newly Discovered Evidence. Specifically, the Appellant request that she be allowed to supplement the Record to include evidence she discovered after the conclusion of the evidentiary hearing before the Department’s Appeal Tribunal. Should the Court reject Appellant’s request to supplement the Record, she alternatively request that the matter be remanded to the Department for a new evidentiary hearing. Responses in opposition to Appellant’s application were filed by Oconee County (“Employer”) on April 17, 2014 and by the Department on April 22, 2014. Replies to the Respondents’ responses were filed by Appellant on April 22, 2014 and April 30, 2014.

In accordance with SCALC Rule 68, the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals, may, in the discretion of the administrative law judge, be applied to resolve questions not addressed by the ALC rules. SCRCP 60(b)(2) provides that the court may relieve a party from a final judgment, order, or proceeding based on *newly discovered evidence* which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). In order to obtain a new hearing based on newly discovered evidence, the moving party must demonstrate that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to

Exhibit A

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the issue, and (5) is not merely cumulative or impeaching. See, Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App., 2005).

Having reviewed Appellant's application to present newly discovered evidence, I find that the application does not meet any of the requirements outlined in SCRCP 60(b)(2), especially in light of the fact that Appellant's primary purpose for wanting to introduce an email communication is that it contradicts the testimony of one of the Employer's witnesses. In addition, Appellant admits in the request that she knew about the evidence prior to the Appellant Panel's decision, but did not raise the issue to the Panel or otherwise request that her case be remanded to the Appeal Tribunal to consider the new evidence.¹ For the foregoing reasons, I find that Appellant's request to introduce new evidence, or alternatively remand the matter to the Department for a new evidentiary hearing, is denied.

On April 25, 2014, the Department filed a motion requesting additional time to file the Brief of Respondent(s). In the motion, the Department asserted that Appellant's request to introduce new evidence needed to be resolved before the Respondents could file briefs adequately addressing the legal issues in this appeal. The Appellant's opposition to the motion was filed on April 28, 2014. However, upon review of the written submissions, this Court finds that the Department has shown good cause for the motion to be granted.

THEREFORE, IT IS HEREBY ORDERED the Appellant's Application for Leave to Present Newly Discovered Evidence is **DENIED**.

IT IS FURTHER ORDERED that the Department's Motion for Extension of Time to File Respondents' Brief(s) is **GRANTED**. Accordingly, the Respondents' brief(s) shall be due twenty (20) days from the date of this order. The Appellant may file a Reply brief within ten (10) days thereafter, if she so chooses.

AND IT IS SO ORDERED

COPIES TO BE SERVED
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail postage paid or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 8 day of May 2014

By: Joseph J. Anderson
Judicial Law Clerk


SHIRLEY C. ROBINSON
Administrative Law Judge

May 8, 2014
Columbia, South Carolina

¹ SCRCP Rule 59(b) provide that "[i]n non-jury actions the motion [for a new trial] shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action..."

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PROOF OF SERVICE

I certify that I have served *Respondent's Motion To Strike Appellant's Application For Leave To Present Additional Evidence* and *Memorandum In Support Of Respondent's Motion* on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on October 30, 2014, to the following address(es):

Stephanie Stewart
2142 Toccoa Highway
Westminster, SC 29693
Pro Se Appellant

Reginald Gay, Esq.
McNair Law Firm
P.O. Box 447
Greenville, SC 29602
Attorney for Respondent, Oconee County


E.B. "Trey" McLeod

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SC Court of Appeals

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October 30, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Stephanie Stewart v. South Carolina Department of Employment and Workforce et.
al.

Case Number: 13-ALJ-22-0555-AP

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the Department's *Motion to Strike Appellant's Application for Leave to Present Additional Evidence, Memorandum in Support of Motion to Strike and Certificate of Service*.

Please contact me if you have any questions

With kind regards, I am

Sincerely Yours,

A handwritten signature in black ink, appearing to read "Trey McLeod", is written over a horizontal line.

E.B. "Trey" McLeod, III
Assistant General Counsel

Enclosures

Cc: Stephanie Stewart
Reginald Gay, Esq.

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