

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

December 2, 2014

The Honorable Jana E. Shealy
Clerk, Administrative Law Court
1205 Pendleton Street
Columbia SC 29201

REMITTITUR

Re: Nucor Corp. v. SCDEW
Lower Court Case No. 2010-ALJ-220938AP
Appellate Case No. 2012-206406

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Daniel E. Shearouse
65

CLERK

cc:

Nosizi Ralephata, Esquire

John S. Wilkerson, III, Esquire

Debra Sherman Tedeschi, Esquire

Sandra Bell Grooms, Esquire

Nancy Bloodgood, Esquire

Lucy Clark Sanders, Esquire

The Honorable Deborah Brooks Durden.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Legette, Respondents.

Appellate Case No. 2012-206406

Appeal from The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 27462
Heard January 7, 2014 – Filed November 12, 2014

AFFIRMED

Nosizi Ralephata and John S. Wilkerson, III, both of
Turner, Padgett, Graham & Laney, of Charleston, for
Appellant.

Nancy Bloodgood and Lucy Clark Sanders, both of
Foster Law Firm, LLC, of Daniel Island, and Sandra Bell
Grooms and Debra S. Tedeschi, both of Columbia, for
Respondents.

JUSTICE KITTREDGE: This direct appeal from the Administrative Law Court (ALC) presents a threshold procedural challenge to appealability and substantively, to the awarding of unemployment benefits to an employee terminated for failing a

drug test administered by a laboratory that was not properly certified. Because this appeal arises from a final resolution of all issues, we find the matter is appealable. We affirm the ALC.

I.

The facts are straightforward. Respondent Kimberly Legette was employed by Appellant Nucor Corporation (Nucor) from August 24, 1998, through April 22, 2010. Nucor terminated Legette's employment on April 22, 2010, after Legette failed a random on-site drug test in violation of Nucor's drug policy. A hair sample collected from Legette by Nucor on April 6, 2010, tested positive for marijuana. Pursuant to Nucor's drug policy, a second hair sample was collected on April 15, 2010, which also tested positive for marijuana. Although Legette obtained an independent drug test on April 15, 2010, which tested negative for drugs, she was fired from her job at Nucor based on the two positive drug test results.

Legette subsequently applied for unemployment benefits. Nucor requested that Legette be denied unemployment benefits, contending she was statutorily ineligible to receive them because she was fired for violating Nucor's drug policy by testing positive for drugs.

There are various reasons a person may be statutorily ineligible to receive unemployment benefits upon termination from employment, including:

(2)(a) Discharge for misconduct connected with the employment . . . [including] conduct . . . in deliberate violation[] or disregard of standards of behavior which the employer has the right to expect of his employee

(3)(a) Discharge for illegal drug use . . . if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and*

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

.....
(4) Discharge for gross misconduct . . . due to . . . failure to comply with applicable state or federal drug and alcohol testing and use regulations

S.C. Code Ann. § 41-35-120 (Supp. 2013) (emphasis added).

The procedural history is a morass. On May 26, 2010, the Department of Employment and Workforce (DEW) initially determined that Legette was disqualified from receiving unemployment benefits for twenty-six weeks under subsection (2) of section 41-35-120 for misconduct by violating Nucor's policy concerning drug use. Legette appealed that decision to the DEW appeal tribunal (Tribunal). During the Tribunal hearing, Legette denied using marijuana but admitted being in the presence of a family member who smoked marijuana regularly. The Tribunal determined Legette was indefinitely disqualified from receiving unemployment benefits. The Tribunal, however, grounded its decision under subsection (3) of section 41-35-120 because she was discharged from employment for illegal drug use.

Legette appealed the Tribunal's decision to the DEW appellate panel (Panel). In its decision, the Panel did not address any of the previous findings regarding subsections (2) or (3) of section 41-35-120. Rather, the Panel reversed the previous determinations on the basis of subsection (4), finding the negative results from Legette's independent drug test demonstrated that Legette had not used illegal drugs and was therefore not barred from receiving unemployment benefits by subsection (4) of section 41-35-120.

Thereafter, Nucor petitioned the Administrative Law Court (ALC) for judicial review, arguing the positive results of the drug tests administered by the laboratory retained by Nucor demonstrated Legette was statutorily ineligible to receive employment benefits under subsections (2), (3), and (4) of section 41-35-120. On May 24, 2011, the ALC rejected Nucor's arguments and affirmed as to subsections (2) and (4), adopting the Panel's findings as findings of fact. The ALC declined to make a finding as to subsection (3). Rather, the ALC found the Panel failed to address whether the laboratory that performed the drug tests was properly certified. As a result, the ALC remanded the matter to the DEW to determine whether subsection (3) barred Legette's eligibility to receive unemployment benefits. *See* S.C. Code Ann. § 41-35-120(3)(a)(iii)(B) (providing that drug testing under this subsection must be performed by a "laboratory certified by the National Institute on Drug Abuse [NIDA], the College of American Pathologists or the State Law Enforcement Division").

Thereafter, Nucor filed a notice of appeal with the court of appeals, seeking review of the ALC's May 24, 2011 decision as to subsections (2) and (4), arguing the ALC's decision was a final determination as to Legette's eligibility under those two subsections, notwithstanding the remand as to subsection (3). However, the court of appeals dismissed the appeal, finding the ALC's order was not a final decision and thus was not immediately appealable. The matter was remanded to the DEW pursuant to the prior order of the ALC.

Upon remand, the matter was apparently referred to the Tribunal, which ruled just as it had originally, finding the drug testing laboratory Nucor used was properly certified and, therefore, that Legette was disqualified from receiving benefits pursuant to subsection (3) based on her illegal drug use. Legette appealed, and on December 9, 2011, the Panel reversed, addressing subsection (3) for the first time. The Panel found the drug testing laboratory Nucor used was not properly certified in accordance with the requirements of subsection (3). Nucor contended that the laboratory it selected met the certification requirements of the NIDA.

The NIDA organization referenced in section 41-35-120(3)(a)(iii)(B) no longer exists. The Tribunal had earlier determined that the drug testing laboratory's Department of Health and Human Services (HHS) certification was the functional equivalent of NIDA certification and thus complied with the statutory certification requirements. However, the Panel disagreed and found the laboratory retained by Nucor was not statutorily certified.¹ The Panel concluded that under the circumstances, positive drug test results from a non-certified laboratory could not serve as a basis to deny unemployment benefits.

Neither party appealed the Panel's December 9, 2011 decision to the ALC; thus, the Panel's findings became the final agency decision. *See* S.C. Code Ann. § 41-35-740 (Supp. 2013) ("A decision of the department, in the absence of an appeal from it as provided in this article, becomes final ten days after the date of notification or mailing of it . . ."). Moreover, the Panel's decision stands as the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case." (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970))).

On January 9, 2012, Nucor filed a second notice of appeal to challenge the ALC's May 24, 2011 decision as to subsections (2) and (4). Specifically, Nucor stated:

Appellant [is] not challenging the [December 9, 2011] decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory [under subsection (3) of section 41-35-120]. As a result, [the ALC's May 24, 2011] Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

The appeal was certified for review by this Court pursuant to Rule 204(b), SCACR.

¹ The Panel found "that [the College of American Pathologists] certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a [College of American Pathologists] certified lab to confirm the hair test."

II.

Respondents DEW and Legette argue this matter is not appealable because Nucor failed to appeal the Panel's December 9, 2011 findings regarding subsection (3) to the ALC. Therefore, according to Respondents, Nucor may not seek judicial review of the ALC's May 24, 2011 findings as to subsections (2) and (4) because there is no final order from the ALC for this Court to review pursuant to section 1-23-610 of the South Carolina Code. Nucor counters that the ALC's prior order concerning subsections (2) and (4) became final when the Panel's decision regarding subsection (3) became the final agency decision. While the more prudent course may have been for Nucor to appeal the Panel's subsection (3) decision to the ALC, we believe Nucor is technically correct on the appealability issue.

Judicial review of disputes arising from the DEW is governed by the Administrative Procedures Act (APA). S.C. Code Ann. § 41-35-750 (Supp. 2013). Pursuant to the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" S.C. Code Ann. § 1-23-380 (Supp. 2013). In proceedings governed by the APA, "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) (citation omitted). "An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013) (internal marks omitted) (citing *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987)) (finding an order remanding matter to the administrative agency was not a final order and was not immediately appealable).

As previously noted, Nucor initially filed a notice of appeal with the court of appeals immediately following the ALC's May 24, 2011 order. However, because the ALC ordered a remand and did not finally determine the issue of Legette's eligibility for unemployment benefits, the court of appeals found the order was interlocutory and not immediately appealable. Nucor now contends that the ALC's May 24, 2011 order became final as to the rulings on subsections (2) and (4) when no appeal was taken from the Panel's December 9, 2011 order concerning

subsection (3). Nucor argues it was not required to appeal the Panel's December 9, 2011 decision regarding subsection (3), to which it takes no exception, in order to seek judicial review of the ALC's May 24, 2011 determination regarding subsections (2) and (4), which were finally determined by the ALC and were not at issue upon remand to the agency. We agree, although the final decision concerning subsection (3) is inextricably linked to the issues raised in Nucor's brief.

While Nucor's decision not to challenge the Panel's adverse finding as to subsection (3) does not foreclose an appeal from the final judgment, the unappealed finding that the laboratory Nucor selected was not properly certified under subsection (3) impacts, under these particular circumstances, appellate review of the ALC's final judgment respecting subsections (2) and (4) of section 41-35-120. This is so because the central argument of Nucor on appeal focuses on the purported error of the ALC in relying on a test administered by a laboratory other than the one utilized by the employer. Nucor's assignment of error is that it was improper to rely on "an off-site test not performed by the employer." Nucor's position may be correct where the employer-retained laboratory is properly certified under subsection (3) and the other requirements of section 41-35-120 are met. Moreover, we agree with Nucor that an employer may elect to discharge an employee as a result of a positive drug test administered by a non-certified laboratory. But our agreement with Nucor in this regard is not dispositive of this appeal.

The narrow question before us as framed by Nucor is whether, in the context of determining Legette's eligibility for benefits in this case, it was permissible to consider evidence other than the positive drug test results from the non-certified laboratory retained by Nucor, including the drug testing performed off-site at Legette's request by another laboratory. We find it was permissible to consider the additional evidence. Nucor makes the argument that a finding under subsection (3) "does not mean . . . an employer cannot utilize one or more sections of the same statute, which would otherwise be just as applicable to reach the same result." We do not disagree with Nucor in the abstract. In this case, however, Nucor's reliance on several statutory grounds to justify the nonpayment of unemployment benefits arises from one fact—the positive drug test results. That renders Nucor's failure to

utilize a certified laboratory a relevant consideration under the entirety of section 41-35-120. Consequently, Nucor's argument that the ALC could not consider evidence beyond the positive drug test results from Nucor's retained non-certified laboratory is rejected.²

In sum, we conclude there is evidence to support the ALC's finding that the positive results from Legette's on-site drug tests did not bar her from receiving unemployment benefits under subsections (2) and (4) of section 41-35-120. Although we agree the results of the on-site drug tests support Nucor's challenge to Legette's eligibility for unemployment benefits, we may not substitute our view of the evidence for that of the fact-finder. Under the deferential substantial evidence standard of review, we are constrained to affirm the ALC's factual findings when supported by some evidence in the record. *See Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014) ("In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." (citing *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010))); *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) ("In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact" (citations omitted)). The contrary evidence, including the off-site drug test results and otherwise, provides sufficient evidence to survive the substantial evidence standard of review.

III.

We find the ALC's May 24, 2011 order was final and appealable once the Panel's December 9, 2011 decision became final, and we affirm the findings of the ALC as to subsections (2) and (4) of section 41-35-120 because they are supported by substantial evidence in the record.

² We agree with the views expressed in Chief Justice Toal's concurring opinion.

AFFIRMED.

HEARN, J. concurs. PLEICONES and BEATTY, JJ., concurring in result only. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: While I concur with the result reached by the majority based on the particular facts of this case, I write separately to express my misgivings regarding the Panel's use of such a strict reading of section 41-35-120. Legette tested positive for marijuana twice, as demonstrated through drug tests administered by a certified laboratory. While the laboratory was not one of the three listed in the subsection (3)(B) of the statute, the Tribunal determined that the laboratory's certification was comparable to that of the three listed in the statute. Further, one of the three laboratories listed in the statute (the NIDA) no longer exists. As such, not only do I urge the General Assembly to consider amending the statute to reflect this change, but I also find that Nucor's drug tests on Legette served as a reliable indicator of her illegal drug usage, which is clearly a proper ground for termination. Additionally, a for-cause termination for illegal drug use would completely justify a denial of unemployment benefits.

Nonetheless, the Panel decided not to accept evidence of the positive drug tests because the laboratory that performed the tests was not one of the three listed in the statute. I do not believe this reading is faithful to the legislative intent of the statute, which is to have the drug tests performed by a reliable, outside laboratory.

However, Nucor did not properly place the laboratory certification issue before this Court. It did not seek a ruling from the ALC on this issue. While subsections (2) and (4) received a final ruling from the ALC and are thus appealable, the ruling on subsection (3) regarding the validity of the laboratory's certification was not appealed to the ALC. Thus, the ALC did not rule upon this issue, and the Panel's ruling that the certification was inadequate is the law of the case. As a result, this issue is not appealable here.

Given the procedural posture of this case, I believe the majority reached the correct result; however, I also believe that, had Nucor properly appealed the laboratory's certification, Legette would not be entitled to unemployment benefits given her multiple positive drug tests. Therefore, I concur in the result reached by the majority.

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

December 9, 2013

Mr. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330 (29211)
1231 Gervais Street
Columbia, SC 29201

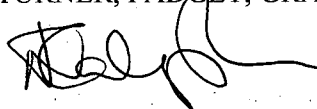
Re: Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legette
Appellate Case Number: 2012-206406
Our File Number: 5670.111

Dear Mr. Shearouse:

We apologize for inundating the Court with correspondence after the briefing has been completed, and we do not wish to further complicate the process. However, we felt a clarification was warranted based on correspondence recently submitted by the South Carolina Department of Employment Workforce ("the Agency"), dated December 2, 2013. The Agency has already raised the *Bone v. U.S. Foods Service*, 404 S.C. 67, 744 S.E. 2d 552 (2013) decision by letter dated July 8, 2013, and Nucor submitted its response on July 13, 2013, subsequent to which, the Court of Appeals notified the parties that oral argument had been scheduled for October 8, 2013. Following that, the case was certified to the South Carolina Supreme Court, and an oral argument is currently scheduled for 10:00 a.m. on January 7, 2014. Thus, the Agency's correspondence is duplicative and does not raise any new controlling authority warranting dismissal of Nucor's appeal.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms
Ms. Debra Tedeschi
Ms. Nancy Bloodgood
Ms. Lucy Clark Sanders

RECEIVED

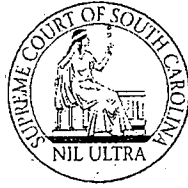
DEC 11 2013

BUSINESS • LITIGATION • SOLUTIONS

S.C. SUPREME COURT

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 5478602v1



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

December 6, 2013

Nosizi Ralephata, Esquire
PO Box 22129
Charleston-SC 29413-2129

John S. Wilkerson, III, Esquire
PO Box 22129
Charleston SC 29413-2129

Debra-Sherman Tedeschi, Esquire
Office of General Counsel
PO Box 8597
Columbia SC 29202

Sandra Bell Grooms, Esquire
Office Of General Counsel
PO Box 8597
Columbia SC 29202

Nancy Bloodgood, Esquire
895 Island Park Drive, Suite 202
Charleston SC 29492

Lucy Clark Sanders, Esquire
895 Island Park Dr., Suite 202
Daniel Island SC 29492

Re: Nucor Corp. v. SCDEW
Appellate Case No. 2012-206406

Dear Counsel:

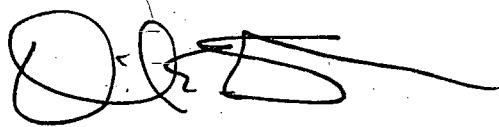
This case is scheduled for oral argument at 10:00 a.m. on Tuesday, January 7, 2014. The following oral argument times have been allocated:

Appellant 15 minutes

Respondent 15 minutes

Appellant in Reply 5 minutes

Very truly yours,

A handwritten signature in black ink, appearing to be "D. R. S.", followed by a long horizontal flourish.

CLERK

P.O. Box 995
1550 Gadsden Street
Columbia, SC 29202
dew.sc.gov



Nikki R. Haley
Governor

Cheryl M. Stanton
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

December 2, 2013

RECEIVED

DEC - 4 2013

S.C. Supreme Court

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
S.C. Supreme Court, Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

RE: *Nucor, Corp. v. S.C. Dept. of Emp. & Workforce*
Appellate Case No. 2012-206406

Dear Clerk Shearouse:

The South Carolina Department of Employment & Workforce (SCDEW) is a respondent in the above-referenced appeal. Final Briefs, originally filed with the Court of Appeals, were served March 28, 2013. Pursuant to Rule 204(b), SCACR, this Court certified the case on October 10, 2013.

Oral argument has been scheduled by the Court for Tuesday, January 7, 2014. Respondent SCDEW hereby brings to the Court's attention supplemental authority for its argument on appeal. *See* Rule 208(b)(7).¹

On June 26, 2013, after the briefs in this case were finalized this Court published the following decision: *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). The majority opinion in *Bone* supports Respondents' arguments on Issue I in

¹ *See* Rule 208(b)(7), SCACR, which states as follows:

Supplemental Citations. When pertinent and significant authorities come to the attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Respondents' Brief (wherein Respondents argue that Appellant Nucor Corp. failed to appeal from a final Administrative Law Court order, and therefore this Appeal should be dismissed).²

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, reading "Debra S. Tedeschi". The signature is fluid and cursive, with the first name "Debra" being more prominent than the last name "Tedeschi".

Debra S. Tedeschi
Deputy General Counsel

cc: Nosizi Ralephata, Esq.
John S. Wilkerson, III, Esq.
Nancy Bloodgood, Esq.
Lucy Clark Sanders, Esq.

² Respondents' Issue I is: SHOULD THE COURT DISMISS THIS APPEAL BECAUSE THERE IS NO FINAL ADMINISTRATIVE LAW COURT (ALC) ORDER SINCE NUCOR HAS ONLY APPEALED FROM THE ALC'S MAY 24, 2011, INTERLOCUTORY REMAND ORDER AND FAILED TO APPEAL FROM SCDEW'S DECISION AFTER REMAND?

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

RECEIVED

NOV 14 2013

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

S.C. SUPREME COURT REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

November 13, 2013

VIA FACSIMILE TRANSMISSION (803-734-1499)
AND REGULAR U.S. MAIL

Mr. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330 (29211)
1231 Gervais Street
Columbia, SC 29201

Re: Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legette

Appellate Case Number: 2012-206406

Our File Number: 5670.111

Dear Mr. Shearouse:

Thank you for providing us with the available dates the Court will hold arguments for the above-referenced matter. We are available on any of the dates proposed. Please let me know if you need additional information.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms

Ms. Debra Tedeschi

Ms. Nancy Bloodgood

Ms. Lucy Clark Sanders

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 5443938v1

TURNER PADGET

RECEIVED

FAX TRANSMITTAL SHEET

NOV 13 2013

Main Phone Number: (843) 576-2800
Main Facsimile Number: (843) 577-3369
Date: November 13, 2013

S.C. SUPREME COURT

PLEASE DELIVER AS SOON AS POSSIBLE TO:

RECIPIENT	COMPANY	FAX NO.	PHONE NO.
Mr. Daniel E. Shearouse	Clerk, Supreme Court of SC	803-734-1499	803-734-1080

FROM:	E-MAIL	DIRECT PHONE	DIRECT FAX	CLIENT/MATTER #:
Nosizi Ralephata	nralephata@turnerpadget.com	843-576-2807	843-577-1655	5670.111

Number of pages being transmitted including the cover page: 2

IF THERE ARE ANY PROBLEMS RECEIVING THIS TRANSMISSION, PLEASE CALL
(843) 576-2800 IMMEDIATELY AND ASK FOR OUR MAIL ROOM. THANK YOU.

Original Copy Via: ☒ U.S. Mail; ☐ Overnight Courier;
☐ Hand-Delivered; ☒ Facsimile Only

Time Sent: _____ Initials of Sender: _____

Please see attached.

THE INFORMATION CONTAINED IN THE FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

RECEIVED

Nosizi Ralephata

NOV 13 2013

REPLY TO:

S.C. SUPREME COURT

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

November 13, 2013

VIA FACSIMILE TRANSMISSION (803-734-1499)
AND REGULAR U.S. MAIL

Mr. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330 (29211)
1231 Gervais Street
Columbia, SC 29201

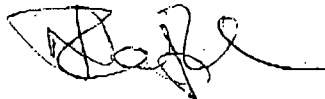
Re: Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legett
Appellate Case Number: 2012-206406
Our File Number: 5670.111

Dear Mr. Shearouse:

Thank you for providing us with the available dates the Court will hold arguments for the above-referenced matter. We are available on any of the dates proposed. Please let me know if you need additional information.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

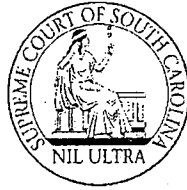
Enclosures

cc: Ms. Sandra Grooms
Ms. Debra Tedeschi
Ms. Nancy Bloodgood
Ms. Lucy Clark Sanders

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 5443938v1



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

November 5, 2013

Nosizi Ralephata, Esquire
John S. Wilkerson, III, Esquire
PO Box 22129
Charleston SC 29413-2129

Debra Sherman Tedeschi, Esquire
PO Box 8597
Columbia SC 29202

Sandra Bell Grooms, Esquire
Office Of General Counsel
PO Box 8597
Columbia SC 29202

Nancy Bloodgood, Esquire
Lucy Clark Sanders, Esquire
895 Island Park Dr.
Ste. 202
Daniel Island SC 29492

Re: Nucor Corp. v. SCDEW
Appellate Case No. 2012-206406

Dear Counsel:

This case will likely be considered during the January 2014 term of Court. The Court will hold arguments on January 7, 8, 21, 22 and 23. If you have a scheduling conflict with any of these dates, please advise the Court of the specific nature of that conflict by November 12, 2013.

Very truly yours,

CLERK

The Supreme Court of South Carolina

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

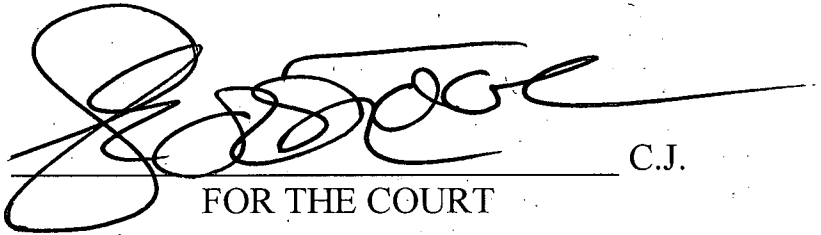
Appellate Case No. 2012-206406

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

October 10, 2013

cc:

Nosizi Ralephata, Esquire

John S. Wilkerson, III, Esquire

Debra Sherman Tedeschi, Esquire

Sandra Bell Grooms, Esquire

Nancy Bloodgood, Esquire

Lucy Clark Sanders, Esquire

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 02, 2013

Ms. Nosizi Ralephata
PO Box 22129
Charleston SC 29413-2129

Mr. John S. Wilkerson, III
PO Box 22129
Charleston SC 29413-2129

Ms. Debra Sherman Tedeschi
PO Box 8597
Columbia SC 29202

Ms. Sandra Bell Grooms
Office Of General Counsel
PO Box 8597
Columbia SC 29202

Ms. Nancy Bloodgood
895 Island Park Drive
Ste 202
Charleston SC 29492

Ms. Lucy Clark Sanders
895 Island Park Dr.
Ste. 202
Daniel Island SC 29492

Re: Nucor Corp. v. SCDEW(2)

Appellate Case No. 2012-206406

Dear Counsel:

The Court of Appeals has requested certification in the above matter from the Supreme Court. **Therefore, oral argument scheduled for the October 2013 term has been cancelled.** Counsel will be notified of the action taken by the Supreme Court on the certification request.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

The Honorable Deborah Brooks Durden
[County] County
Trial Court Case No. 2010ALJ220938AP

ORDER

Respondent, South Carolina Department of Employment and Workforce, has filed a motion for a protective order from oral argument scheduled for October 8, 2013. Upon consultation with the Court, the motion is GRANTED. The parties will be advised of further action in the case.

FOR THE COURT

BY V. Claire Allen
DEPUTY CLERK

Columbia, South Carolina

cc: Anne E. Mjaatvedt

FILED

October 2, 2013

Nosizi Ralephata

John S. Wilkerson, III

Debra Sherman Tedeschi

Sandra Bell Grooms

Nancy Bloodgood

Lucy Clark Sanders

RECEIVED

SEP 30 2013

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

Appellate Case No.: 2012-206406

Nucor Corporation,

Appellant,

v.

South Carolina Department of Employment,
And Kim A. Legette,

Respondents,

RESPONDENT SCDEW'S MOTION FOR PROTECTION ORDER

Respondent, the South Carolina Department of Employment and Workforce (SCDEW), hereby requests an Order of Protection from oral argument for the following dates: October 7 through October 11, 2013.

The Department has received the Court's notice that oral argument has been scheduled in the above-captioned case for October 8, 2013 at 11:20 a.m. Since receiving that notice, SCDEW's undersigned attorney has been informed that she will be out of town for business purposes, attending the NASWA UI Directors' Conference and IT/Legal Issues Forum in Rapid City, South Dakota. The conference dates are October 7-10, 2013.

The Department respectfully requests the Court reschedule the oral argument in this case from October 8, 2013 to another Court Roster.

CONCLUSION

Based on the reasons above, the Respondent SCDEW respectfully requests an Order of Protection from oral argument in this case and for the Court to reschedule oral argument to another Court Roster.

Respectfully submitted,



Debra S. Tedeschi, SC Bar # 15307
Deputy General Counsel
Sandra B. Grooms, SC Bar # 640
Assistant General Counsel
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-2666 (Telephone)
(803) 737-0124 (Facsimile)
legal@dew.sc.gov

Attorneys for Respondent SCDEW

August __, 2013

Sept. 30

(orig. sent & signed
Aug. 30)



on
Roster

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 06, 2013

Ms. Anne E. Mjaatvedt
815 1St Ave, #87
Seattle WA 98104

Ms. Nosizi Ralephata
PO Box 22129
Charleston SC 29413-2129

Mr. John S. Wilkerson, III
PO Box 22129
Charleston SC 29413-2129

Ms. Debra Sherman Tedeschi
PO Box 8597
Columbia SC 29202

Ms. Sandra Bell Grooms
Office Of General Counsel
PO Box 8597
Columbia SC 29202

Ms. Nancy Bloodgood
895 Island Park Drive, Ste 202
Charleston SC 29492

Acknowledgment received.

Signature: _____

Date: _____

Print Name: _____

Appellate Case No. 2012-206406

Ms. Lucy Clark Sanders
895 Island Park Dr.
Ste. 202
Daniel Island SC 29492

Kim A. Leggette
517 Laurel Ridge Road
North Charleston SC 29418

Re: Nucor Corp. v. SCDEW(2)
Lower Court Case No. 2010ALJ220938AP
Appellate Case No. 2012-206406

Dear Counsel:

Please be advised that this appeal will be argued on 10/08/2013 at 11:20 AM in Courtroom 2. The following oral argument times have been allocated:

Appellant: 10 minutes

Respondent: 10 minutes

Appellant in reply: 5 minutes

Arguments frequently begin before the time set. Please ARRIVE 30 MINUTES prior to your scheduled argument time.

Above is an acknowledgment verifying that you have received notification of the date and time set for argument. Please sign and date, then return the completed acknowledgment to:

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Very truly yours,

V. Claire Allen

DEPUTY CLERK

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

July 8, 2013

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals, Clerk of Court
P.O. Box 11629
Columbia, South Carolina 29211

RE: *Nucor, Corp. v. S.C. Dept. of Emp. & Workforce*
Appellate Case No. 2012-206406

Dear Clerk Kitchings:

The South Carolina Department of Employment & Workforce (SCDEW) is a respondent in the above-referenced appeal. Pursuant to Rule 208(b)(7), SCACR, Respondent SCDEW hereby brings to the Court's attention the following recent authority issued by the South Carolina Supreme Court:

Bone v. U.S. Food Service, Op. No. 27278 (S.C. Sup. Ct. filed June 26, 2013)

The majority opinion in *Bone* supports Respondents' arguments on Issue I in Respondents' Brief (wherein Respondents argue that Appellant Nucor Corp. failed to appeal from a final Administrative Law Court order, and therefore the Appeal should be dismissed).

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

Debra S. Tedeschi
Deputy General Counsel

cc: Anne E. Mjaatvedt, Esq.
Nosizi Ralephata, Esq.
John S. Wilkerson, III, Esq.
Nancy Bloodgood, Esq.
Lucy Clark Sanders, Esq.
Kim A. Leggette

RECEIVED

JUL 10 2013

SC Court of Appeals

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

This Court has received a motion to substitute Nancy Bloodgood and Lucy Sanders as counsel for the respondent in place of Anne E. Mjaatvedt. No return has been received. This motion is granted.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

FILED

SF 6/17/13

Columbia, South Carolina

cc:

Anne E. Mjaatvedt
Nosizi Ralephata
John S. Wilkerson, III
Debra Sherman Tedeschi
Sandra Bell Grooms
Nancy Bloodgood
Lucy Clark Sanders
Kim A. Leggette



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 05, 2013

Ms. Anne E. Mjaatvedt
815 1St Ave, #87
Seattle WA 98104

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

This Court has received your motion for substitution of counsel. By copy of this letter, opposing counsel and your client are requested to file a return to this motion no later than ten (10) days from the date of this letter. The time limits for perfecting the appeal will be held in abeyance until the motion is decided.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Nosizi Ralephata
John S. Wilkerson, III
Debra Sherman Tedeschi
Sandra Bell Grooms
Nancy Bloodgood
Lucy Clark Sanders
Kim A. Leggette

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2012-206406

Nucor Corporation

Appellant,

v.

South Carolina Department of Employment, and
Kim A. Legette,

Respondents.

**PROOF OF SERVICE FOR RESPONDENT LEGETTE'S NOTICE OF MOTION
FOR SUBSTITUTION OF COUNSEL**

RECEIVED
MAY 28 2013
SC Court of Appeals

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
Attorneys for Respondents

I, Nancy Bloodgood, Esquire, certify that on May 23, 2013, I served a copy of Respondent's Legette's Notice of Motion for Substitution of Counsel via First Class Mail by placing a copy of the said documents in the United States mail with sufficient postage thereon on the following:

John S. Wilkerson, Esquire
Turner Padget Graham & Laney, P.A.
PO Box 22129
Charleston, SC 29413

Kim A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418

Nancy Bloodgood

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
Attorneys for Respondent Legette

Charleston, South Carolina

Date: May 23, 2013



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 15, 2013

Ms. Anne E. Mjaatvedt
815 1St Ave, #87
Seattle WA 98104

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

Upon reviewing your Motion for Substitution of Counsel, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The accompanying proof of service is not in compliance with the SCACR. Your proof of service should show service of the motion on your client and include their mailing address.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Nosizi Ralephata
John S. Wilkerson, III
Debra Sherman Tedeschi
Sandra Bell Grooms
Nancy Bloodgood
Lucy Clark Sanders

Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 200-5276
anne@aemlawyer.com

May 3, 2013

RECEIVED

MAY 06 2013

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court, The South Carolina Court of Appeals
1015 Sumter Street
Columbia SC 29201

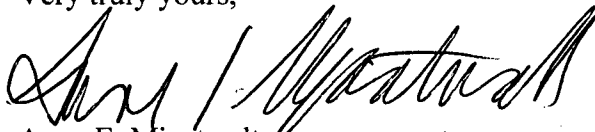
RE: Nucor Corporation v. SCDEW
Case Number: 2012-206406

Dear Ms. Kitchings:

I represent Respondent Kim A. Legette in the above reference matter. Please find enclosed the original and six copies of Respondent Legette's Notice of Motion for Substitution of counsel. Also enclosed is check No. 1156 for \$25.00 for the filing fee.

Please return a file stamped copy to Ms. Bloodgood in the enclosed addressed envelope, and contact me or Ms. Bloodgood at any time if you have any questions or concerns.

Very truly yours,



Anne E. Mjaatvedt

Enclosure

Cc: Nancy Bloodgood, Esq.
John S. Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Sandra Grooms, Esq.
Kim A. Legette

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

68314
RECEIVED

MAY 06 2013

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2012-206406

Nucor Corporation,

Appellant,

v.

South Carolina Department of Employment,
And Kim A. Legette,

Respondents,

**RESPONDENT LEGETTE'S NOTICE OF MOTION FOR SUBSTITUTION OF
COUNSEL**

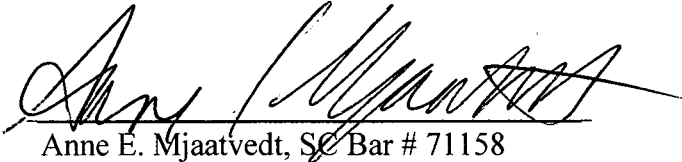
Anne E. Mjaatvedt, Esq., Attorney for Respondent Legette, here files this Motion to Withdraw as Counsel for Respondent Legette and Moves for the Substitution of Nancy Bloodgood, Esq. and Lucy Sanders, Esq. as counsel on the following grounds.

Attorney Mjaatvedt will be leaving South Carolina and moving to the state of Washington effective May 3, 2013 for personal reasons.

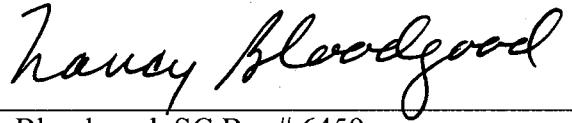
Attorneys Bloodgood and Sanders here make their appearance as substitute counsel. This withdrawal/substitution can be accomplished without material adverse effect on the case as the the final briefs have been filed, and all Respondents are joined on the same briefs in this appeal.

There are no objections to this substitution.

Respectfully submitted:



Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
(843) 793-4240
anne@aemlawyer.com



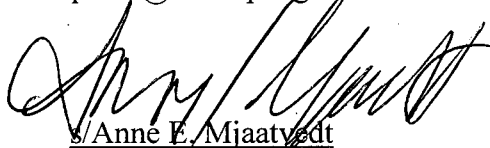
Nancy Bloodgood, SC Bar # 6459
Lucy C. Sanders, SC Bar # 78169
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com
lsanders@fosterfoster.com

Charleston, SC
May 1, 2013

Certificate of Service

I, the undersigned, hereby certify that on the 1st day of May, 2013, I caused a true and correct copy of the *Plaintiff's Notice of Motion for Substitution of Counsel* by E-Mail only to the Attorneys for the Defendants:

John S. Wilkerson, Esq., D.S.C. # 4657
Nosizi Ralephata, Esq., D.S.C. # 9685
TURNER PADGET GRAHAM & LANEY, P.A.
P.O. Box 22129
Charleston SC 29413
jwilkerson@turnerpadget.com
nralephata@turnerpadget.com



s/ Anne E. Mjaatvedt
Anne E. Mjaatvedt

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

March 28, 2013

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

RECEIVED
APR 05 2013
SC Court of Appeals

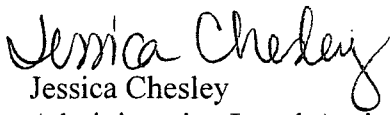
RE: Nucor Corp. v. SC DEW and Kim A. Legette
Case No. 2010-ALJ-22-0938-AP

Dear Ms. Kitchings:

Enclosed for filing are the original unbound and fifteen bound copies of the Respondents Final Brief in the above referenced case. Also enclosed is a Proof of Service and the Certificate of Counsel that the Brief complies with Rule 211(b).

Please let me know if you have any questions.

Sincerely,


Jessica Chesley
Administrative Legal Assistant for
Debra Tedeschi
Assistant General Counsel

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-3168
FAX (803) 737-3060
April 4, 2013

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

Re: Nucor Corporation v. SCDEW and Kim A. Legette
Docket No. 2010-ALJ-22-0938
Appellate Case No. 2012-206406

RECEIVED

APR 05 2013

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing please find the South Carolina Department of Employment and Workforce's Amended Proof of Service, correcting service of the Department's Final Brief. It was discovered on April 3, 2013, that the Final Brief was inadvertently sent to Susan J. Firimonthe instead of John Wilkerson, III and Nosizi Rallephata, as evidenced in our prior Proof of Service (enclosed, along with a copy of the return note from South Carolina Legal Services advising us of the oversight).

As evidenced by the Amended Proof of Service we are hereby serving the Department's Final Brief on Appellant, Nucor Corp., as of today.

We apologize for any confusion this may have caused. Please do not hesitate to contact our office with any questions.

Kind Regards,



Amy Proveaux
Administrative Legal Assistant
SC Department of Employment and Workforce

cc: Johns S. Wilkerson, III, Esq.
Nosizi Rallephata, Esq.
Anne E. Mjaatvedt (Letter and Amended Proof of Service only)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Durden, Administrative Law Judge

Case No. 2010-ALJ-22-0938-AP

Nucor Corp.,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Kim A. Legette,

Respondent.

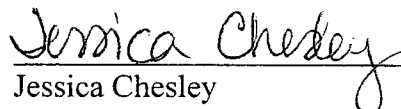
PROOF OF SERVICE

I certify that I have served the Respondents Final Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2013, addressed to the Attorneys for the parties at their addresses of record:

Susan J. Firimonte, Esq.
320 S. Coit Street
Florence, SC 29501-4746

Anne E. Mjaadvedt, Esq.
39 Broad Street, Suite 208
Charleston, SC 29401

March 28, 2013



Jessica Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202

RECEIVED
APR 05 2013
SC Court of Appeals

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

April 3, 2013

VIA UPS DELIVERY

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED

APR 04 2013

SC Court of Appeals

Re: In the Matter of Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legette
Appellate Case Number: 2012-206406
Our File Number: 5670.111

Dear Ms. Kitchings:

Enclosed please find the unbound originals and fifteen copies of the Final Brief of Nucor Corporation, Final Reply to Respondents' Return to Nucor Corporation's Appeal along with their Proofs of Service and the Record on Appeal for the above referenced matter. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of Appellant's Final Briefs on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Anne E. Mjaatvedt
Ms. Sandra Grooms
Ms. Debra Tedeschi

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 5025434v1

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

March 28, 2013

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

RE: Nucor Corp. v. SC DEW and Kim A. Legette
Case No. 2010-ALJ-22-0938-AP

Dear Ms. Kitchings:

Enclosed for filing are the original unbound and fifteen bound copies of the Respondents Final Brief in the above referenced case. Also enclosed is a Proof of Service and the Certificate of Counsel that the Brief complies with Rule 211(b).

Please let me know if you have any questions.

Sincerely,

Jessica Chesley
Jessica Chesley
Administrative Legal Assistant for
Debra Tedeschi
Assistant General Counsel

RECEIVED

MAR 28 2013

SC Court of Appeals

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

March 14, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Nucor Corporation v. SCDEW and Kim A. Legette
Appellate Case No.: 2012-206406
Our File Number: 5670.111

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of the Proof of Service of Record on Appeal and Certificate of Counsel for the above referenced matter. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record.

We would also respectfully point out that because of prior pagination and shrink to fit issues, we have numbered the Record in alternating left and right placement, consecutively, with the prefix ROA to clearly show the Record pages. Based on our reading of the SCACR, we believe the Record is in compliance with Rule 210, SCACR. We kindly ask that you and counsel notify us immediately if you take the position that the Record does not comply with SCACR. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NXR/adh
Enclosures

cc: Ms. Anne E. Mjaatvedt
Ms. Debra Sherman Tedeschi
Ms. Sandra Bell Grooms

RECEIVED
MAR 18 2013
SC Court of Appeals

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4987985v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED
MAR 18 2013
SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

PROOF OF SERVICE

I certify this 14th day of March, 2013 that I served copies of the **Record on**

Appeal by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

Ms. Debra Tedeschi
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that a copy of the **Proof of Service of Record on Appeal and Certificate of Counsel** was sent via United States mail for filing with the Clerk of Court for South Carolina Court of Appeals, pursuant to the South Carolina Appellate Court Rules.

TURNER PADGET GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

March 14, 2013
Charleston, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

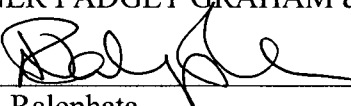
v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that the Record on Appeal complies with SCACR
210.

TURNER PADGET GRAHAM & LANEY, PA

BY: 

Nosizi Ralephata

John S. Wilkerson, III

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2807

Facsimile: (843) 576-1655

Email: NRalephata@TurnerPadget.com

JWilkerson@TurnerPadget.com

ATTORNEY FOR APPELLANT
NUCOR CORPORATION

RECEIVED
MAR 18 2013
SC Court of Appeals

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

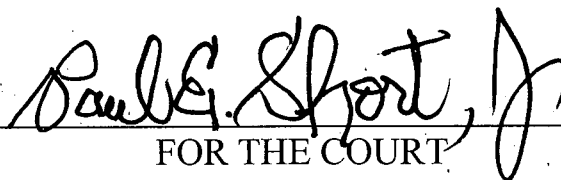
v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

Respondents have filed a motion to dismiss, arguing Appellant has failed to "follow Rules 210 and 267, SCACR, regarding the Record on Appeal." Appellant filed a return and a motion to supplement the Record on Appeal. After consideration, Respondents' motion to dismiss is denied. Appellant's motion for leave to supplement the Record on Appeal is granted. Within twenty days, Appellant shall serve a supplemental record as set forth in Appellant's return to the motion to dismiss. Final briefs shall be served and filed within twenty days after service of the supplemental record.


FOR THE COURT

Columbia, South Carolina

FILED

SF 2/22/13

cc:

Anne E. Mjaatvedt

Nosizi Ralephata

John S. Wilkerson, III

Debra Sherman Tedeschi

Sandra Bell Grooms

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

John S. Wilkerson, III

E-Mail: JWilkerson@TurnerPadget.com
Writer's Direct Dial: (843) 576-2801
Direct Fax: (843) 577-1649

December 27, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

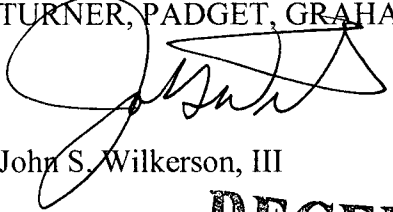
Re: Nucor Corporation v. SCDEW and Kim A. Legette
Appellate Case No.: 2012-206406
Our File Number: 5670.111

Dear Ms. Abbott Kitchings:

Enclosed please find the original and six copies of the **Return to Respondents' Motion to Dismiss or in the Alternative, Motion for Order Compelling Appellant to File a Record on Appeal in Compliance with the Rules and for an Extension of Time for Respondents to File Their Final Brief and Proof of Service**. Also enclosed please find **Appellant's Motion for Leave to Supplement the Record on Appeal, Proof of Service** and our firm's check in the amount of \$25.00 for the filing fee. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.


John S. Wilkerson, III

JSW/adh

Enclosures

cc: Ms. Anne E. Mjaatvedt
Ms. Debra Tedeschi
Ms. Sandra Grooms

RECEIVED

DEC 28 2012

SC COURT OF APPEALS

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4790895v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

RECEIVED

DEC 28 2012

APPEAL FROM ADMINISTRATIVE LAW COURT

SC COURT OF APPEALS

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

**RETURN TO RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE,
MOTION FOR ORDER COMPELLING APPELLANT TO FILE A RECORD ON
APPEAL IN COMPLIANCE WITH THE RULES AND FOR AN EXTENSION OF TIME
FOR RESPONDENTS TO FILE THEIR FINAL BRIEF**

The Appellant, by and through its undersigned attorneys, pursuant to Rule 240 of the South Carolina Appellate Court Rules, responds to Respondents' Motion as follows:

Rather than file their Final Brief, Respondents instead have filed a motion to dismiss this appeal citing three copying errors in the Record on Appeal. The errors consist of the following:

(1) failing to copy the back side of one transcript of proceedings below (which Respondents have had in their possession for some time); (2) including duplicate copies of one set of exhibits in the

Record; and (3) failing to correct an earlier error by Respondent Legette's counsel in attaching exhibits to one of her briefs below in the improper order. All of these copying errors could have been easily corrected had Respondents' counsel brought these issues to Appellant's attention before filing this motion. None of these errors have caused prejudice and should not be considered as a basis for dismissing this appeal.

The current appeal is the fifth appellate proceeding following an initial ruling by a Claims Administrator in favor of Nucor. Hence, the Record on Appeal before this Court is necessarily voluminous and, in many cases, necessarily duplicative.¹ In fact, the Record on Appeal as filed contains over 791 numbered pages.² While undersigned counsel acknowledges that "the South Carolina Appellate Court Rules are not mere technicalities,"³ we also note that human error sometimes occurs despite the exercise of reasonable care. The technical errors complained of by Respondents are excellent examples of human error, both by counsel for Appellant as well as counsel for Respondent Legette.

Respondents first call to the attention of the Court Appellant's failure to include "side two" of each page of one transcript of proceedings below that was submitted by the official reporter in a two-sided format. As reflected by the Affidavit of April Hager (attached as Exhibit 1), this transcript was the only document in the entire package constituting the Record on Appeal which was printed on both sides of the page, and that fact escaped her recognition when she copied the material for the purpose of electronic page numbering. The Affidavit further demonstrates that normal custom and practice in her many years as a legal assistant is for

¹ Rule 210 (c) SCACR provides in pertinent part as follows: "When a portion of an order, judgment, decision or pleading is to be included in the Record on Appeal, the entire order, judgment, decision or pleading shall be included in the Record. . . ." In a case involving an initial ruling and five appeals, the orders and associated briefs, etc. each containing the same or a similar set of exhibits, duplicates are to be expected.

² Due to an inadvertent failure to copy both sides of one of the transcripts which was originally printed by the Official Reporter on both sides of the page, the numbered pages contain certain pages with an "A" designation indicating the pages originally omitted from the printing process. (See, e.g. Record on Appeal, pp. 333 – 400-A.

³ *Henning v. Kaye*, 307 S.C. 436, 415 S.E. 2d 794 (1992)

original transcripts to be printed on only one side of the page. It should be noted that the first indication from Respondents' counsel that there was any concern over the numbering of pages in the Record was the filing of this motion. A phone call or other communication easily could have resulted in a quick correction of the error without prejudice to either party. Nor can Respondents claim prejudice as a result of this copying error since the transcript in question was the official transcript of the hearing before the Administrative Hearing Officer on August 15, 2011, a transcript that had been previously provided to all counsel and included in earlier appeal proceedings.

Before the Record on Appeal was filed with this court, Appellant's counsel discovered this error and attempted to correct it by adding the omitted pages with the letter "A" designations so as not to cause all subsequent numbered pages to need re-numbering. Even this correction, however, did not cure the entire error since counsel did not notice, until the filing of this motion by Respondent, that the exhibits attached to that transcript were also printed on both sides.⁴

The remaining errors cited in this motion are not material and could not have caused any prejudice to Respondents. As noted, pages 448-468 and 469-489 are exact duplicates. This error of including duplicates of the same document could not have caused confusion, particularly since the error was identified by Respondents' Counsel.

Respondents finally complain that certain exhibits found at pages 648-651 originally attached to one of Respondent Legette's earlier briefs are out of order. These exhibits were copied in the same order they were originally attached to Legette's brief and included in the Record at pages 619-651.⁵ Appellant's perpetuation of an error originally committed by

⁴ Based upon this discovery, Appellant files contemporaneously with this Return a Motion, pursuant to Rules 240 and 212(b) SCACR to Supplement the Record on Appeal with the still-missing back-side pages of the exhibits. (Record, pp. 401-418).

⁵ See Affidavit of April Hager, Exhibit 1 at ¶ 7.

Respondent's Counsel who now blames Appellant for not correcting her own mistake should not be cited as a basis for dismissing this appeal.

Respondents cite two decisions of the South Carolina Supreme Court (*Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 641 S.E.2d 895 (2007) and *Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986)) in support of the relief they seek in this motion, neither of which are factually similar to this motion. In *Johnson*, the Appellant failed to include in the transcript the very motion and order which was the subject of the appeal. The Supreme Court affirmed dismissal of the appeal by the Court of Appeals, not because of errors in copying the Record on Appeal, but because Rule 210(h) SCACR provides that "no point will be considered which does not appear in the record on appeal." 272 S.C. at 283. Since the Record did not contain the order from which appeal was taken, the Court was unable to consider it and had no choice but to dismiss the appeal. Here, the Record as filed contains all facts and other matters cited by any party in their respective briefs. Therefore, it cannot be said that the appeal can be dismissed for failure to comply with Rule 210(h) SCACR, and *Johnson*, *supra*. is inapposite.

Likewise, the *Tally* decision provides no support for Respondents' position. Respondents rely upon *Tally* for the proposition that "[d]ismissal is justified where there are numerous procedural errors." Motion to Dismiss, p. 2. The "numerous procedural errors" the Supreme Court found sufficient to dismiss Tally's appeal included the following: (1) raising multiple issues in a single exception; (2) raising issues for the first time on appeal that had not been presented to the court below; (3) failing to preserve an issue raised below but not ruled upon by the court below; and (4) raising as an exception an issue on which he had prevailed below rather than properly asserting it as an additional sustaining ground. 289 S.C. at 487. It is apparent that

the “numerous procedural errors” committed by Tally affected the entire appellate process in a substantive way and did not involve errors in the Record on Appeal. The copying errors cited here do not come close to the substantial nature of the procedural errors in *Tally* and should not justify dismissal of this appeal.

The Supreme Court’s Order in the case of *Henning v. Kaye*, 307 S.C. 436, 415 S.E. 2d 794 (1992) is instructive. There, the Respondent moved to dismiss Appellant’s appeal based upon numerous substantial rules violations relating to Appellant’s initial brief and his Designation of Matter to be Included in the Record on Appeal (“Designation”). The opinion did not specify the issues related to the Designation, but described the deficiencies in the initial brief as follows:

Appellant's brief fails to comply with the Rule 207 in the following particulars: the components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.

307 S.C. at 436. After noting that these substantial procedural errors are “not mere technicalities” and would justify dismissal of the appeal, the Court exercised its discretion in denying the motion to dismiss and ordered the party to correct the errors by submitting an amended initial brief and Designations. Similarly Appellant here urges this court to deny the motion to dismiss because the cited errors are not nearly as substantial as those cited above and neither impair the orderly administration of justice nor inhibit appellate review. *See*, 307 S.C. at 436.

Appellant’s counsel accepts full responsibility for the cited copying errors identified by Respondent, but requests the Court to deny the motion to dismiss and grant leave to file a

Supplemental record to correct these technical errors. Appellant also consents to Respondent's request for an extension of time within which to file her final brief.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2807

Facsimile: (843) 576-1655

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

December 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 27th day of December, 2012 that I served copies of the **Return to Respondents' Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance With the Rules and for an Extension of Time for Respondents to File Their Final Brief** by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

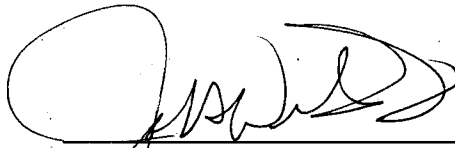
ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

Ms. Debra Tedeschi
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that the original and six copies of the **Return to Respondents' Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance With the Rules and for an Extension of Time for Respondents to File Their Final Brief and Proof of Service** were sent via United States mail for filing with the Clerk of Court for South Carolina Court of Appeals, pursuant to the South Carolina Appellate Court Rules.

TURNER PADGET GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2801

Facsimile: (843) 577-1649

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

December 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

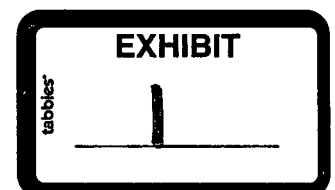
South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

AFFIDAVIT OF APRIL D. HAGER

PERSONALLY APPEARED BEFORE ME April D. Hager, who, after being duly sworn, deposes and says as follows:

1. I am a resident of Dorchester County, South Carolina and employed as an Administrative Assistant in the Charleston, South Carolina office of Turner Padgett Graham and Laney, PA.

2. I have been employed as an Administrative Assistant in a litigation law practice for 20 years, the last 7 with Turner Padgett Graham and Laney. In that capacity, I have had occasion to become familiar with transcripts of depositions and court proceedings, having handled hundreds of them during my career.



3. In my experience, original transcripts are routinely printed on one side of a page and I cannot recall ever handling a transcript where the original was printed on both sides of the page, the transcript of the August 15, 2011 hearing before the Administrative Hearing Officer of the S. C. Dept. of Employment & Workforce being the only exception I can recall.

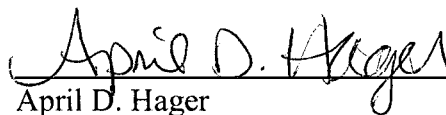
4. I personally duplicated the documents to be included in the Record of Appeal for this case and utilized an electronic page numbering system. The duplication and numbering involves inserting the documents into a copier with an automatic feeder, and I did not notice in that process that the above-referenced transcript was printed on both sides of the page.

5. I have now reviewed all other documents included in the Record on Appeal and confirmed that the above-referenced transcript was the only document in the entire Record that was printed on both sides of the page.

6. Ms. Ralephata reviewed the Record on Appeal before it was served on counsel and apparently did not notice the failure to copy both sides of the pages of this transcript.

7. I have reviewed the original of Respondent Legette's brief and attached exhibits as received from Respondent Legette which are now reproduced in the Record on Appeal at pages 648-651. The order in which the exhibits attached to that Brief in the Record on Appeal is identical to the order they were in when originally received by service from Legette's counsel.

FURTHER AFFIANT SAITH NOT.


April D. Hager

Sworn to and subscribed before me this
the 27th day of December, 2012.


Notary Public for South Carolina

My commission expires: 1-23-2017

66-712

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

RECEIVED

APPEAL FROM ADMINISTRATIVE LAW COURT DEC 28 2012

The Honorable Deborah Brooks Durden

SC Court of Appeals

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

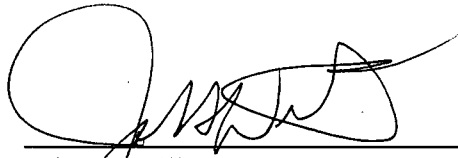
South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

**APPELLANT'S MOTION FOR LEAVE
TO SUPPLEMENT THE RECORD ON APPEAL**

Pursuant to Rules 240 and 212(b) of the South Carolina Appellate Court Rules, Appellant moves for leave to supplement the Record on Appeal filed with this Court on December 14, 2012, stamped received on December 17, 2012. The supplementation is needed because Respondents have called to the attention of Counsel and the Court certain copying errors in the Record as filed. The reasons for and substance of the proposed supplementation are more particularly set forth in Appellant's Return to Respondents' Motion to Dismiss filed contemporaneously with this motion. Appellant craves reference to that Return as its Memorandum in Support of the present motion.

Respectfully Submitted,

TURNER PADGET GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2801

Facsimile: (843) 577-1649

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

December 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED
DEC 28 2012
SC Court of Appeals

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 27th day of December, 2012 that I served copies of the **Appellant's Motion for Leave to Supplement the Record on Appeal** by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

Ms. Debra Tedeschi
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that the original and six copies of the **Appellant's Motion for Leave to Supplement the Record on Appeal and Proof of Service** were sent via

United States mail for filing with the Clerk of Court for South Carolina Court of Appeals,
pursuant to the South Carolina Appellate Court Rules.

TURNER PADGET GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2801

Facsimile: (843) 577-1649

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

December 27, 2012



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 19, 2012

Ms. Nosizi Ralephata
Mr. John S. Wilkerson, III
PO Box 22129
Charleston SC 29413-2129

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

Upon reviewing your appellant's final brief, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- Under Rule 267 of the SCACR, all appellant's counsel are required to be listed on the cover of the appellant's final brief.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Anne E. Mjaatvedt
Debra Sherman Tedeschi
Sandra Bell Grooms



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 19, 2012

Ms. Nosizi Ralephata
Mr. John S. Wilkerson, III
PO Box 22129
Charleston SC 29413-2129

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

Upon reviewing your record on appeal, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- Under Rule 267 of the SCACR, all counsel are required to be listed on the cover of the record on appeal.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Anne E. Mjaatvedt
Debra Sherman Tedeschi
Sandra Bell Grooms



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 19, 2012

Ms. Nosizi Ralephata
Mr. John S. Wilkerson, III
PO Box 22129
Charleston SC 29413-2129

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

Upon reviewing your appellant's final reply brief, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- Under Rule 267 of the SCACR, all appellant's counsel are required to be listed on the cover of the appellant's final reply brief.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Anne E. Mjaatvedt
Debra Sherman Tedeschi
Sandra Bell Grooms

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

December 17, 2012

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

RE: NuCor v. South Carolina Department of Employment and Workforce and
Kimberly Legette
Case Tracking Number: 2012-206406

Dear Ms. Kitchings:

Enclosed for filing is the original and seven copies of the Respondent's Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance with the Rules in above referenced case. Please file and return a clocked in copy in the envelope provided.

Sincerely,


Jessica Chesley
Administrative Legal Assistant for
Debra S. Tedeschi
Sandra B. Grooms
Assistant General Counsel

RECEIVED

DEC 18 2012

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

DEC 18 2012

SC Court of Appeals

Appellate Case No.: 2012-206406

Nucor Corporation,

Appellant,

v.

South Carolina Department of Employment,
And Kim A. Legette,

Respondents,

**RESPONDENTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE,
MOTION FOR AN ORDER COMPELLING APPELLANT TO FILE A RECORD ON
APPEAL IN COMPLIANCE WITH THE RULES AND FOR AN EXTENSION OF TIME
FOR RESPONDENTS TO FILE THEIR FINAL BRIEF**

Pursuant to SCACR Rule 260, Respondents South Carolina Department of Employment and Workforce (SCDEW) and Kim A. Legette move this Court to dismiss the appeal of Appellant Nucor Corporation for failure to follow the Appellate Court Rules. Specifically, Appellant has failed to follow Rules 210 and 267, SCACR regarding the Record on Appeal. As a result, Respondents are unable to timely finalize their brief to this Court.

Appellant was required to serve a copy of the Record of Appeal on each party within 30 days after service of the last brief. Rule 210(a), SCACR. Appellant was unable to meet this timetable, and Respondents granted them additional time for serving the ROA.¹ However, when Appellant did serve the ROA, it was incomplete, and improperly formatted.

¹ This is not the first time Appellant has avoided the timelines set out by the rules. Appellant belatedly filed a Reply Brief, and did not even request an extension until after the deadline had passed.

The ROA arrived in a large, single three-ring binder. Although it appears from the Index that all matter designated by the parties was listed in the Index (albeit in the incorrect order, *see infra*), the ROA in fact is incomplete. By providing material that was unbound and not complete, Appellant has flagrantly disregarded Rules 210(c) and 267(c) and 267(d). As a result of Appellant's disregard for the Appellate Court Rules, Respondents are prejudiced because there is no way for Respondents to properly finalize their brief.

Specifically, Respondents have noticed the following deficiencies in what was served upon them:

- pp. 333-418: the second side of the entire two-sided transcript and exhibits were omitted;
- pp. 469-489 are exact duplicates of pp.448-468;
- pp. 648-651 should immediately precede p. 627 (pp. 648-651 are the first 4 pages of Claimant's Exhibit 1, but have been placed at the end of the exhibits in error);

Furthermore, it appears that all of the papers in the binder are significantly reduced in size from the originals, in violation of Rule 267(c), SCACR. In addition, it does not appear Appellant followed Rule 210(c), SCACR, because the matter in the binder has not been arranged in the order specified by the Rule.

The above referenced errors throughout the Record of Appeal have made it impossible for Respondents to complete their final brief, as relevant pages in the ROA are missing.

It is the appealing party who must be held accountable for failing to present the court with an adequate record on appeal for review. *See Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007). Dismissal is justified where there are numerous procedural errors. *Talley, v. S.C. Higher Educ. Tuition Grants Comm.*, 289

Respondents have been more than gracious in not contesting these untimely filings, but are out of patience given that this tardiness now has impacted Respondents' own ability to properly file with the Court.

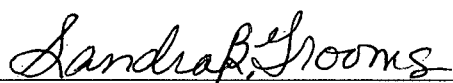
S.C. 483, 487; 347 S.E.2d 99 (1986). Based on Appellant's repeated failure to comply with the requirements of the Appellate Rules, Respondents request that this Court dismiss this Appeal in its entirety.

If this Court decides not to dismiss, Respondents request that in the alternative, this Court to Order that Appellant to file its Record on Appeal in compliance with the Rules, and provide Respondents an extension for time to file their final brief at a reasonable time after Appellant has served its corrected Record.

CONCLUSION

For the foregoing reasons, Respondents request that this appeal be dismissed, or in the alternative, that this Court grant Respondents an extension of the deadline to file their final briefs until after Appellant has complied with the rules. Further, Respondents move this Court for costs associated with this Appeal and for time spent on the incorrect Record of Appeal.

Respectfully submitted,



Debra S. Tedeschi, SC Bar # 15307
Deputy General Counsel
Sandra B. Grooms, SC Bar # 640
Assistant General Counsel
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-2666 (Telephone)
(803) 737-0124 (Facsimile)
legal@dew.sc.gov

Attorneys for Respondent SCDEW

Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 20401
(843) 793-4240 (Telephone)
(843) 278-9239 (Facsimile)
anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

December 17, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2012-206406

Nucor Corporation,

Appellant,

RECEIVED

DEC 18 2012

SC Court of Appeals

v.

South Carolina Department of
Employment and Workforce
and Kim A. Legette,

Respondent.

PROOF OF SERVICE

I certify that I have served the Respondents Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance with the Rules on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on December 17 2012, addressed to the Attorney for the Appellant and the Attorney for Respondent Legette at their addresses of record:

John Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Turner Padgett
PO Box 22129
Charleston, SC 29413

Anne E. Mjaatvedt, Esq.
Anne Mjaatvedt Law Firm LLC
39 Broad Street, Suite 208
Charleston, SC 29401

December 17 2012


Jessica Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

December 17, 2012

VIA HAND DELIVERY

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: In the Matter of Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legette
Appellate Case Number: 2012-206406
Our File Number: 5670.111

Dear Ms. Kitchings:

Enclosed please find the original and fifteen copies of the Final Brief of Nucor Corporation, Final Reply to Respondents' Return to Nucor Corporation's Appeal and Record on Appeal each with their Proof of Service for the above referenced matter. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Anne E. Mjaatvedt (Mailed December 14, 2012)
Ms. Sandra Grooms (Mailed December 14, 2012)
Ms. Debra Tedeschi (Mailed December 14, 2012)

RECEIVED

DEC 17 2012

SC Court of Appeals

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4824108v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

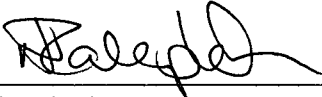
v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that the Final Brief of Nucor Corporation and the Final Reply to Respondents' Return to Nucor Corporation's Appeal complies with SCACR 211(b)(1) and (2).

TURNER PADGET GRAHAM & LANEY, PA

BY: 
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEY FOR APPELLANT
NUCOR CORPORATION

RECEIVED

DEC 17 2012

SC Court of Appeals

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

November 26, 2012

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

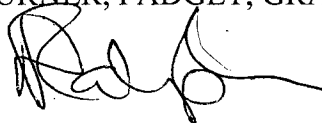
Re: Nucor Corporation v. SCDEW and Kim A. Legette
Appellate Case No.: 2012-206406
Our File Number: 5670.111

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of the Proof of Service of Record on Appeal and Certificate of Counsel for the above-referenced matter. Please file the originals in your office and return a clocked copy to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Anne E. Mjaatvedt
Ms. Debra Tedeschi
Ms. Sandra Grooms

RECEIVED
NOV 27 2012
SC Court of Appeals

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4790895v1

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

Appellant filed a motion to submit the reply brief out of time. The motion is granted and the appellant's initial reply brief is accepted as filed. Appellant is requested to include the appropriate title of the reply brief when filing it in its final form.

FOR THE COURT

BY: V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

11-16-12 *SPM*

cc:

Anne E. Mjaatvedt

Nosizi Ralephata

John S. Wilkerson, III
Debra Sherman Tedeschi
Sandra Bell Grooms

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

65991
CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

October 23, 2012

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: In the Matter of Nucor Corporation v. S.C. Department of Employment and Workforce
and Kim A. Legette
Appellate Case Number: 2012-206406
Our File Number: 5670.111

Dear Ms. Kitchings:

Enclosed please find the original and six copies of a Consent Motion to Submit Brief Out of Time, the original and one copy of Reply to Respondents' Return to Nucor Corporation's Appeal and Proof of Service for the above referenced matter. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Anne E. Mjaatvedt
Ms. Sandra Grooms
Ms. Debra Tedeschi

RECEIVED

OCT 24 2012

SC Court of Appeals

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4724994v1

Other Counsel of Record:

Ms. Debra S. Tedeschi, SC Bar No.: 15307
Ms. Sandra Grooms, SC Bar No.: 640
S.C. Department of Employment and Workforce
P.O. Box 8597
Columbia, SC 29202
Phone: 803-737-2666
Facsimile: 803-737-0124
Email: legal@dew.sc.gov

Attorneys for Respondent SCDEW

Ms. Anne E. Mjaatvedt, SC Bar No.: 71158
Anne Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
Phone: 843-793-4240
Facsimile: 843-278-9239
Email: anne@aemlawyer.com

Attorney for Respondent Kim A. Legette

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Appellate Case No.: 2012-206406

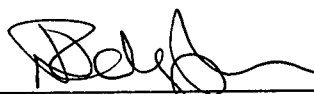
Nucor Corporation,..... Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

**REPLY TO RESPONDENTS' RETURN
TO NUCOR CORPORATION'S APPEAL**

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata, SC Bar No.: 72484
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2807
Facsimile: 843-576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

October 23, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
I. THE ALC JUDGE’S ORDER MUST BE REVERSED BECAUSE IT IS ERRONEOUS AS A MATTER OF LAW	4
A. The ALC’s Reliance on the outside Independent Test Administered under Different Detection Standards Was Erroneous as a Matter of Law	4
B. Nucor Has Consistently Asserted That Termination Was Proper Under Sections (2), (3) and (4) of the Statute, And Respondents Arguments To The Contrary Are Not Supported By the Record.....	6
C. Appellate Review Will Not Result in Inconsistent Decisions Because the Appellate Panel’s Order Does Not Dispose Of The Issues On Appeal.....	7
II. THE ORDER ON APPEAL IS FINAL AND RIPE FOR APPELLATE REVIEW	10
III. THE ISSUES ON APPEAL WERE RAISED AND RULED ON BY THE ALC, AND ARE THEREFORE PROPERLY PRESERVED FOR THE PRESENT APPEAL	13
IV. NUCOR HAS EXHAUSTED ITS ADMINISTARTIVE REMEDIES.....	15
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't. of Health and Env'tl. Control</i> , 387 S.C. 265, 266, 692, S.E. 2d 894 (2010)	11, 12, 15, 16
<i>Ex parte U-Drive It, Inc.</i> , 369 S.C. 1, 630 S.E.2d 464 (2006)).....	15
<i>Good v. Hartford Accident & Indemnity Co.</i> , 201 S.C. 32, 21 S.E.2d 209 (1942)	11, 12
<i>Hill v. S.C. Dep't of Health & Env'tl. Control</i> , 389 S.C. 1, 19 (S.C. 2010)	13
<i>Home Med. Sys. v. S.C. Dep't of Revenue</i> , 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009).....	13
<i>Peterson Outdoor Advertising Corp. v. Beaufort County</i> , 291 S.C. 533, 354 S.E.2d 563 (1987).....	7
<i>Risher v. S.C. Dep't of Health & Env'tl. Control</i> , 393 S.C. 198, 207-208 (S.C. 2011)	13
<i>Sloan v. Department of Transp.</i> , 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005)	14
<i>Sloan v. DOT</i> , 379 S.C. 160, 169 (S.C. 2008)	14
<i>Turner v. Rogers</i> , 131 S.Ct. 2507, 2515, 180 L. Ed. 2d 452 (2011)	14

Statutes

South Carolina Code Ann. § 1-23-380 and 610	15
South Carolina Code Ann. § 41-35-120.....	2, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19

Rules

Rule 201, SCACR	15

Submission Of Laboratory Packages By Accredited Laboratories - www.fda.gov › Regulatory Information › Guidances (last visited 11/28/2011). Thus, the laboratory used by Nucor is nationally and internationally certified, and certainly, competent to prove Legette's violation of Nucor's Drug and Alcohol Policies.

It is clear that the intent of South Carolina Code Ann. § 41-35-120 ("the Statute") was to ensure that only nationally recognized accreditation bodies would certify laboratories to perform the hair panel drug tests on private sector employees. Respondents argue that "If examined under § 41-35-120(2) and (4), the employer's tests are inadmissible because the tests were performed by an uncertified laboratory."³ However, *there is nothing in the Statute that says Section 120(3)(a)(iii)(B) is a rule of evidence exclusion or the only way to establish the bona fides of a testing facility.* A certified laboratory's tests automatically meet the requirements of reliability because the Statute says so, but it is not the only way to establish the reliability of the test. If the employer can establish that the laboratory followed the correct protocols and processes needed for certification, then why would the results not be admitted? Indeed, the legislature also intended to give teeth to an overriding policy promoting safety and drug-free workplaces by unequivocally denying benefits to those who test positive for illegal drugs at work if the test is administered on behalf of the employer by a laboratory that is certified by a nationally recognized accrediting body. The general purpose of the unemployment statutes – to grant benefits to eligible and deserving claimants – is served by denying benefits to individuals who not only violate workplace policies, but also violate the law by using illegal drugs.

³ Respondents' Brief, at p. 31.

Likewise, testimony at all the evidentiary hearings established reliability of the employer's laboratory results, notwithstanding certification issues, including that the laboratory conducted the tests in the same manner as a certified laboratory would have done. [ROA ____]. Similarly, the only evidence supporting the alleged "contradictory" results is Legette's independent tests, which was administered under an incorrect detection level. [ROA ____]. And even assuming for arguments sake Legette's "contradictory" results would be acceptable as competent evidence, these results would only create an inference of unreliability if the detection levels were the same or lower than the limit of detection criterion utilized by Nucor. However, it is undisputed that they were not, [ROA ____] and therefore, are not probative of anything except that the passage of time reduced the number at which the THC/marijuana was detected because the evidence degraded over time.

In addition, Nucor has exhausted its administrative remedies, and properly preserved the issues on appeal. To assert otherwise is not only an insupportable deviation from the rule of law, but such a position eviscerates Nucor's due process rights because Nucor has consistently challenged the reliance on the outside independent test administered under different detection standards, and has requested that the appellate bodies properly interpret and apply Sections (2), (3)(c), and (4) to this dispute. preserved, and are ripe for review by this Court.

I. THE ALC JUDGE'S ORDER MUST BE REVERSED BECAUSE IT IS ERRONEOUS AS A MATTER OF LAW

A. The ALC's Reliance on the outside Independent Test Administered under Different Detection Standards Was Erroneous as a Matter of Law.

The ALC's Order concluded, as a matter of law, that Nucor's arguments regarding S.C. Code Ann. § 41-35-120(2) and (4) lacked merit, and this ruling impermissibly relied on the Appellate Panel's erroneous conclusion that an outside test was not only authorized under the Statute, but also constituted a proper basis for reversing the Appeal Tribunal's decision. However, as asserted by Nucor consistently throughout the life of this case, both the ALC and the Agency are not authorized to accept or rely on an employee's off-site independent drug test administered using different, less sensitive detection levels, and which Legette knew would not be accepted by Nucor, as basis for reinstating Legette's unemployment benefits. If an employee is permitted to obtain and rely on her own outside independent tests, then it will be virtually impossible to terminate an employee based on violation of the employer's drug policies. An employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random workplace drug tests, while allowing every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether, thereby jeopardizing the safety of other employees.

Respondents assertion that the "independent laboratory [used by Legette] sent samples to Omega with the same cut-off criteria as Nucor used" is incorrect and contradicted by the testimony of Legette's expert. *See*, Respondents' Brief, p. 10. As set forth in Nucor's Initial Brief at pp. 23-24, the record shows clearly that while Nucor's second drug test, performed at the request of Claimant, was administered as a "level of

detection” test [ROA 30, Exhibit 5; ROA 105; Exhibit 7, ROA 136], Legette’s independent “negative” test was administered under a different standard [ROA 30, 63-64]. More pertinently, both Legette and her expert conceded that the second drug test administered on behalf of Nucor at Legette’s request was administered as a “level of detection” test [ROA 30, Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Legette’s independent and allegedly “negative” test was administered under a different criterion. [ROA 30, 63-64]. In addition, when questioned directly as to whether the independent test performed outside Nucor’s facility by Dr. Bennett was conducted at the same stringent limit of detection level as that utilized by Nucor on April 15, 2012, Legette testified she was not sure what standard Dr. Bennett applied. [August 2011 Transcript, p. 118, ROA ____].

Moreover, as set forth in greater detail below and in Nucor’s Initial Brief, use of a noncertified laboratory only forecloses the employer from a conclusive presumption that such tests will receive primacy over any other test results. In other words, by using a certified laboratory, the results will automatically be accepted without analyzing and determining whether the laboratory procedure meets the standards of a certified laboratory. On the other and, if the laboratory is not certified, then the employer has to establish reliability and conformity with the statutory requirements. The evidentiary hearings, including testimony establish that Nucor’s test results are in conformity with the Statute’s requirements. [ROA ____]. Thus, the only issue is whether it is permissible to rely on “contradictory” test results from the same laboratory when it is undisputed that the two tests utilized different detection levels and the employer’s results were are a

lower detection level that was appropriate to use. In that regard, the ALC's decision is not based upon the "substantial evidence on the whole record" and must be reversed.

The only tests at issue are the tests performed in April 2010. Respondents' persistent dredging of the February and March drug test results defies logic at best, particularly in light of Legette's own concession that she was terminated solely on the basis of her failure of the drug tests administered on April 6, 2010 and April 15, 2010, and that she cannot point to anything that was done incorrectly with regard to the collection and processing of her hair specimen, and that she simply assumes there was a mistake because she does not use drugs. [Respondents' Brief, pp. 7-9; August 2011 Transcript, pp. 111-112]. Further, Legette readily concedes that the hair sample at issue in the April 2010 tests matched her hair color at the time the sample was taken. [August 2011 Transcript, p. 110]. Nucor has never referenced or relied on the February and March, 2010 test results with regard to Legette's termination. [ROA - August 2011 Hearing Transcript]. Thus, there is no dispute that only the April 6, 2010 and April 15, 2010 drug tests are implicated in this dispute. There is no rational basis for even raising the February and March 2010 drug tests which were not relied upon by Nucor in terminating Legette's employment.

B. Nucor Has Consistently Asserted That Termination Was Proper Under Sections (2), (3) and (4) of the Statute, And Respondents Arguments To The Contrary Are Not Supported By the Record.

Respondents' position that Nucor only relied on Section 3 of the Statute as basis for terminating Legette's employment has no record support. The record is replete with briefing by Nucor regarding the propriety of termination under either of the applicable

Sections (2), (3) or (4). [Nucor's Briefs to the ALC, ROA __; Nucor's Initial Court of Appeals Brief (2011); Nucor's Briefs on appealability in February 2012, ROA __].

Furthermore, the ALC's order specifically relies on, and incorporates the independent test that was the basis of the Agency's "contradictory test results" finding as basis for upholding the Appellate Panel's reinstatement of Legette's benefits under Section (4). Thus, Judge Durden's Order affirms the Appellate Panel's application of Section (4) to the facts of this case, while dismissing Nucor's arguments that violation of an employer's drug policies constitutes termination for cause as provided under Section (2) of the Statute. Stated differently, Nucor argued that termination was proper under all three Sections, but the ALC judge ruled that Nucor's arguments as to Sections (2) and (4) were without merit. [ROA __]. Thus, Respondents' argument that Nucor has only relied on Section (3) of the Statute as basis for terminating Legette has no merit.

C. Appellate Review Will Not Result in Inconsistent Decisions Because the Appellate Panel's Order Does Not Dispose Of The Issues On Appeal.

In this instance, Respondents, while acknowledging the finality of the Orders at issue, have yet again, attempted to thwart South Carolina law and confuse the issues by arguing that Nucor's appeal has been rendered moot based on the Appellate Panel of South Carolina Department of Employment and Workforce's ("Appellate Panel") most recent decision regarding certification of the laboratory pursuant to the specific language of S.C. Code Ann. § 41-35-120 (3)(a)(iii)(B).

However, framing the issue as moot/disposed of by operation of the Appellate Panel's decision is not only a mischaracterization of the dispute between the parties, including the issues that form(ed) the bases of Nucor's appeals, both to the ALC and to

this Court; but it is also an incorrect and untenable construction of the applicable Statute. "A case is 'moot' when judgment, if entered, will have no practical effect on existing controversies." *Peterson Outdoor Advertising Corp. v. Beaufort County*, 291 S.C. 533, 354 S.E.2d 563 (1987). In this case, Nucor's appeal is not moot because there is an actual controversy, the issues are ripe, and judgment will have a practical effect on the controversy.

Respondents' argument that Section (3)(a) is the *only* provision that can be used to disqualify an employee has no legal support and has far reaching consequences that would actually jeopardize the safety of employees in the state. To adopt Respondents position would mean that even employees that either confess to using illegal drugs while at work, or employees that are caught using illegal drugs at work would be entitled to unemployment benefits simply because the employer did not test the subject employee for drugs as set forth under Section (3)(a)(iii)(B) of the Statute. Such a construction not only creates absurd results that are contrary to the language, purpose and intent of the Statute, but also precludes an employer as a matter of law from relying on other applicable provisions of the Statute to reach the same result. Disqualification from benefits under Section (3) is not conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B); rather under Section 3(c), results from a certified laboratory are given primacy, while noncertified laboratory results are given whatever weight the fact finder deems appropriate.

Respondents additionally assert that under the Statute, the *only* way an employer can establish an employee's violation of the prohibition against use of illegal drugs in the workplace is by using *only* a laboratory certified as set forth in the Statute with absolutely

no deviation from the language of the Statute. Interestingly, however, even the Agency candidly concedes that because NIDA no longer exists, the Agency now accepts results from SAMHSA. [Agency's Brief to the ALC, ROA __, ALC's Order, p. ROA __; Respondents Brief, pp. 29-32]. But, the plain language of the Statute does not provide that a laboratory must be certified by SAMHSA, and the Agency's acceptance of SAMHSA as a successor certifying body shows that what is intended by legislature is accreditation by a nationally recognized certifying body. Clearly then, certification as set forth under Section (3)(a)(iii)(B) simply provides primacy and a presumption of reliability to drug test results from those certified laboratories. In that regard, if the laboratory is certified as set forth under Section (3)(a)(iii)(B), then there is no inquiry about the reliability, methodology and accreditation of the testing laboratory. However, if the laboratory is not so certified, then the employer has to establish that the test results are reliable, which Nucor has done in this case, as conceded by Legette's own expert. [ROA __]. Framed another way, the overriding objective and intent of legislature, and the spirit of the Statute is that an employer should, and is allowed to terminate an employee for illegal drug use as long the employer can prove that the statutory standards were properly applied and that the laboratory results would be the same regardless of certification. An employee cannot inject disparate result at different detection level to suggest the initial tests are not accurate. Moreover, Legette's reliance *on the same laboratory* waives any objection and/or estops her from asserting that Nucor's results should be disregarded for failure to strictly comply with the language of Section (3)(a)(iii)(B) regarding certification of the laboratory. Legette's position that her own test results should be honored while Nucor's test results, performed at the same

laboratory, should be disregarded is disingenuous. Legette's position shows she concedes the integrity and reliability of the laboratory testing methods and results when she finds such results favorable. Legette's support of the laboratory at issue cannot properly be disregarded because of an unfavorable test result.

The Appellate Panel *did not* conclude that Section (3)(a) is the *only* provision that can be used to disqualify an employee. As a result, this Court's ruling on the issues on appeal issue would not produce inconsistent results. Rather, appellate review is warranted to provide clear guidance as to whether a disgruntled terminated employee can obtain and rely on an independent test administered under different detection standards to challenge an employer's random worksite drug tests. Appellate review is also necessary to provide a uniform and consistent application of the Statute, including whether termination based upon drug use is provable *only* through use of a laboratory certified as set forth under Section 41-35-120(3)(a)(iii)(B), to the exclusion of Sections (2), (3)(c) and (4).

II. THE ORDER ON APPEAL IS FINAL AND RIPE FOR APPELLATE REVIEW

The finality of the order on appeal is not an issue that is subject to legitimate dispute. Although Respondents have now yet again changed courses, and are asserting in their Response Brief that there is no final order that can be appealed, it is clear that this position is contrary to Respondents' prior concessions that the ALC's May 2011 Order and the Appellate Panel's December 9, 2011 are final with respect to the issues raised and ruled on. There is nothing left to be done in this case except to enforce by execution what has been determined with finality. There are no outstanding issues on remand, no

outstanding issues (legal or factual) pending before the ALC, or any of the Agency's tribunals, and no outstanding motions.

The ALC has repeatedly and categorically informed the parties that its May 24, 2011 Order is final and disposes of *all* the issues raised by Nucor. [Correspondence dated April 4, 2012 from the ALC, ROA __; ALC email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" ROA __]. (emphasis added). Similarly, Respondents fail to identify a single claim, issue or fact that has yet to be resolved with finality. Thus, Respondents' position has no merit and is advanced purely for purposes of avoiding having to address the merits of Nucor's issues on appeal. Of note in this regard is that when this Court initially raised the appealability issue in January 2012, Respondents asserted that the entire controversy had been disposed of by application of both the ALC's May 24, 2011 order and the December 9, 2011 Appellate Panel Decision [p. 2 of Legette's brief, ROA __; p. 2 of Agency's brief, ROA __]. Thus, there is no genuine dispute that the ALC's order is as final as it gets under South Carolina law. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

South Carolina law likewise, provides clear guidance with regard to what constitutes a non-final order/judgment. Under established precedent, an order does not constitute a final judgment where "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't. of Health and Env'tl. Control*, 387 S.C. 265, 266, 692, S.E. 2d 894 (2010). In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in

the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission. However, that is not the case here. In this case, not only has the issue on remand been resolved, but the ALC judge has repeatedly informed the parties that her Order is final and she no longer has jurisdiction over the case. [May 24, 2011 ALC Order, ROA __; ALC email dated June 14, 2011, ROA __; correspondence dated April 4, 2012 from the ALC, ROA __].

If the Court dismisses Nucor's appeal, the practical result is a catch-22 situation whereby this Court asserts that the Order appealed is *not* final, while the ALC *insists* that its Order is *final*, that it has closed its docket and no longer has jurisdiction over the matter, thereby leaving Nucor with no access to the justice system. [Correspondence dated April 4, 2012 from the ALC, ROA __]. Not only would such a dismissal be contrary to Nucor's substantial rights, but it would also be contrary to the holding in *Charlotte-Mecklenburg* order with regard to what constitutes a final order for purposes of appealing as of right. This position is supported by a long line of South Carolina precedent. *See, e.g. Good v. Hartford Accident & Indemnity Co., supra.* Moreover, *Charlotte-Mecklenburg* has neither been interpreted as, nor is it intended to, deny appellants the option of appealing a final order as of right.

Respondents' reliance on this Court's March 23, 2012 Order dismissing Nucor's appeal is misplaced and has no basis in law or fact because there remain no issues to be resolved by the lower courts. It is undisputed that Nucor's first appeal was within thirty days after the ALC notified the parties that its May 24, 2011 Order was final, and that the ALC no longer had jurisdiction over the matter. (*See, Nucor's initial Notice of Appeal,*

dated July 5, 2011, ROA ____).⁴ The Court dismissed this attempt on October 13, 2011 on the basis that because there was an issue on remand, the ALC Order was not yet final. After the Agency rendered a final decision regarding certification of the laboratory, Nucor again timely appealed to this Court, and fully explained the history of the case, including how the applicable orders were final under South Carolina law. [ROA ____]. The ALC characterizes its Order as “final”, indicates it has closed its file, no longer has jurisdiction over the matter, and refuses any further involvement with the matter. [Correspondence dated April 4, 2012 from the ALC, ROA ____].

Thus, dismissal of Nucor’s appeal would contravene South Carolina law and deny Nucor its right to appeal a final order. Absent immediate review in this Court, there is nothing left to be done except to execute the erroneous final Orders of the ALC and the Appellate Panel.

III. THE ISSUES ON APPEAL WERE RAISED AND RULED ON BY THE ALC, AND ARE THEREFORE PROPERLY PRESERVED FOR THE PRESENT APPEAL

In determining whether an issue is properly before the Appellate Court, the standard is whether such issue was raised and ruled on by the ALC. *Risher v. S.C. Dep’t of Health & Env’tl. Control*, 393 S.C. 198, 207-208 (S.C. 2011); *Hill v. S.C. Dep’t of Health & Env’tl. Control*, 389 S.C. 1, 19 (S.C. 2010) (“However, it was incumbent upon Hill to show that he had clearly raised the issue to the ALJ and asked for a specific ruling in that regard in order to preserve the issue for review by the circuit court.”) citing *Home Med. Sys. v. S.C. Dep’t of Revenue*, 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009) (observing issue preservation is required in administrative appeals and a circuit court

⁴ Nucor has timely appealed this decision three times. The Respondents’ insistence that this decision was not appealed is puzzling and without merit.

sitting in an appellate capacity may not consider issues not raised to and ruled upon by the ALC). Here, there is no question that the issues on appeal were raised multiple times by Nucor, and have been ruled on with finality by the ALC. Nucor has consistently and primarily argued that S.C. Code Ann. § 41-35-120 does not permit or otherwise authorize the Agency or the ALC to accept or rely on an employee's off-site independent drug test administered using different, less sensitive detection levels, and which the employee knew would not be accepted by the employer, as basis for reinstating such employee's unemployment benefits. [Petition for Judicial Review; Appeal to the ALC, including supporting memoranda, ROA ____]. Nucor has also consistently argued that that an employee's use of illegal drugs at the employer's steel manufacturing plant is basis to terminate the employee for cause or gross misconduct under Sections (2) and (4) of the Statute, thereby disqualifying the employee from receiving unemployment benefits. Upon review of these issues on appeal, the ALC judge incorrectly ruled that Nucor's arguments were without merit and not supported by the evidence. [Id]. Because these issues were raised and ruled on by the ALC, they are properly preserved for appellate review. The single and narrow issue relating to certification of the laboratory as specified under Section 41-35-120 (3)(a)(iii)(B), which was decided on December 11, 2011 *is not* on appeal, and thus Respondents continued reference to that decision is just a red herring that is intended to distract the Court from the actual issues on appeal.

In addition, the legal issues on appeal fall squarely into the category of issues that are "capable of repetition yet constantly evading review." *Sloan v. Department of Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). *See also, Turner v. Rogers*, 131 S.Ct. 2507, 2515, 180 L. Ed. 2d 452 (2011). Moreover, a decision on the merits of this

case will have a significant impact on private sector employers in South Carolina regarding whether an employee can rely on outside independent drug tests not performed on behalf of the employer, to challenge an employer's onsite random drug test, and the subsequent termination and disqualification from unemployment benefits. *Sloan v. DOT*, 379 S.C. 160, 169 (S.C. 2008).

The quagmire created by the Appellate Panel and the ALC's reliance on an unauthorized creation of an exception to the applicable Statute based on an off-site independent test that was administered under completely different testing criterion, as basis for reinstating the Claimant's unemployment benefits has caused the vicious cycle and confusion that is now synonymous with this case. Nucor has a substantial and legal right to have the issues that have always been the backbone of its appeal resolved; namely whether the Agency has authority to reinstate unemployment benefits on the basis that an outside independent test that was *not* administered on behalf of the employer, and which was conducted under different testing criteria, comprises "contradictory" results. Nucor additionally is entitled to a legal resolution of the issues on appeal, namely analysis and interpretation of Sections (2), (3) and (4) of the Statute to the facts of this case, including whether each Section is mutually exclusive.

IV. NUCOR HAS EXHAUSTED ITS ADMINISTRATIVE REMEDIES

Nucor has exhausted its administrative remedies, including appealing the issues to the ALC. Because the issues raised to the ALC, including issues purportedly remanded for further proceedings have been determined with finality, this case is ripe for appeal pursuant to S.C. Code Ann. § 1-23-380 and 610. As our Supreme Court observed in

Charlotte-Mecklenburg,⁵ “[t]he right of appeal arises from and is controlled by statutory law.” (citing *Ex parte U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)); see also Rule 201, SCACR. These statutes, by their express terms, permit immediate appellate review of a final order of the ALC.

Nucor initially filed a Petition for Judicial Review on December 14, 2010 on the basis that the Appellate Panel’s reliance on the outside independent test as basis for reinstating Legette’s benefits was erroneous as a matter of law and contrary to the mandate of the Statute. The parties briefed the issues, and on May 24, 2011, the ALC issued an Order holding that Nucor’s arguments that benefits must be denied pursuant to S.C. Code Ann. § 41-35-120(2) and (4) were without merit. In so holding, the ALC found that “[t]he Department’s finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order.” [May 24, 2011 ALC Order, ROA ____]. The order remanded to the Agency on the single and narrow issue of whether disqualification from benefits comported with the requirements set forth under S.C. Code Ann. § 41-35-120(3)(iii)(B) which deals with certification of the testing laboratories. [Id.]. On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC “no longer has jurisdiction in the matter because Judge Durden’s Order is a final order in this matter.” [June 14, 2011 Email correspondence, ROA ____]. (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal with the South Carolina Court of Appeals appealing the ALC’s application of S.C. Code Ann. § 41-35-120(2) and (4) to the dispute. Thereafter, the Court of Appeals issued an order dated October 13, 2011 dismissing the appeal as one

⁵ 387 S.C. 265, 692 S.E.2d 894 (2010).

that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority, supra*.

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order, and issued its decision on August 18, 2011, which was the subject of Claimant's appeal to the Appellate Panel. On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. [ROA ____]. The Appellate Panel also specifically requested that the parties come prepared to discuss whether and to what extent the laboratory at issue complied with the certification requirements set forth in the Statute in light of switch from certification oversight by the National Institute on Drug Abuse (NIDA), to the Substance Abuse and Mental Health Services Administration (SAMHSA). [Id.] On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the Statute. On December 9, 2011, the Appellate Panel issued its decision, holding that the laboratory was not certified at the time of the subject test as required under S.C. Code Ann. § 41-35-120(3). [ROA ____]. Neither party appealed this decision.

Nucor thereafter filed a Notice of Appeal with the Court of Appeals asserting that Judge Durden's Order was now final since the only issue on remand had now been disposed of by the Appellate Panel. [January 9, 2012 Notice of Appeal, ROA ____]. On February 2, 2012, the Court of Appeals requested that the parties submit memoranda addressing the issue of appealability within ten (10) days of the date of the correspondence. The parties complied with the request. Significantly, neither party disputed that the applicable orders were final. *See*, reference to Respondents' prior

representations regarding finality of Judge Durden's Order, p. 1, *supra*. However, on March 23, 2012, the Court of Appeals disagreed and again dismissed the appeal stating: "the order on appeal is not a final order." [March 23, 2012 Order, ROA ____].

In response to the Court's March 23, 2012 Order dismissing its appeal, the undersigned communicated with the Clerk of Court for the ALC to determine what needed to be done for purposes of "finalizing the ALC's order." Pursuant to those discussions, the undersigned provided the ALC judge with written correspondence setting forth the history of the case and the bases for the two dismissals by the Court, and requested a "final" order in the matter, or in the alternative, guidance as to what, if any, additional action was required of the parties in order to have a "final" order as set forth in the March 23, 2012 Order of this Court. [Correspondence, ROA ____]. The ALC judge responded stating that since the issue on remand had been resolved and since no appeal was taken from the Appellate Panel's decision, her order of May 24, 2011 was the final order in this matter. [Correspondence dated April 4, 2012 from the ALC, ROA ____].

Nucor is not, and has not, sought review of the Appellate Panel's decision of December 9, 2011 regarding certification of the laboratory. Nucor's issues on appeal arise out of the May 24, 2011 ALC's judge's erroneous application of the law, namely: (1) Whether South Carolina law permits an employee to obtain an outside independent drug test using different and less sensitive detection levels to trump an employer's properly administered workplace drug tests; (2) Whether the Agency and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in S.C. Code Ann. § 41-35-120 in determining eligibility for unemployment benefits; (3) Whether an employer in South Carolina can terminate an employee for illegal drug use

only if the employer strictly complies with Section 41-35-120(3)(a) of the Statute; and (4) Whether Section 41-35-120 (3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered null and superfluous by operation of Section 41-35-120(3)(a).

The only issue that was remanded by the ALC for additional determination (whether the testing laboratory was certified as required under S.C. Code Ann. § 41-35-120(3)(iii)(B)) has been resolved by the Appellate Panel. Significantly, the May 24, 2011 order accepted and concluded that the Appellate Panel's reliance on the outside independent test administered under different detection level was competent evidence for purposes of affirming the Appellate Panel's reinstatement of benefits under Section (4) of the Statute. Even Respondents concede that the only issue that was remanded for further fact-finding by the ALC is certification of the laboratory. [Respondents Brief, p. 3: "Nonetheless, the ALC remanded the matter to SCDEW for further consideration of the issue of whether Legette was disqualified under S.C. Code Ann. § 41-35-120(3), *and specifically whether the drug testing facility used by Nucor was properly certified as required by the statute.*"] (emphasis added).

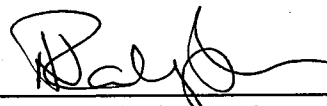
Respondents' argument that Nucor was required to appeal the Appellate Panel's December 2011 decision to the ALC is puzzling at best. Nucor has conceded that further research and discussions with the College of American Pathologists ("CAP") indicate that certification of the laboratory as specified by the language of the Statute was likely available at the time of Legette's tests in April 2010. However, while the Appellate Panel's decision resolved the factual issue relating to certification of the laboratory in compliance with the specific language of the Statute, it is undisputed that this decision

did not, and could not have addressed the issues relating to reliance on outside independent tests and proper interpretation and application of Sections (2), (3) and (4). The Appellate Panel did not address these issues because the ALC had already ruled on same with finality, and simply asked the Appellate Panel to conduct a factual finding regarding certification of the laboratory at issue. As a result, once the only outstanding factual issue had been resolved with finality, the ALC's May 2011 order likewise, became final as to all issues raised by Nucor. These issues were

CONCLUSION

The record is clear, and there is no legitimate dispute that the Order on appeal is final under South Carolina law. In addition, Nucor raised the issues on appeal to the ALC, and the issues were properly preserved for appeal. Further, Nucor has exhausted its administrative remedies, and the record shows that the ALC's Order improperly allowed the Appellate Panel to create an exception to the Statute, outside of its authority, and its decision is not based on "substantial evidence" and must therefore, be reversed.

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata, SC Bar No.: 72484
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2807
Facsimile: 843-576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

October 23, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Appellate Case No.: 2012-206406

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

MOTION TO SUBMIT REPLY BRIEF OUT OF TIME

The Appellant, by and through its undersigned attorneys, pursuant to Rule 240 of the South Carolina Appellate Court Rules, hereby moves to be allowed to submit its Reply Brief out of time due to the complex legal issues involved. Appellant's Reply Brief was due on October 15, 2012. Counsel for Respondents consent to this Motion. This deadline has not previously been extended and no parties are prejudiced by this extension and other deadlines will not be affected.

For these reasons, Appellant respectfully requests that this Court allow Appellant to submit its Reply Brief on October 23, 2012.

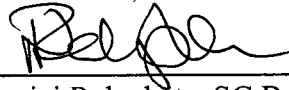
RECEIVED

OCT 24 2012

SC Court of Appeals

TPGL 4732738v1

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata, SC Bar No.: 72484
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2807
Facsimile: 843-576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

October 23, 2012

Other Counsel of Record:

Ms. Debra S. Tedeschi, SC Bar No.: 15307
Ms. Sandra Grooms, SC Bar No.: 640
S.C. Department of Employment and Workforce
P.O. Box 8597
Columbia, SC 29202
Phone: 803-737-2666
Facsimile: 803-737-0124
Email: legal@dew.sc.gov
Attorneys for Respondent SCDEW

Ms. Anne E. Mjaatvedt, SC Bar No.: 71158
Anne Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
Phone: 843-793-4240
Facsimile: 843-278-9239
Email: anne@aemlawyer.com
Attorney for Respondent Kim A. Legette

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Appellate Case No.: 2012-206406

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 23rd day of October, 2012 that I have served copies of the *Motion to Submit Reply Brief Out of Time and Reply to Respondents' Return to Nucor Corporation's Appeal* by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Debra S. Tedeschi
Ms. Sandra Grooms
S.C. Department of Employment and Workforce
P.O. Box 8597
Columbia, SC 29202

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata, SC Bar No.: 72484
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2807
Facsimile: 843-576-1655
Email: NRalephata@TurnerPadget.com

RECEIVED

OCT 24 2012

SC Court of Appeals

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

TPGL 4727878v1

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

October 5, 2012

RECEIVED

OCT 08 2012

SC Court of Appeals

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

RE: Nucor Corporation v. SC DEW and Kim A. Legette
Appellate Case No 2012-206406

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Respondents Brief, Designation of Matter, Certificate of Counsel and Proof of Service in the above referenced case.

Please stamp the copies and return to us in the enclosed self addressed envelope.

If you have any questions, please contact me at the number or address above.

Sincerely,

Jessica Chesley

Jessica Chesley
Administrative Legal Assistant for
Debra S. Tedeschi
Assistant General Counsel

"Putting South Carolinians Back to Work"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

OCT 08 2012

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

SC Court of Appeals

Appellate Case No.: 2012-206406

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondents propose the following be included in the Record on Appeal:

Orders/Decisions

1. Court of Appeals Order Reinstating Appeal, dated June 6, 2012
2. Court of Appeals Order Dismissing Appeal, dated March 23, 2012
3. SCDEW Appellate Panel Decision No. 2011-P-2740, dated December 9, 2011
4. Court of Appeals Order Dismissing Appeal, dated October 13, 2011
5. Order of Administrative Law Court, dated May 24, 2011
6. SCDEW Appellate Panel Decision No. 2010-C-2253, dated November 19, 2010

Transcripts / Record on Appeal to ALC

7. SCDEW Record on Appeal to ALC dated January 24, 2011
8. Supplement to ALC Record on Appeal labeled "Supplement 1-26" dated March 21, 2011
9. Transcript of Appeal Tribunal Hearing No. 10129-15740 dated August 15, 2011

Motions / Briefs / Notices of Appeal / Miscellaneous

10. Nucor Reply to Opposition for Rehearing dated April 23, 2012
11. SCDEW Opposition to Nucor's Petition dated April 17, 2012
12. Legette Opposition to Nucor's Petition dated April 16, 2012
13. Nucor Petition for Rehearing and Rehearing *En Banc*, dated April 9, 2012
14. Legette Memorandum on Appealability dated February 13, 2012

15. SCDEW Memorandum on Appealability dated February 13, 2012
16. Nucor Memorandum on Appealability dated February 13, 2012
17. Court of Appeals Letter, dated February 2, 2012
18. Nucor's Notice of Appeal to Court of Appeals dated January 9, 2012
19. Nucor Brief to SCDEW Appellate Panel dated November 30, 2011
20. Legette Brief to SCDEW Appellate Panel dated November 30, 2011
21. Legette Reply to Return to Motion to Dismiss dated September 10, 2011
22. SCDEW Response to Motion to Dismiss dated September 6, 2011
23. Nucor Return to Motion to Dismiss dated September 2, 2011
24. Legette Motion to Dismiss appeal to Court of Appeals dated August 23, 2011
25. Legette appeal to Appellate Panel dated August 22, 2011
26. Appeal Tribunal Decision No. 2011-A- 15157, dated August 18, 2011
27. Amended Notice of Appeal to Court of Appeals dated July 5, 2011
28. Notice of Appeal to Court of Appeals dated June 22, 2011
29. Email from ALC to parties dated June 14, 2011
30. SCDEW Return to Motion for Hearing/Oral Argument dated June 10, 2011
31. SCDEW letter to Nucor Counsel dated June 7, 2011
32. Nucor Motion for Hearing/Oral Argument dated June 2, 2011
33. Respondent Legette *pro se* Reply dated April 29, 2011
34. Appellant Nucor Reply Brief to ALC dated April 4, 2011
35. Respondent Legette *pro se* Brief to ALC dated March 21, 2011
36. Respondent SCDEW Brief to ALC dated March 21, 2011
37. Appellant Nucor Brief to ALC dated February 17, 2011
38. Nucor Petition for Judicial Review to ALC dated December 14, 2010

RECEIVED
OCT 08 2012
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that this Designation of Matter contains no matter which is irrelevant to the appeal and complies with Rule 209, SCACR.

October 5, 2012



Debra S. Tedeschi, SC Bar # 15307
Sandra B. Grooms, SC Bar # 640
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-2666 (Telephone)/(803) 737-0124 (Facsimile)
legal@dew.sc.gov

Attorneys for Respondent SCDEW

Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 20401
(843) 793-4240 (Telephone)/(843) 278-9239 (Facsimile)
anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2012-206406

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Kim A. Legette,

Respondent.

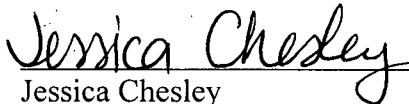
PROOF OF SERVICE

I certify that I have served the Respondents Initial Brief, Designation of Matter and Certificate of Counsel on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on October 5 2012, addressed to the Attorney for the Appellant and the Attorney for Respondent Legette at their addresses of record:

Nosizi Ralephata, Esq.
Turner Padget
PO Box 22129
Charleston, SC 29413

Anne E. Mjaatvedt, Esq.
Anne Mjaatvedt Law Firm LLC
39 Broad Street, Suite 208
Charleston, SC 29401

October 5 2012



Jessica Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395

65341

Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anne@aemlawyer.com

July 30, 2012

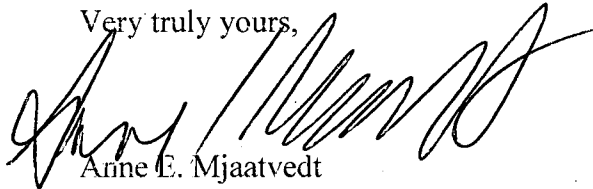
Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: Nucor Corporation v. SCDEW and Kim A. Legette
Appellate Case No.: 2012-206406

Dear Ms. Kitchings:

I represent Respondent Kim A. Legette in the above reference matter. I am writing to request an extension of time to file Respondent Legette's Initial Brief and Designation of the Matter in this case. The original deadline for this Brief is August 6, 2012. Respondent Legette is requesting a thirty (30) day extension to Wednesday, September 5, 2012. Please find enclosed the \$25.00 filing fee (check # 1112).

Very truly yours,



Anne E. Mjaatvedt

Enclosure (as stated)

Cc: Via E-Mail only:
John S. Wilkerson, III, Esq., Nosizi Ralephata, Esq., Counsel for Appellant
Sandra Grooms, Esq., Counsel for Respondent SCDEW
Kim A. Legette

RECEIVED
AUG 01 2012
SC Court of Appeals

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

P. O. Box 8597
Columbia, South Carolina 29202
803-737-2666

July 31, 2012

Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
AUG 01 2012
SC Court of Appeals

RE: Nucor v. SCDEW and Kim A. Legette
Case # 2012-206406

Dear Ms. Kitchings:

Respondent S.C. Department of Employment and Workforce, by its undersigned attorneys, respectfully requests an extension of time to file Respondent's Initial Brief and Designation of Matter in this case. The original due date for its Brief is August 6, 2012. Respondent requests a thirty (30) day extension to September 5, 2012.

Further, please add Debra Tedeschi, Assistant General Counsel, as attorney for Respondent SCDEW in this matter, in substitution for Romi Robinson, who should no longer be listed as counsel of record on this case.

Sincerely,

Debra Tedeschi, Assistant General Counsel
Sandra Grooms, Assistant General Counsel
S.C. Department of Employment & Workforce
legal@dew.sc.gov

cc: John S. Wilderson, III, Esq., Nosizi Ralephata, Esq., Counsel for Appellant
Anne Mjaatvedt, Esq., Counsel for Respondent Kim A. Legette

"Putting South Carolinians Back to Work"

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

The time for serving and filing the respondents' initial briefs and designations of matter is hereby extended until October 5, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Anne E. Mjaatvedt

Nosizi Ralephata

John S. Wilkerson, III

Debra Sherman Tedeschi

Sandra Bell Grooms

FILED

9/25/12

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1255

July 5, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Nucor Corporation v. SCDEW
Court of Appeals Tracking No.: 2011194207
Our File No.: 5670.111

Dear Ms. Kitchings:

Enclosed please find the originals and one copy of each of the Initial Brief, Designation of Matter to Be Included in the Record on Appeal, and Proof of Service in the above referenced matter. Please file the originals in your office and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NXR/adh

Enclosures

cc: Ms. Romi Y. Robinson
Ms. Sandra Grooms
Ms. Anne E. Mjaatvedt
Ms. Jana E. Shealy

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4544970v1

RECEIVED
JUL 09 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Administrative Law Court

Appellant proposes the following to be included in the Record on Appeal:

Petition for Judicial Review dated December 14, 2010

Initial Brief of Appellant Nucor Corporation filed Feb. 17, 2011

Brief of the South Carolina Department of Employment and Work Force dated
March 21, 2011

Brief of Kim Legette received March 22, 2011

Reply Brief of Nucor Corporation filed April 4, 2011

Brief of Kim Legette received April 19, 2011

Order of Judge Durden, of the Administrative Law Court dated May 24, 2011

SC Court of Appeals

JUL 09 2012

RECEIVED

South Carolina Department of Employment and Workforce

Appellate Panel Decision NO. 2010-2253

Letter of Transmittal of Appellate Panel Decision

Request for Determination of Insured Status

Request for Separation Information

Discharge for Cause Fact Finding

Claims Adjudicator's Determination

Claimant Appeal to Appeal Tribunal

Notice of Hearing before Appeal Tribunal

Witness Subpoena

Transcript of Testimony Appeal Number 10377-11778 (July 12, 2010) with:

Agency Exhibit 1

Employer Exhibit 1 – 8

Appeal Tribunal Decision 2010-A-11555

Claimant Appeal to Appellate Panel

Notice of Claimant Appeal to Appellate Panel

Notice of Hearing before the Appellate Panel

SCESC Discharge for Cause Fact Finding with attachments (pp. 25)

Email from Administrative Law Court dated June 14, 2011

Transcript of Testimony Appeal Number 10129-15740 (August 15, 2011)

Briefs to Appellate Panel regarding Certificate of Lab

South Carolina Court of Appeals

Amended Notice of Appeal dated July 1, 2011

Notice of Appeal dated January 9, 2012

Appellant's Memorandum in Support of Appealability

Appellant's Return to Respondent's Brief Regarding Appealability

Order Reinstating Appeal

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

July 5, 2012

Other Counsel of Record:

Ms. Romi Y. Robinson
Ms. Sandra Grooms
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
Phone: 803-737-2666
Email: legal@dew.sc.gov

Ms. Anne E. Mjaatvedt
Anne Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
Phone: 843-793-4240
Email: anne@aemlawyer.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

PROOF OF SERVICE

I hereby certify that on July 5, 2012, a copy of the *Initial Brief and Designation of Matter for the Record on Appeal* has been served upon the following by placing same in the United States Mail, postage prepaid, to:

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Ms. Romi Y. Robinson
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 995
Columbia, SC 29202

SC Court of Appeals
JUL 09 2012
RECEIVED

Ms. Anne E. Mjaatvedt
Anne Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

July 5, 2012



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 06, 2012

Ms. Anne E. Mjaatvedt
Leggette
39 Broad St., Ste. 208
Charleston SC 29401

Ms. Nosizi Ralephata
Nucor Corporation
PO Box 22129
Charleston SC 29413-2129

Re: Nucor Corp. v. SCDEW(2)
Appellate Case No. 2012-206406

Dear Counsel:

All parties are advised the appellant's initial brief and designation of matter must be served and filed no more than thirty days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

cc: John S. Wilkerson, III
Romi Yolanda Robinson

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

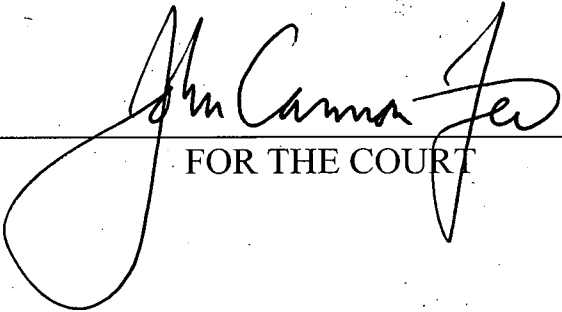
v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

After careful consideration of Appellant's petition for rehearing and Respondents' returns, I find my prior order was erroneous; therefore, this appeal is reinstated. Nothing in this order prevents the parties from raising the issue of appealability in their briefs.



FOR THE COURT C.J.

Columbia, South Carolina

cc:

Anne E. Mjaatvedt

Nosizi Ralephata

John S. Wilkerson, III

Romi Yolanda Robinson

FILED

Warter 6/6/12

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

April 23, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Kim A. Legette v. SC Department of Employment and Workforce and Nucor Corporation
Docket Number: 10-ALJ-22-0938-AP
TPGL File No.: 5670.111

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Reply to Return in Opposition to Petition for Rehearing and Rehearing *En Banc* and one copy of the Proof of Service regarding the above-referenced matter. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

Both counsel for South Carolina Department of Workforce and Ms. Legette are copied on this correspondence.

Thank you very much for your courtesy.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms
Ms. Anne E. Mjaatvedt

RECEIVED

APR 23 2012

SC Court of Appeals

BUSINESS • LITIGATION • SOLUTIONS

Bank of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202

Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden
Docket No.: 10-ALJ-22-0938-AP

RECEIVED

APR 23 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S REPLY TO RETURN IN OPPOSITION
TO PETITION FOR REHEARING AND REHEARING *EN BANC*

It is unassailable law in South Carolina that an order is final when there is nothing left to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). Neither this Court, the ALC, nor Respondents have articulated or pointed to any "open questions of fact" or outstanding issues that must be resolved for the orders to become "final." *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). The reason is because there is nothing else left to be done except execute judgment, or appeal to this Court. The fact

that Nucor did not appeal the Appellate Panel's decision of December 9, 2011 to the ALC does not make the issues decided by the ALC any less final, including application of S.C. Code Ann., § 41-35-120¹(2) and (4) – which were clearly fully resolved in the May 24, 2011 Order. Nucor has done everything to preserve its appeal rights in this case, including a timely appeal in June 2011 after the ALC Judge had notified the parties in writing that her Order was final as to Sections (2) and (4) of the Statute; and a timely appeal on January 9, 2012, after the Agency had issued its final decision with regard to the certification issue. Respondents candidly admit that the Agency's decision of December 9, 2011, finally resolved the only outstanding issue that had been remanded back by the ALC.² The ALC likewise, has repeatedly informed the parties that its May 24, 2011 order is final as to the issues decided therein, except the certification issue, which was resolved with finality on December 9, 2011. It is patently clear that Respondents' basis for supporting dismissal of the appeal arises out of Respondents' unwillingness to address the legal issues that were timely raised by Nucor both to the ALC and to this Court. However, reluctance to address meritorious legal questions, after all factual issues have been resolved, is not a basis for denying a party an appeal as of right.

¹ S.C. Code Ann., § 41-35-120, including the applicable sections is referred to herein as "the Statute".

² See, p. 2 of Agency's Return in Opposition to Petition: "The remanded proceedings included a de novo evidentiary hearing before the Department, and oral/written arguments before the Appellate Panel, and a *final agency decision in the matter was issued on December 9, 2011.*" (Emphasis added). See also, p. 1 of Legette's Return in Opposition to Petition: "The final order in this entire matter is the Appellate Panel's December 9, 2011 Decision (Appellant's Ex. D.)" (Emphasis in original).

In the alternative, if the Court is still of the opinion that there is no final decision, Nucor respectfully requests that the Court issue an instruction requiring the ALC to issue an order that this Court will consider "final" so that Nucor is not unfairly prejudiced and deprived of its right to appeal.

Nucor has consistently argued that the Appellate Panel's acceptance of an independent drug test as controlling, with no evidence that it comported with the statute, is in contravention of the statute's mandate and outside the scope of the Agency's authority, and therefore, improper basis for reinstating Claimant's benefits under Section (4). Nucor also argued that the Appellate Panel has no authority to apply additional or different criteria or exceptions to the plain mandates of the statute, and these issues were presented as questions of law for the ALC to resolve. The ALC simply affirmed the Agency's reinstatement of benefits under Section (4) without addressing the substantive issues raised on appeal to that body, and chose instead, to remand for additional fact finding, the single narrow issue of whether the laboratory was certified as required under the Statute. However, whether or not the laboratory is properly certified is not the dispositive question in this case. Neither does certification moot the issues raised on appeal, including interpretation and application of Sections (2), (3)(c), and (4) to this dispute, and whether the Agency was authorized to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer. These issues were timely raised to the ALC, and have been timely raised on appeal to this Court.

None of the Respondents have argued, nor can they argue that these issues were remanded for further proceedings at the Agency level. Indeed, Respondents cannot assert

any such arguments as a matter of law because these are legal issues that cannot be resolved by the trier of fact. Similarly, none of the Respondents have argued, nor can they argue, that the May 24, 2011 Order is not final as to application of Section (2) and (4) to this dispute. Judge Durden makes it clear that her order applies with finality as to those Sections. Thus, the only option available to Nucor is to appeal that order to this Court. Respondents' entire basis for supporting an unjust dismissal of Nucor's fundamental right to appeal a final order stems from the unprecedented view that by not appealing the certification issue only, Nucor has waived, as a matter of law, *all* other issues that were timely raised to both the ALC and to this Court, twice. There is no legal support for such a position, neither have Respondents cited to any.

Likewise, Respondents' assertion that the May 24, 2011 Order remanded the entire case to the lower tribunals not only is incorrect, but also stands in direct contradiction to their previous arguments to this Court in response to its request for briefing on appealability of the orders. There, Respondents argued that the appeal should be dismissed because the issue of certification was still pending in the lower tribunals. In fact, when Nucor attempted to appeal the ALC's Order regarding interpretation and applicability of Sections (2) and (4) in June 2011, both Respondents argued that the appeal was not ripe because the issue of certification had been remanded back to the Agency, asserting that:

"However, the same [ALC] Order also remanded the matter to SCDEW based on its holding that the Appellate Panel did not make a finding regarding disqualification on the basis of §41-35-120(3), *and ordered the SCDEW to consider the issue of whether the drug test laboratory was properly certified under §41-35-120(3).*

“.... [H]owever, *this appeal is prematurely filed because the issue of disqualification under Section (3) is under consideration* through the Department’s administrative tribunals.”

See, Respondent Legette’s Brief of August 23, 2011 to this Court at p. 2 (Emphasis added). The Agency filed a Response concurring in, and joining in Legette’s Motion to Dismiss of August 23, 2011. As set forth in the Agency’s own written correspondence, the sole issue that the Agency requested that the parties brief and argue was whether the CLIA/HHS certificate was sufficient and/or equivalent to the NIDA certification required under the Statute.³ For the Agency to now argue that the entire case was remanded for a full hearing on all the issues, which in turn required Nucor to appeal back to the ALC *all* the issues, including issues that had already been fully resolved is a thinly veiled attempt to deprive Nucor of its right to appeal a final order.

The April 4, 2012 letter from the ALC is likewise, specific and reiterates that the ALC’s May 24, 2011 order is final: “With this Order, this Court closes its docket in this matter. Should Appellant desire to review the Department’s decision on remand, she will be required to file a separate notice of appeal from the determination.”⁴ That same order that the Agency is now incorrectly mischaracterizing as remanding *all* issues provides:

“Upon consideration of the record and briefs, this case must be *remanded back to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code §41-35-120(3)* which deals with discharge based upon positive drug tests.”

May 24, 2011 order at p. 1. (Emphasis Added).

It is also noteworthy that when this case was initially argued before the Appeal Tribunal in July 2010, none of the parties were represented by counsel, and at that

³ See, Exhibit 1, attached hereto.

⁴ See, April 4, 2012 correspondence from ALC, attached to Petition as Exhibit A.

hearing that the adjudicator found that the laboratory *was* certified as required under South Carolina law.⁵ Thus, when Nucor appealed to the ALC, all the arguments were based on a Record and documents that had been accepted and made part of the proceedings by the Agency and its tribunals. The propriety of the laboratory's certification was only raised as an issue by the Agency in response to Nucor's appeal to the ALC (after it had initially accepted and held that the laboratory was properly certified under South Carolina law). It was on this basis that the certification issue was remanded. On remand, the parties were specifically instructed by the Appellate Panel to come prepared to address the certification issue.⁶ Based on multiple reassurances from the laboratory regarding the lack of a hair specimen certification program by the College of American Pathologists ("CAP") and literature available online,⁷ Nucor argued that the laboratory met the certification requirements. However, the Agency's Appellate Panel *sua sponte* contacted CAP directly, and determined, based on correspondence from CAP, that the laboratory was *not* properly certified. Nucor subsequently received correspondence directly from CAP confirming that its hair certification program was available at the time of the subject test, and that the laboratory could have obtained such certification (assuming it met the relevant criteria). As a result, Nucor did not appeal the Agency's decision regarding certification. Thus, to now argue that Nucor has waived its

⁵ See, May 3, 2010 order, July 12, 2010 Transcript, and July 19, 2010 order, previously attached as part of the Record on July 22, 2011. To avoid duplication and an unnecessarily voluminous brief, these documents are not attached hereto; however, Nucor will be happy to resubmit these documents at the Court's request.

⁶ See, Exhibit 1 to Petition.

⁷ The undersigned as well as other attorneys and support staff in the law firm corresponded with, and researched the availability of a hair sample certification program at the time of the subject test, and concluded based on the information reviewed and received, that it was impossible to comply with the Statute as written.

appeal rights on *all* the issues in this matter based on the failure to appeal the certification issue is incorrect and contrary to South Carolina law. *See, Atl. Coast Builders & Contrs., LLC v. Lewis*, 722 S.E.2d 213, 215 (2011), quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). The issues that are the subject of this appeal were all raised to the ALC, and are therefore preserved for appeal to this Court.

Furthermore, the constant back and forth with regard to whether the applicable orders are final not only imposes an unjustified burden on Nucor and delays justice, but it also encourages unsupported and irrelevant arguments designed to avoid a merits resolution of the substantive issues raised in this appeal. Respondents cannot have it both ways. First, they admit that the May 24 Order is final but assert, incorrectly, that Nucor should not be allowed to appeal as of right because the issues are moot.⁸ Second, after the ALC judge issued a letter stating that her order is final, Respondents alternatively argued that the May 24 Order is *not* final because Nucor did not appeal the December 9, 2011 order to the ALC. The fact that the Appellate Panel determined the single issue regarding certification of the laboratory does not deprive or foreclose Nucor from appealing those issues that had already been deemed finally decided, and which were not subject to remand. There is no South Carolina case law in support of such a position, and

⁸ *See*, p. 2 of Legette's August 23, 2011 Brief, in which the Agency concurred and joined. *See also* p. 2 of Legette's Brief on appealability ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."); and p. 2 of the Agency's Brief on appealability ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

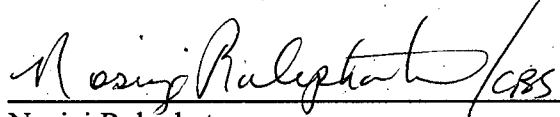
it is telling that the Respondents cite none. *See, Atl. Coast Builders & Contrs., LLC v. Lewis, and Elam v. S.C. Dep't of Transp., supra.*

In the event this Court dismisses Nucor's appeal again, it must seek *certiorari* or the case is over. Such a result is fundamentally unjust because Nucor has a right (and, indeed, an obligation) to appeal final orders, such as the order at issue, to this Court for a determination of the merits. Thus, if the Court is of the opinion that the orders on appeal are not final, then an instruction to the ALC to issue a final order is warranted to enable Nucor to appeal the issues raised back in December 2010, which have yet to be addressed.

CONCLUSION

For all the foregoing reasons, and the arguments contained in Nucor's Petition, Nucor respectfully asks that the Court grant its Petition for Rehearing and Rehearing en banc.

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Fax: (843) 576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 23, 2012
Charleston, SC

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Phone: (803) 737-0239

Fax: (803) 737-0124

November 15, 2011

Nosizi Ralephata
Turner Padget Graham & Laney, P.A.
Post Office Box 22129
Charleston, SC 29403

Re: Leggette v. Nucor, Appeal 10129-15740

Dear Ms. Ralephata,

The Appellate Panel has scheduled the above appeal for oral argument on November 30, 2011, at 3:00 p.m. The Panel asks that you come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory certification programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Farnolari".

Paul R. Farnolari
Manager, Higher Authority Appeals

Cc: ~~Sealed by law~~
Claimant
Claimant Attorney
Employer
Imaging
File



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden
Docket No.: 10-ALJ-22-0938-AP

RECEIVED
APR 23 2012
SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 23rd day of April 2012 that I served copies of the **Appellant's Reply**
to Return in Opposition to Petition for Rehearing and Rehearing *En Banc* by United
States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

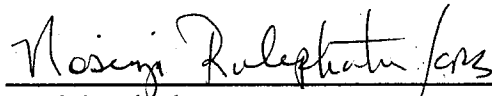
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that a copy of the **Appellant's Reply to Return in Opposition to Petition for Rehearing and Rehearing *En Banc*** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER PADGET GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 23, 2012
Charleston, SC

Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anne@aemlawyer.com

April 17, 2012

Certified U.S. Mail, Return Receipt Requested

Honorable Jenny Abbott Kitchings
Clerk of Court, The South Carolina Court of Appeals
1015 Sumter Street
Columbia SC 29201

RECEIVED

APR 18 2012

SC Court of Appeals

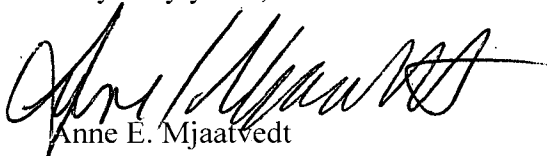
RE: Nucor Corporation v. SCDEW
Case Tracking Number: 2012206406

Dear Ms. Kitchings:

I represent Respondent Kim A. Legette in the above reference matter. Please find enclosed the original and six copies of Respondent Legette's Return In Opposition To Appellant's Petition for Rehearing and Rehearing En Banc.

Please return a file stamped copy to me in the enclosed envelope, and contact me at any time if you have any questions or concerns.

Very truly yours,



Anne E. Mjaatvedt

Enclosure

Cc: John S. Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Sandra Grooms, Esq.
Kim A. Legette

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Matter No.: 2012206406
Case No. 10-ALJ-22-0938-AP

RECEIVED
APR 18 2012
SC Court of Appeals

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

RESPONDENT LEGETTE'S RETURN IN OPPOSITION TO APPELLANT'S
PETITION FOR REHEARING AND REHEARING EN BANC

Respondent Kim A. Legette respectfully files this Return in opposition to Appellant's most recent petition of April 9, 2012. While SCACR Rule 240(e) states that a return to a SCACR Rule 221 motion need not be filed without a request from the Court, Respondent Legette wishes to very briefly respond to Appellant's newest filings in the hope of avoiding any further waste of this Court's time.

The matter is really quite simple. This Court made the correct decision in its March 23, 2012 Order that the ALC order on appeal was not the final order, hence not appealable. The final order in this entire matter is the Appellate Panel's December 9, 2011 Decision (Appellant's Exh. D).¹ Appellant did not pursue an appeal of that decision to the ALC required under S.C. Ann. § 41-35-740, and as clearly stated in ALJ Durden's letter of April 4, 2012 (Appellant's

¹ Respondent Legette refers here to Exhibits filed by Appellant with their most recent submission to avoid confusion with the myriad other briefings.

Exh. A). As there was no request for judicial review within the statutory time limits, there is no further avenue for appeal or judicial review.

The confusion seems to arise based on Appellant's misunderstanding of the ALC's Order of May 24, 2011, where that court remanded the entire matter back down to the Appellate Tribunal "for a new hearing". (Appellant's Exh. B, pg. 5-6). The Appellate Tribunal on remand made a finding of fact based on the appropriate paragraph of the statute dealing with workplace drug testing, § 41-35-120(3) on August 8, 2011. Respondent Legette appealed the Tribunal's decision to the Appellate Panel pursuant to S.C. Code Ann. § 41-35-710, and the Appellate Panel issued the final decision on the entire matter on December 9, 2011, as discussed above. Appellant admits it did not appeal that Order.

Respondent Legette requests the opportunity for further briefing on the substantive matters only if this Court finds it necessary, pursuant to Rule 240 on the issue of petitions for rehearing. However, Respondent Legette requests that this Court deny Appellant's request for rehearing and rehearing en banc based on the above argument.

Respectfully submitted,



Anne E. Mjaatvedt, SC Bar # 71158

ANNE MJAATVEDT LAW FIRM, LLC

39 Broad Street, Suite 208

Charleston, SC 20401

(843) 793-4240 (Telephone)

(843) 278-9239 (Facsimile)

anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

April 17, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Matter No.: 2012206406
Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

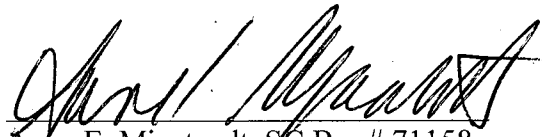
South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served Respondent Legette's Return In Opposition To Appellant's Petition For Rehearing And Rehearing En Banc in the above referenced matter by depositing a copy of the same in the United States Mail, postage prepaid on April 17, 2012 to the attorneys of record:

John S. Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston SC 29413
Attorneys For Appellant

Sandra Grooms, Esq.
S.C. Dept. of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
*Attorney For Respondent South Carolina
Department Of Employment Workforce*



Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 20401
(843) 793-4240 (Telephone)
(843) 278-9239 (Facsimile)
anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

P. O. Box 8597
Columbia, South Carolina 29202
803-737-2666

April 16, 2012

RECEIVED
APR 17 2012

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Kim A. Legette v SCDEW and Nucor Corp.
Docket # 10-ALJ-22-0938-AP

Dear Ms. Kitchings:

Please construe this letter as the return in opposition of the S.C. Department of Employment and Workforce (SCDEW) to the Appellant's Petition for Rehearing and Rehearing En Banc in the above-referenced matter. Six copies are enclosed for the Court, along with Proof of Service upon all parties.

The Court properly dismissed this appeal by its Order filed March 23, 2012, because the order on appeal was not a final order. See S.C. Code. Ann. § 1-23-610 (A) (1) Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); *Charlotte Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

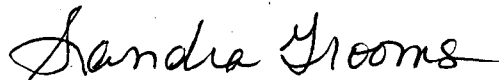
Petitioner completely misrepresents the April 4, 2012, letter from Judge Durden and erroneously characterizes the May 2011 Order as final, when it clearly ordered that the case was **REMANDED** to SCDEW for a new hearing and decision. Further, the Order clearly specified that a separate notice of appeal from the Department's decision on remand was required if Appellant desired review of the Department's decision following remand.

"Putting South Carolinians Back to Work"

The remanded proceedings before the Department included a de novo evidentiary hearing, and oral/written arguments before the Appellate Panel, and a final agency decision in the matter was issued by the Appellate Panel on December 9, 2011. Nucor chose not to file an appeal to the Administrative Law Court, and the appeal period to obtain judicial review has long since expired.

Thus, there has been no final Order from the Administrative Law Court. The May 2011 Order remanding the matter to SCDEW for further proceedings was not a final order and not appealable to the Court of Appeals. The Petition for Rehearing should be denied.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Grooms".

Sandra Grooms, Assistant General Counsel
S.C. Department of Employment & Workforce
legal@dew.sc.gov

cc: Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

The Honorable Deborah Durden, Administrative Law Judge

Case No.: 2010-ALJ-22-0938-AP

Nucor Corporation,

Appellant,

v.

South Carolina Department of Employment
And Workforce and Kim A. Legette,

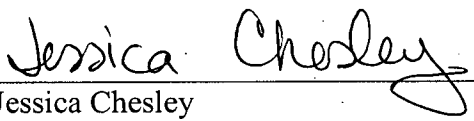
Respondent(s).

PROOF OF SERVICE

I certify that I have served the return in opposition of SCDEW to Appellant's petition for rehearing and rehearing en banc, by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2012, addressed to:

Nosizi Ralephata, Esquire
Turner Padgett Graham & Laney, PA
P.O. Box 22129
Charleston, South Carolina 29413
(Attorney for Nucor)

Anne E. Mjaatvedt, Esquire
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
(Attorney for Kim A. Legette)



Jessica Chesley

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

April 9, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Kim A. Legette v. SC Department of Employment and Workforce and Nucor Corporation
Docket Number: 10-ALJ-22-0938-AP
TPGL File No.: 5670.111

Dear Ms. Kitchings:

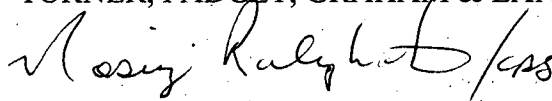
Enclosed please find the original and seven copies of Appellant's Petition For Rehearing and Rehearing *En Banc* regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

Both counsel for South Carolina Department of Workforce and Ms. Legette are copied on this correspondence.

Thank you very much for your courtesy.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms
Ms. Anne E. Mjaatvedt

BUSINESS • LITIGATION • SOLUTIONS

Bank of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202
Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

TPGL 4391125v1

RECEIVED
APR 09 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED
APR 09 2012
SC Court of Appeals

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Appellant Nucor Corporation ("Nucor") hereby petitions this Court for rehearing of its Order filed March 23, 2012 pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. The Order dismissed Nucor's appeal stating: "the order on appeal is not a final order." Citing S.C. Code Ann. §1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC) and *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept of Health and Environmental Control*, 387 S.C. 265, 266, 692, S.E. 2d 894 (2010) (holding that an

order of the Administrative Law Court remanding the case to the Department of Health and Environmental Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order, and therefore, not immediately appealable under §1-23-610). Although Nucor agrees that *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept of Health and Environmental Control* determines when an order issued by the Administrative Law Court ("ALC") is "final" for purposes of appeal, Nucor asserts that a rehearing is warranted in this case because the Court's Order (1) misapplies the controlling law; (2) the Order's characterization of the order on appeal as "not final" is incorrect and not supported by the record, and is inconsistent with the ALC's characterization of its own order. In essence, the Court has denied Nucor the right to appeal a final order of the ALC (See, correspondence dated April 4, 2012 from the ALC attached hereto as Exhibit A, reiterating that the order appealed by Nucor is final in this matter).

There is no dispute by and among the ALC judge, the South Carolina Department of Employment Workforce ("the Agency" or "Department"), and all the parties that the May 24, 2011 order is now final and there is nothing left to be done except to enforce by execution what has been determined. There are no outstanding issues on remand, no outstanding issues (legal or factual) pending before the ALC, or any of the Agency's tribunals, and no outstanding motions. In addition, the ALC has, once again, categorically informed the parties that its May 24, 2011 order is final and disposes of all the issues raised by Nucor. See, Exhibit A. Thus, the order appealed is as final as it gets under South Carolina law. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). "A final judgment disposes of the whole subject matter of the action

or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” If this Court denies Nucor the right to appeal, then the case is effectively terminated. By virtue of the Court’s dismissal of Nucor’s appeal, Nucor is now caught in a catch-22 whereby this Court asserts that the order appealed is *not* final, while the ALC *insists* that its order is *final*, that it has closed its docket and no longer has jurisdiction over the matter, thereby leaving Nucor with no access to the justice system. *See*, Exhibit A. Not only is the dismissal contrary to Nucor’s substantial rights, but it is also contrary to the holding in *Charlotte-Mecklenburg* order with regard to what constitutes a final order for purposes of appealing as of right.

As set forth in detail below, the ALC’s order is based on clear legal errors which have an impact on virtually all private sector employers in South Carolina who administer on-site random drug tests on their employees in an effort to maintain a drug-free workplace. Accordingly, Nucor respectfully submits this Petition for Rehearing. Pursuant to Rule 219, Nucor also asserts that the issues raised in its Notice of Appeal are of sufficient importance to warrant a rehearing by the Court *en banc*.

PROCEDURAL HISTORY

Claimant, Kimberly Legette (“Legette” or “Claimant”), was terminated from her employment at Nucor’s steel manufacturing plant in Berkeley County on April 22, 2010, after testing positive for marijuana pursuant to two tests administered on behalf of Nucor: (1) a random drug test administered on April 6, 2010 which tested positive for 1.25 picograms per milligram of marijuana; and (2) a more stringent “level of detection”/“limit of detection” administered on April 15, 2010 on behalf of Nucor at Claimant’s request. Prior to her termination on April 15, 2010, and after twice testing

positive for marijuana through a process that she herself verified, Legette sought an additional off-site "independent" drug test, which was administered under different testing standards, that allegedly yielded a negative result. Legette subsequently sought unemployment benefits on the basis of this off-site independent test.

The Claims Adjudicator and the Appeal Tribunal denied Legette's claim for benefits on the basis that she had been discharged for cause pursuant to S.C. Code Ann. § 41-35-120(2),¹ and that she was disqualified to receive benefits based on illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3), respectively. However, relying on the off-site independent test administered under different testing criterion, the Appellate Panel reversed on November 17, 2010, and reinstated Legette's benefits on the basis that she was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4).

As a result of the Appellate Panel's erroneous reliance on the outside independent test as basis for reinstating Legette's benefits, Nucor filed a Petition for Judicial Review on December 14, 2010. The parties briefed the issues, and on May 24, 2011, the ALC issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. § 41-35-120(2) and (4) were without merit. In so holding, the ALC found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order." *See*, Order, at p. 4, attached hereto as Exhibit B. The order remanded to the Agency on the single and narrow issue of whether

¹ S.C. Code Ann. § 41-35-120(2), (3) and (4) are collectively referred to herein as "the Statute."

disqualification from benefits comported with the requirements set forth under S.C. Code Ann. § 41-35-120(3)(iii)(C) which deals with certification of the testing laboratories.

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC “no longer has jurisdiction in the matter *because Judge Durden’s Order is a final order in this matter.*” Email correspondence is attached hereto as Exhibit C. (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal with the South Carolina Court of Appeals appealing the ALC’s application of South Carolina Code Ann. § 41-35-120(2) and (4) to the dispute. Thereafter, the Court of Appeals issued an order dated October 13, 2011 dismissing the appeal as one that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority, supra.*

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC’s remand Order, and issued its decision on August 18, 2011, which was the subject of Claimant’s appeal to the Appellate Panel. On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties come prepared to discuss whether and to what extent the laboratory at issue complied with the certification requirements set forth in the Statute in light of switch from certification oversight by the National Institute on Drug Abuse (NIDA), to the Substance Abuse and Mental Health Services Administration (SAMHSA). On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the Statute. On December 9, 2011, the Appellate Panel issued its decision, holding that the laboratory was not certified at the time of the subject test as required

under S.C. Code Ann. § 41-350120(3). Neither party appealed this decision. The Appellate Panel's order is attached hereto as Exhibit D.

Nucor thereafter filed a Notice of Appeal with the Court of Appeals asserting that Judge Durden's Order was now final since the only issue on remand had now been disposed of by the Appellate Panel. *See*, January 9, 2012 Notice of Appeal, attached hereto as Exhibit E. On February 2, 2012, the Court of Appeals requested that the parties submit memoranda addressing the issue of appealability within ten (10) days of the date of the correspondence. The parties complied with the request. Significantly, neither party disputed the applicable orders were final.² However, on March 23, 2012, the Court of Appeals disagreed and again dismissed the appeal stating: "the order on appeal is not a final order." *See*, Exhibit F, March 23, 2012 Order.

In response to the Court's March 23, 2012 Order dismissing its appeal, the undersigned communicated with the Clerk of Court for the ALC to determine what needed to be done for purposes of "finalizing the ALC's order." Pursuant to those discussions, the undersigned provided the ALC judge with written correspondence setting forth the history of the case and the bases for the two dismissals by the Court, and requested a "final" order in the matter, or in the alternative, guidance as to what, if any, additional action was required of the parties in order to have a "final" order as set forth in the March 23, 2012 Order of this Court. The correspondence is attached hereto as Exhibit G. The ALC judge responded stating that since the issue on remand had been

² *See*, p. 2 of Legette's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). *See also*, p. 2 of the Agency's Brief ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

resolved and since no appeal was taken from the Appellate Panel's decision, her order of May 24, 2011 was the final order in this matter. *See*, Exhibit A.

ARGUMENT

I. THE ORDER ON APPEAL IS FINAL UNDER SOUTH CAROLINA LAW.

This Court's Order dismissing the instant appeal as not "final" is inconsistent with South Carolina law. In *Charlotte-Mecklenburg*,³ the Supreme Court of South Carolina reiterated the long-standing rule that an order that finally determines the substantive rights of the parties, such as the ALC order on appeal herein, is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* Court emphasized the distinction between an "interlocutory order" and a "final order" as follows: "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission. However, that is not the case here. Here, not only has the issue on remand been resolved, but the ALC judge has repeatedly informed the parties that her

³ 387 S.C. 265, 692 S.E.2d 894 (2010).

order is final and she no longer has jurisdiction over the case. *See*, May 24, 2011 ALC Order and correspondence from the ALC attached as Exhibit A.

South Carolina Code Ann. § 1-23-610 provides for appellate review of final judgment of the ALC. There is no dispute by and among the parties that the ALC's order is final and constitutes the law of the case unless appealed to the appellate courts because all issues have been decided. This position is supported by a long line of South Carolina precedent. *See, e.g. Good v. Hartford Accident & Indemnity Co., supra.* Moreover, *Charlotte-Mecklenburg* has neither been interpreted as, nor is it intended to deny appellants the option of appealing a final order as of right. The Court's March 23, 2012 Order dismissing Nucor's appeal appears to be premised on the assumption that there remain issues to be resolved by the lower courts. However, this assumption is incorrect and has no record support. Nucor's first appeal was within thirty days after the ALC notified the parties that its May 24, 2011 order was final, and that the ALC no longer had jurisdiction over the matter. (*See*, Nucor's initial Notice of Appeal, dated July 5, 2011). The Court dismissed this attempt on October 13, 2011 on the basis that because there was an issue on remand, the ALC order was not yet final. After the Agency rendered a final decision regarding certification of the laboratory, Nucor again timely appealed to this Court, and fully explained the history of the case, including how the applicable orders were final under South Carolina law. However, as with the first appeal, the second attempt was dismissed March 23, 2012. Nucor is not aware of what else can be done to make the ALC's order "final," particularly where the issuing court itself characterizes its order as "final", indicates it has closed its file, no longer has jurisdiction over the matter, and refuses any further involvement with the matter. *See* Exhibit A.

Thus, dismissal of Nucor's appeal contravenes South Carolina law and denies Nucor its right to appeal a final order. Absent immediate review in this Court, there is nothing left to be done except to execute the erroneous final orders of the ALC and the Appellate Panel.

II. REHEARING *EN BANC*

Nucor further contends a rehearing *en banc* is appropriate in this case because the challenged order involves a complicated issue of growing concern to private employers who administer random work-place drug tests on their employees to ensure a safe work environment. Pursuant to Rule 219(a), SCACR, the Court can conduct an *en banc* review "when the proceeding involves a question of exceptional importance." The present case falls squarely within that category.

It is clear that the ALC's and Agency's orders warrant appellate review because of the far reaching consequences on South Carolina employers. Based on the ALC's order (which in turn relies on the Agency's order reinstating benefits on the basis that an outside independent test that was not administered on behalf of the employer, and which was conducted under different testing criteria, comprises "contradictory" results), arguably, virtually every employer in South Carolina will be required to accept outside drug test results proffered by disgruntled employees and will owe them unemployment benefits in spite of their violation of the employer's known drug and alcohol policies. There is no question that if an employee is permitted to obtain and rely on her own outside independent tests, then it will be virtually impossible to terminate an employee based on violation of the employer's drug policies. An employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random

workplace drug tests, while allowing every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether, thereby jeopardizing the safety of other employees. Such a result is contrary to the clear purpose of S.C. Code Ann., § 41-35-120. Further, in affirming the Agency's decision, the ALC failed to review and determine the legal issues presented, including interpretation of S.C. Code Ann., § 41-35-120(2), (4) and whether the plain language of the statute permits the Agency to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer.

In addition, appellate review is necessary in order to clarify the law regarding whether: (1) In determining eligibility for unemployment benefits, the Agency and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120; (2) an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a); and that (3) Section 41-35-120 (3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered superfluous by operation of Section 41-35-120(3)(a); and (4) Sections (2), (3) and (4) of the Statute are mutually exclusive, and thus, failure to prove technical compliance with the laboratory certification requirement as set forth in Section (3)(a)(iii)(B), precludes an employer, *as a matter of law*, from proving that violation of the employer's drug policies constitutes "cause" or "gross misconduct" under Sections (2) and (4) of the Statute.

As a practical matter, however, a definitive appellate ruling is unlikely because while employers rarely contest unemployment benefits proceedings, appealing the

Agency's decisions to the ALC, let alone the appellate courts, is substantially a novelty. As a result, the odds of these issues reaching the appellate courts via a "conventional" path are almost none existent. By conducting an *en banc* review, this Court can establish a uniform rule for the Agency and its tribunals to follow, and it can determine whether Sections (2), (3) and (4) of the Statute are mutually exclusive, whether outside independent test are authorized under the Statute, and whether disqualification from benefits under Section (3) is conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B). These are issues of "exceptional importance" to employers in South Carolina.

The present case is appealable, as explained above, and it provides the perfect opportunity for the Court to consider and rule upon these important legal issues. Therefore, a rehearing *en banc* is warranted, and Appellant's petition should be granted.

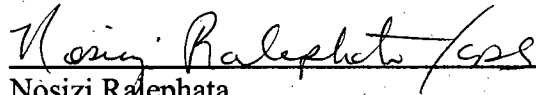
CONCLUSION

The ALC's May 24, 2011 and the Agency's December 9, 2011 orders determine with finality *all* issues raised by Nucor in its appeal to the ALC. Pursuant to the *Charlotte-Mecklenburg* decision and South Carolina Code Ann. § 1-23-610(A), a final judgment has been rendered, and absent an appeal to this Court, this case is effectively terminated. Thus, a rehearing should be granted.

Furthermore, a rehearing *en banc* is warranted because the issues in this appeal are of exceptional and growing importance to employers in this State. These issues require clarification of South Carolina law regarding the proper interpretation and application of S.C. Code Ann. §41-35-120. Without a clear appellate ruling on this matter, employers will have to way of conducting random workplace drug tests to ensure

the safety of all employees since employees will be able to defeat these properly administered tests with their own off-site independent tests that have no indicia of reliance; that are administered under different testing standards, and which are not performed on behalf of the employer. For these reasons, the Court should also grant Appellant's request for a rehearing *en banc*.

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
Fax: (843) 576-1649
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 9, 2012
Charleston, SC

Administrative Law Court

DEBORAH BROOKS DURDEN
Administrative Law Judge



PHONE: (803) 734-0550
FAX: (803) 734-6400
WEB: WWW.SCALC.NET

April 4, 2012

Nosizi Ralephata, Esquire
Turner Padget, Graham & Laney, P.A.
Post Office Box 22129
Charleston, South Carolina 29413

RE: Nucor Corporation v. S.C. DEW, and Kim A. Legette
Docket No. 10-ALJ-22-0938-AP

Dear Ms. Ralephata:

I am writing in response to your letter of March 28, 2012 requesting that this Court issue a final order disposing of all issues raised in the above-referenced case. Unfortunately that will not be possible, as this Court does not have an open file or any continuing jurisdiction in the matter.

I invite your attention to page six of my order dated May 24, 2012, which states, "With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination." Because the order of remand was a final decision in the matter there is nothing left for this Court to decide absent an appeal of the Department's decision on remand.

Sincerely,

A handwritten signature in cursive script, reading "Deborah Brooks Durden".

Deborah Brooks Durden
Administrative Law Judge

cc: Romi Y. Robinson, Esquire
Kim A. Legette

EXHIBIT G

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Phone: (803) 737-0239

Fax: (803) 737-0124

November 15, 2011

Nosizi Ralephata
Turner Padgett Graham & Laney, P.A.
Post Office Box 22129
Charleston, SC 29403

Re: Leggette v. Nucor, Appeal 10129-15740

Dear Ms. Ralephata,

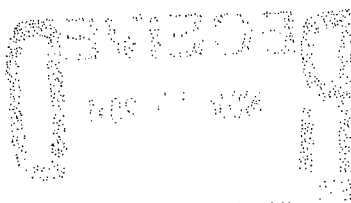
The Appellate Panel has scheduled the above appeal for oral argument on November 30, 2011, at 3:00 p.m. The Panel asks that you come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory certification programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services.

Sincerely,

Paul R. Famolari

Manager, Higher Authority Appeals

Cc: Claimant
Claimant Attorney
Employer
Imaging
File



**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

Docket No. 10-ALJ-22-0938-AP

ORDER

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

EXHIBIT B

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

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, a 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, and 1-23-600(D) (Supp. 2010); 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). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

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. Dep’t 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)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
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

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

From: Robin Coleman [<mailto:rcoleman@scal.c.net>]

Sent: Tuesday, June 14, 2011 2:16 PM

To: Ralephata, Nosizi; legal@dew.sc.gov; kimlegette@yahoo.com

Subject: Nucor Corporation v. S.C. DEW, and Kim A. Legette; Docket No. 10-ALJ-22-0938-AP

Ms. Ralephata, Ms. Robinson, Ms. Legette: This Court has received several pieces of correspondence in the above-referenced case since Judge Durden's Order remanding the matter back to the Department, namely Appellant's Motion for Hearing/Oral Argument, Appellant's Notice of Request for Protection, and Respondent's Return to Motion for Hearing/Oral Argument. Please be advised that this Court no longer has jurisdiction in the matter because Judge Durden's Order is a final order in this matter.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

This email and any attached files are confidential and intended solely for the intended recipient(s). If you are not the named recipient you should not read, distribute, copy or alter this email. Any views or opinions expressed in this email are those of the author and do not represent those of the South Carolina Administrative Law Court.

EXHIBIT C

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)
Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

EXHIBIT D

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

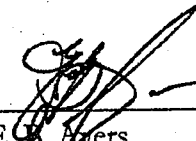
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

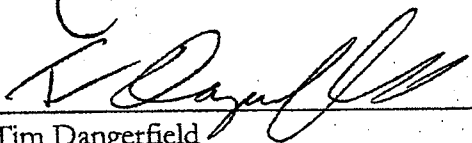
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

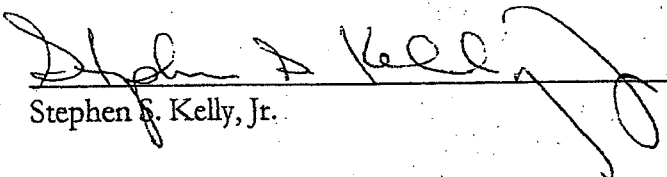
**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 11/30/11
Date Mailed: 12/9/11
Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED

JAN 10 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

NOTICE OF APPEAL

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011. Appellant received written notice of the entry of this Order on May 24, 2011. Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct, and as basis for her ruling, the ALC Judge relied on offsite independent test results. However, she remanded to the

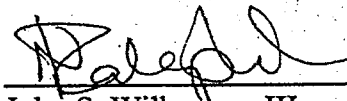
EXHIBIT E

TPGL 4227866v1

lower tribunals the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B).

The South Carolina Department of Employment Workforce Appellate Panel issued its Order regarding the laboratory's certification and whether such certification comports with the Statute's mandate on December 9, 2011, and Appellant received a copy of the Order on or about December 12, 2011. The Appellate Panel's Order is not attached because Appellant are not challenging the decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory. As a result, Judge Durden's Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT

January 9, 2012

Other Counsel of Record:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Leggette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 2010-AL-22-00938

ORDER

Appellant has filed a notice of appeal from the Administrative Law Court's order remanding this case to the South Carolina Department of Employment and Workforce for a new hearing to determine whether Respondent Kim A. Legette was disqualified to receive unemployment benefits pursuant to section 41-35-750 of the South Carolina Code (Supp. 2011). After preliminary review, this Court requested that the parties submit appealability memoranda.

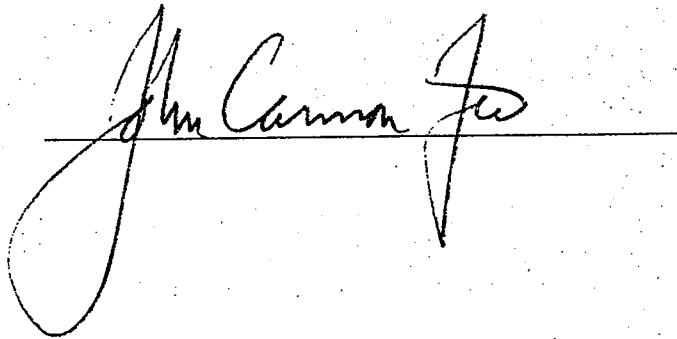
The parties have now submitted their memoranda and, after careful consideration, this appeal is dismissed because the order on appeal is not a final order. See S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental

EXHIBIT F

Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

IT IS SO ORDERED.

Columbia, South Carolina

A handwritten signature in black ink, appearing to read "John S. Wilkerson, III", is written over a horizontal line.

cc: John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy

FILED

cc 3/23/12

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Nosizi Ralephata

E-Mail: Nralephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

March 28, 2012

The Honorable Deborah Durden
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Kim A. Legette v. SC Department of Employment and Workforce and Nucor Corporation
Docket Number: 10-ALJ-22-0938-AP
TPGL File No.: 5670.111

Dear Judge Durden:

As you may recall, appellant, Nucor Corporation filed a Petition for Judicial Review on December 14, 2010. The parties briefed the issues, and on May 24, 2011, this Court issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. § 41-35-120(2) and (4) were without merit. In so holding, the Court found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order." *See*, Order, at p. 4, attached hereto. The Order remanded to the South Carolina Department of Employment and Workforce ("Agency") on the single and narrow issue of whether disqualification from benefits comported with the requirements set forth under S.C. Code Ann. § 41-35-120(3)(iii)(C) which deals with certification of the testing laboratories. *Id.*

On June 2, 2011, Nucor filed a Motion for Oral Argument, and this Court responded via email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" Attached hereto. (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal with the South Carolina Court of Appeals appealing this Court's application of South Carolina Code Ann. § 41-35-120(2) and (4) to the dispute. Thereafter, the Court of Appeals issued an order dated October 13, 2011 dismissing the appeal as one that is not immediately appealable in light of

EXHIBIT G

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TPGL 4373863v1

The Honorable Deborah Durden
March 28, 2012
Page 2

Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). See, October 23, 2011 Order, attached hereto.

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order, and issued its decision on August 18, 2011, which was the subject of Claimant's appeal to the Appellate Panel. On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties "come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services." See, Appellate Panel correspondence attached hereto.

On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the statute. On December 9, 2011, the Appellate Panel issued its decision regarding the narrow issue of whether the laboratory was certified as contemplated under S.C. Code Ann. § 41-350120(3), which provides that a testing laboratory must be certified by the NIDA, CAP or SLED. The Appellate Panel held that the laboratory was not certified at the time of the subject test as required. Neither party appealed this decision. The Appellate Panel's order is attached hereto.

Nucor thereafter filed a Notice of Appeal with the Court of Appeals asserting that Judge Durden's Order was now final since the only issue on remand had been disposed of by the Appellate Panel. See, January 9, 2012 Notice of Appeal, attached hereto. Nucor also explained that the Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct and that the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B) had been ruled on.

On February 2, 2012, the Court of Appeals requested that the parties submit memoranda addressing the issue of appealability within ten (10) days of the date of the correspondence. (Attached hereto). The parties complied with the request. Of significance is that neither party disputed that the applicable Orders were final.¹ Rather, Respondents, while acknowledging the

¹ See, p. 2 of Respondent Kim Legett's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). See also, p. 2 of the South Carolina Department of Employment and Workforce's Brief ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

The Honorable Deborah Durden

March 28, 2012

Page 3

finality of the Orders at issue, argued instead, that Nucor's appeal had been rendered moot based on the Appellate Panel of South Carolina Department of Employment and Workforce's ("Appellate Panel") most recent decision regarding certification of the laboratory pursuant to South Carolina Code Ann. § 41-35-120 (3)(a)(iii)(B). In response, Nucor asserted that Respondents' mootness argument was tantamount to a declaration, without any legal authority, that: (1) South Carolina law permits an employee to obtain an outside independent drug test using different and less sensitive detection levels to trump an employer's properly administered workplace drug tests; (2) In determining eligibility for unemployment benefits, the South Carolina Department of Employment Workforce and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120 ("the Statute"); (3) *As a matter of law*, an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a) of the Statute; and that (4) Section 41-35-120(3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered null and superfluous by operation of Section 41-35-120(3)(a).

However, on March 23, 2012, the Court of Appeals disagreed and again dismissed the appeal stating: "the order on appeal is not a final order." *See*, March 23, 2012 Order. Thus, it is clear that the Court of Appeals has determined that this Court's May 24, 2011 Order is not yet a final order pursuant to *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, *supra*. Pursuant to the Court of Appeal's March 23, 2012, Order, a final order must be issued by this Court before the parties can exercise their appeal options to that court.

As a result, Nucor respectfully requests that this Court issue a final order disposing of all issues raised in this case in order to enable the parties to evaluate and timely determine their appeal options. This case has already had a long and convoluted history, and the parties have expended significant time and resources regarding their respective positions. The dispute has undergone full fact-finding hearings at the Appeals Tribunal on two separate occasions; has been appealed to the Appellate Panel of the South Carolina Department of Employment Workforce (hereinafter "Appellate Panel" or "Agency") twice; has been appealed to the Administrative Law Court (hereinafter "ALC") once; and Nucor has attempted to appeal to the Court of Appeals on two separate occasions.

In the event that this Court determines that resolution of the issues raised requires new and/or additional briefing from the parties, including whether certification of the laboratory renders applicability of Sections (2), (3)(c), and (4) of S.C. Code Ann. § 41-35-120 moot, please let us know.

Both counsel for South Carolina Department of Workforce and counsel for Ms. Legette are copied on this correspondence.

The Honorable Deborah Durden
March 28, 2012
Page 4

We appreciate your consideration of this matter.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms
Ms. Romi Y. Robinson
Ms. Anne E. Mjaatvedt
The Honorable Jana E. Shealy

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden
Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

SC Court of Appeals

APR 09 2012

RECEIVED

PROOF OF SERVICE

I certify this 9th day of April 2012 that I served copies of the **Appellant's**
Petition for Rehearing and Rehearing *En Banc* by United States Mail, postage
prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

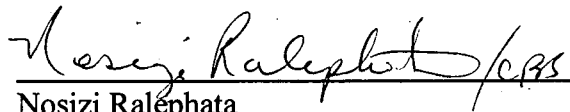
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that a copy of the **Appellant's Petition for Rehearing and Rehearing *En Banc*** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER PADGET GRAHAM & LANEY, P.A.

A handwritten signature in dark ink, appearing to read "Nosizi Ralephata", is written over a horizontal line. To the right of the signature, the initials "NCS" are written.

Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 9, 2012
Charleston, SC



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 23, 2012

John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Turner, Padget, Graham,
& Laney, P.A.
P.O. Box 22129
Charleston, SC 22129

Anne E. Mjaatvedt, Esquire
39 Broad Street, Suite 208
Charleston, SC 29401

Romi Y. Robinson
S.C. Dept. of Employment and
Workforce
P.O. Box 995,
Columbia, SC 29202

Re: Nucor Corp. v. SCDEW(2)
Case Tracking #: 2012206406

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding the above case.

Very truly yours,

V. Claire Allen, Deputy
CLERK

JAK/ec

cc: The Honorable Jana E. Shealy

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Leggette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 2010-AL-22-00938

ORDER

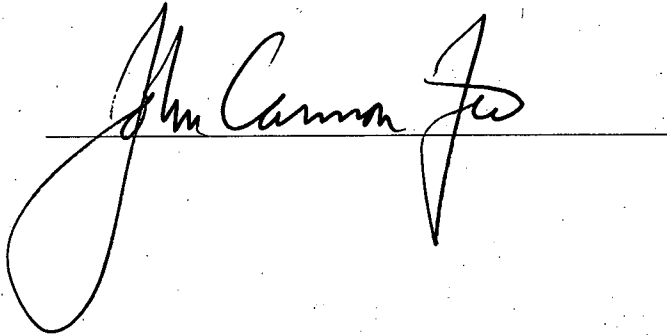
Appellant has filed a notice of appeal from the Administrative Law Court's order remanding this case to the South Carolina Department of Employment and Workforce for a new hearing to determine whether Respondent Kim A. Legette was disqualified to receive unemployment benefits pursuant to section 41-35-750 of the South Carolina Code (Supp. 2011). After preliminary review, this Court requested that the parties submit appealability memoranda.

The parties have now submitted their memoranda and, after careful consideration, this appeal is dismissed because the order on appeal is not a final order. See S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental

Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

IT IS SO ORDERED.

Columbia, South Carolina

A handwritten signature in black ink, appearing to read "John S. Wilkerson, III", is written over a horizontal line.

cc: John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy

FILED

rc 3/23/12



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890

FAX: (803) 734-1839

www.sccourts.org

February 22, 2012

John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Turner, Padget, Graham,
& Laney, P.A.
P.O. Box 22129
Charleston, SC 22129

Re: Nucor Corp. v. SCDEW(2)
Case Tracking #: 2012206406

Dear Counsel:

We have received your extension request for service of the Appellant's Initial Brief and Designation of Matter. You are reminded, pursuant to the Court's letter of February 2, 2012, that the filing deadlines for this matter are currently held in abeyance.

Therefore, your extension request is unnecessary and will not be considered by the Court. All memoranda of appealability have been received from all parties and are submitted for the Court's consideration.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ēc

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED

FEB 24 2012

SC Court of Appeals

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

RETURN TO RESPONDENTS' BRIEF REGARDING APPEALABILITY

Other Counsel of Record:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and
Workforce
P.O. Box 995
Columbia, SC 29202

SUMMARY OF ARGUMENT

The issues raised are ripe for appeal, and it is not disputed that the applicable Orders are final.¹ In this instance, Respondents, while acknowledging the finality of the Orders at issue, have yet again, attempted to thwart South Carolina law and confuse the issues by arguing that Nucor's appeal has been rendered moot based on the Appellate Panel of South Carolina Department of Employment and Workforce's ("Appellate Panel") most recent decision regarding certification of the laboratory pursuant to South Carolina Code Ann. § 41-35-120 (3)(a)(iii)(B).

However, framing the issue as moot is not only a mischaracterization of the dispute between the parties, including the issues that form(ed) the bases of Nucor's appeals, both to the Administrative Law Court ("ALC") and to this Court; but it is also an incorrect and untenable construction of the applicable statute. "A case is 'moot' when judgment, if entered, will have no practical effect on existing controversies." *Peterson Outdoor Advertising Corp. v. Beaufort County*, 291 S.C. 533, 354 S.E.2d 563 (1987). In this case, Nucor's appeal is not moot because there is an actual controversy, the issues are ripe, and judgment will have a practical effect on the controversy.

In arguing mootness, Respondents are in fact, declaring, without any legal authority, that: (1) South Carolina law permits an employee to obtain an outside independent drug test using different and less sensitive detection levels to trump an

¹ See, p. 2 of Respondent Kim Legette's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). See also, p. 2 of the South Carolina Department of Employment and Workforce's Brief¹ ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

employer's properly administered workplace drug tests; (2) In determining eligibility for unemployment benefits, the South Carolina Department of Employment Workforce² and the Administrative Law Court ("ALC") are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120 ("the Statute"); (3) *As a matter of law*, an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a) of the Statute; and that (4) Section 41-35-120 (3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered null and superfluous by operation of Section 41-35-120(3)(a).

Both the ALC and the Agency are not authorized to accept or rely on an employee's off-site independent drug test administered using different, less sensitive detection levels, and which Legette knew would not be accepted by Nucor,³ as basis for reinstating Legette's unemployment benefits. If an employee is permitted to obtain and rely on her own outside independent tests, then it will be virtually impossible to terminate an employee based on violation of the employer's drug policies. An employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random workplace drug tests, while allowing every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether, thereby jeopardizing the safety of other employees.

² The South Carolina Department of Employment and Workforce, including the Appellate Panel, Appeal Tribunal and Claims Adjudicator will collectively be referred to herein as "the Agency" or "the Department".

³ R. 11, 24, 30, 38, 63-64, 101, 121, 136; Exhibits 4, - 7; Legette's ALC Response Brief.

Further, if as Respondents argue, Section (3)(a) is the *only* provision that can be used to disqualify an employee, then even employees that either confess to using illegal drugs while at work, or employees that are caught using illegal drugs at work would likewise, be entitled to unemployment benefits simply because the employer did not test the subject employee for drugs as set forth under Section (3)(a)(iii)(B) of the Statute. Such a construction not only creates absurd results that are contrary to the language, purpose and intent of the Statute, but also precludes an employer as a matter of law from relying on other applicable provisions of the Statute to reach the same result.

ARGUMENT

It is unfortunate that this case that has now been unnecessarily transformed into a long-drawn, convoluted and hyper-technical legal dispute implicating legal errors and statutory interpretation simply because Legette unjustifiably insists that she is entitled to unemployment benefits. Further, even though Legette insists that she is entitled to unemployment benefits pursuant to Section 3(a) of the Statute, she also acknowledges she failed two drug tests administered on behalf of Nucor, in violation of Nucor's Drug and Alcohol Policies, of which she was fully aware.⁴ For all purposes, these positive drug tests should have ended the inquiry because they comprise uncontested evidence of Legette's violation of Nucor's drug policies. However, Legette, of her own accord, sought and obtained a third independent test from an outside sample collector which was performed according to different testing standards, [R. 63-64], and which she alleges it

⁴ Legette concedes that Nucor has a Drug and Alcohol Policy; that she was aware of this Policy at all times pertinent hereto, and that she was aware that testing positive for drugs pursuant to a drug test administered on behalf of the employer was basis for termination. R. 13, 24, 42, 85-88. Legette also acknowledges that Nucor does not accept outside independent tests. R. 25, 27, 57; Legette's ALC Response Brief, first and second pages.

came back negative for marijuana. [R. 51-52, 54, 56]. It is on the basis of the third independent test that the Appellate Panel and the ALC found there were contradictory results, and thereby reinstated Legette's benefits pursuant to Section (4) of the Statute.

As regards appealability of the ALC's Order, Respondents' "mootness" arguments are the functional equivalent of a declaration by the Court that Sections (2), (3) and (4) of the Statute are mutually exclusive, and thus, failure to prove technical compliance with the laboratory certification requirement as set forth in Section (3)(a)(iii)(B), precludes an employer, *as a matter of law*, from proving that violation of the employer's drug policies constitutes "cause" or "gross misconduct" under Sections (2) and (4) of the Statute.⁵

As an initial matter, it is noteworthy that Respondents' argument is undercut by the fact that the Agency and its lower tribunals applied each of Sections (2), (3) and (4) of the Statute to the exact same set of facts at each stage of the Agency proceedings, thereby substantiating that Nucor's reliance upon any one (or all) of these Sections is proper.⁶ In

⁵ In this brief, when Nucor refers to "noncertified laboratories", the reference is only intended to differentiate those laboratories that do not hold the certification requirements of Section 41-35-120(3)(a)(iii)(B) of the Statute. However, this is not intended to imply or concede that these "noncertified laboratories" do not hold any other relevant certifications, including national and international certifications pertinent to workplace hair sample testing for drugs.

⁶ The Claims Adjudicator determined that Legette was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy, and that this failure to comply with company policies constituted discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2). [R. 13, 85].

The Appeal Tribunal found that Legette was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana and held that Legette was disqualified from receiving benefits under S.C. Code Ann. § 41-35-120 (3). [R. 274-275].

addition, the construction urged by Respondents is contrary to the rules of statutory construction. *See, Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (The agencies charged with enforcing statutes usually receive deference from the courts as to their interpretations of those laws.). Similarly, Respondents make this broad and far reaching conclusion but cite no legal support or precedent for such a crippling interpretation.

Under South Carolina law, “[a] statute shall not be construed by concentrating on an isolated phrase. The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.” *Beaufort County v. S.C. State Election Comm’n*, 395 S.C. 366 (S.C. 2011). In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent. *Id.* Statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Id.* Further, “[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (internal citation omitted). Further, “where possible, *all* provisions of a statute must be given full force and effect.” *Nucor Steel v. S.C. Pub. Serv. Comm’n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). (Emphasis added).

The Appellate Panel held: “while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer’s exam, processed by the same laboratory, indicating the claimant was drug free” and that “Claimant was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120 (4). [R. 1-2].

In this case, the Statute sets forth eight disqualifications to an employee's right to receive unemployment benefits including Sections (2) - discharge for cause, (3) discharge for drug use, and (4) discharge for gross misconduct. Each of these bases is self-contained and independent of the other sections. Under proper facts, the same conduct can disqualify a worker from benefits under more than one statutory condition. *See, Beaufort County v. S.C. State Election Comm'n*, and *Nucor Steel v. S.C. Pub. Serv. Comm'n*, *supra*. In fact, this case provides such an instance, and hence, the Agency's reliance on all three Sections of the Statute.

When faced with two or more applicable sections of a statute, other courts have analyzed and applied each applicable section of the statute at issue. In *Trapeni v. Department of Employment Sec.*, 142 Vt. 317, 320 (Vt. 1982), the Supreme Court of Vermont considered whether either of *two* disqualification provisions applied to worker who was out of work due to a strike that stopped the project, either of which would have disqualified the employee from benefits: (1) labor dispute disqualification (disqualifies striker if labor dispute stops employer's operations); and (2) voluntary leave disqualification. The court ultimately found neither disqualification was applicable, but both bases were properly considered and applied to the facts of the case.

Similarly, *Administrator v. Sides*, 2000 Conn. Super. LEXIS 2720 (Conn. Super. Ct. Oct. 10, 2000), illustrates another instance where two disqualification grounds were considered: whether substance abuse constituted good cause (thereby rebutting a "for cause" disqualification) and termination based on violation of the absenteeism policy. There, the employee was terminated for violation of the employer's absenteeism policy after missing three days without calling in as required. One of her absences was due to

substance abuse issues. The Employment Security Board tried to read into the statute a requirement that absences due to substance abuse were like sick leave for which good cause was established, thereby invoking the "for cause" clause of the statute. However, although the court ultimately disagreed with the "good cause" argument, that section of the statute was fully considered in addition to the absenteeism policy and the court held that the employee was disqualified from receiving unemployment benefits.

Thus, an employer is not restricted to a single disqualification category. Conduct that disqualifies an employee from benefits under one section of a statute can be also considered under other applicable sections of that statute, if appropriate. To further illustrate the absurd outcome that would result from the position urged by Respondents, consider scenario A, where an employee confesses to using, and being under the influence of illegal drugs while present at work. As a result of this confession, the employer uses a non-certified laboratory to confirm the presence of drugs in the employee's system, and the results come back positive for illegal drugs. Under these circumstances, based upon Respondents' argument, that employer would then be precluded from discharging the employee for cause" or "gross misconduct" under Sections 41-35-120(2) or (4) simply because the employer did not test that employee for drugs as required under Section 41-35-120(3)(a)(iii)(B).

Similarly, under scenario B, an employee is caught smoking marijuana on the employer's premises during scheduled work hours. The employer terminates the employee without performing any form of drug test. Likewise, based on Respondents' construction of the Statute, that employer would also be precluded from terminating the employee for "cause" or "gross misconduct," because the employer did not test the

employee as set forth under Section (3)(a)(iii)(B), even though the employer has other evidence of the employee's violation of its drug policies.

Both scenarios A and B, above clearly involve termination based on use of illegal drugs in violation of the employer's drug policies. However, pursuant to Respondents' theory, the employer would be *precluded as a matter of law* from proving that the employee was terminated for "cause" or "gross misconduct" based on her violation of the employer's drug policies because of Section (3)(a)(iii)(B). Not only would this result run afoul of the intent of the Statute – *i.e.* disqualify an employee from receiving unemployment benefits based on her violation of workplace drug policies, such an interpretation would severely circumscribe an employer's ability to provide a safe and drug free workplace for the rest of its employees, and would significantly jeopardize the safety of South Carolina employees as a whole. In addition, reading the Statute as permitting termination based upon drug use that is provable *only* through use of a laboratory certified as set forth under Section 41-35-120(3)(a)(iii)(B) would render Section 3(c) a nullity. Section 3(c) permits an employer to legitimately discharge based on for example, police arrest records, drug tests performed by a treating physician, or believable reports from other employees that they saw the employee using illegal drugs. Here, Respondents' argument rests entirely on the faulty and unsupported assumption that "disqualification for drug use" is the equivalent of "proof of drug use by a laboratory certified" as set forth in Section (3)(a)(iii)(B) of the Statute. When read as a whole, it is clear that whether a laboratory is certified or not as mandated under Section (3)(a)(iii)(B) is a matter that goes to weight, not admissibility, of the test results.

Nucor's interpretation (and the interpretation adopted by the Agency and its lower tribunals in applying Sections (2),(3), and (4) to this dispute), properly recognizes that all three Sections of the Statute apply to the facts of this case, and that these Sections are not mutually exclusive. There is nothing complicated or innovative about such an interpretation. It simply recognizes the common rules of statutory interpretation. In other words, just because a laboratory does not meet the certification requirements of Section (3)(a)(iii)(B) does not mean, nor should it mean that an employer cannot utilize one or more sections of the same statute, which would otherwise be just as applicable to reach the same result. In addition, there is nothing in Section (3)(a) which addresses violations of a drug policy that are discovered by the employer other than testing as set forth in Section (3)(a)(iii)(B), and these are precisely the violations that would fall under Sections (2), (3)(c) and (4) of the Statute.

Furthermore, this is not a case where Nucor has failed to prove drug use: indeed, other than the Appellate Panel's unauthorized reliance on the outside independent test which was administered under different detection standards, all the fact finding bodies found that Legette had been discharged from her employment *because* of her use of illegal drugs in violation of Nucor's Drug and Alcohol Policies. [R. 13, 275]. When an employee, of their own accord, seeks and obtains an independent test, which is administered under different detection standards, it is clear that she is attempting to circumvent an otherwise valid termination and disqualification using unauthorized and incomparable standards in an effort to thwart South Carolina law and the public policy behind a drug free and safe workplace for all employees.

Moreover, if the issue of whether Sections (2), (3) and (4) of the Statute must be applied independent of each other or whether these Sections are mutually exclusive is a novel question of law, then this Court is free to decide the question with no particular deference to the ALC or the Appellate Panel and its lower tribunals. *L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000). In such situations, the appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and the Court's sense of justice. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005). In that regard, this Court has essentially *de novo* review of the issue, thereby rendering Respondents' argument regarding mootness a non-issue.

It is also noteworthy that in her brief, Legette's incorrectly states Judge Durden's findings regarding applicability of Sections (2) and (4). Judge Durden held: "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order", and thus Nucor's arguments as to Sections (2) and (4) "are without merit." [ALC Order, at p. 4.]. This is inconsistent with Legette's statement that "Judge Durden held that the Agency incorrectly decided Respondent Legette's eligibility under the standards of S.C. Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120 (4) – 'Discharge for gross misconduct' in her May 24, 2011 Order.""⁷ Judge Durden never analyzed which Section of the statute was applicable or whether the Sections were mutually exclusive. Rather, her Order specifically relies on, and incorporates the independent test that was the basis of the Agency's "contradictory test results" finding as

⁷ Legette's Brief, p. 2.

basis for upholding the Appellate Panel's reinstatement of Legette's benefits under Section (4). Thus, Judge Durden's Order *affirms* the Appellate Panel's application of Section (4) to the facts of this case, while dismissing Nucor's arguments that violation of an employer's drug policies constitutes termination for cause as provided under Section (2) of the Statute. In that regard, Judge Durden's Order, likewise, bolsters Nucor's position that each of the Sections at issue is independent and stand-alone, and that Nucor can terminate in reliance upon any one or all three Sections.

Similarly, Respondent Agency's argument that Nucor has conceded that Legette is eligible for benefits under Section 41-35-120(3) is inaccurate. *See*, Agency's Brief, p. 2. The only issue that Nucor has not appealed is whether the laboratory was certified as required under Section (3)(a)(iii)(B), which is the only issue that was remanded and resolved through the Appellate Panel's decision of December 9, 2011. However, as set forth above, Nucor *does not* concede that Legette is entitled to benefits under Section (3)(c). Disqualification from benefits under Section (3) is not conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B); rather under Section 3(c), results from a certified laboratory are given primacy, while noncertified laboratory results are given whatever weight the fact finder deems appropriate.

CONCLUSION

Based on the foregoing, a finding that the laboratory was not certified as required under Section (3)(a)(iii)(B) is neither dispositive of this case, nor does it comprise a factual finding that Legette *did not* use illegal drugs in violation of Nucor's Drug and Alcohol Policies. In addition, neither the ALC nor the Agency was unauthorized to rely

an off-site drug test administered under different, less sensitive detection levels, to trump Nucor's tests that Legette admits she failed. It is therefore clear that the issues raised in this appeal are far from resolved, and a decision of this Court will not only grant meaningful relief to Nucor, it will also clarify application of Section 41-35-120, including whether an employee is permitted to rebut an employer's drug test results with her own unauthorized tests, and whether an employer can rely on any applicable Section of the Statute in establishing violation of its policies.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Telephone: 843-576-2807
Facsimile: 843-577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

February 24, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM ADMINISTRATIVE LAW COURT

RECEIVED

FEB 24 2012

SC Court of Appeals

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that on February 24, 2012, copies of the **Appellant's Return to Respondents' Brief Regarding Appealability** were served upon the following counsel of record by depositing those copies in the United States Mail, postage prepaid, to:

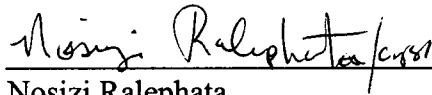
Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and
Workforce
P.O. Box 995
Columbia, SC 29202

The undersigned further certifies that a copy of the **Appellant's Return to Respondents' Brief Regarding Appealability** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER PADGET GRAHAM & LANEY, P.A.



Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Telephone: 843-576-2807
Facsimile: 843-577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

February 24, 2012
Charleston, SC

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1255

February 24, 2012

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Nucor Corporation v. SCDEW
Court of Appeals Tracking No.: 2012206406
Our File No.: 5670.111

RECEIVED
FEB 24 2012

SC Court of Appeals

Dear Ms. Gee:

Enclosed please find the original and one copy of Appellant's Return to Respondents' Brief Regarding Appealability and the original and one copy of the Proof of Service in the above referenced matter. Please file the originals in your office and return a clocked copy with the courier. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Nosizi Ralephata/css

Nosizi Ralephata

NXR/adh
Enclosures

cc: Ms. Romi Y. Robinson
Ms. Anne E. Mjaatvedt
The Honorable Jana E. Shealy

BUSINESS • LITIGATION • SOLUTIONS

Bank of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202
Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

TPGL 4310202v1

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Post Office Box 8597
631 Hampton Street
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

February 13, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Nucor Corporation v. SC Dept. of Employment and Workforce
Case No: 2012206406

Dear Ms. Gee:

Enclosed is the original Memorandum of the Respondent SC Department of Employment and Workforce Regarding Appealability in the above referenced case. Also enclosed is Proof of Service for all documents.

With kind regards, I am,

Sincerely,

Jessica Chesley
Administrative Legal Assistant for
Sandra Grooms, Esq.
SC Department of Employment & Workforce

RECEIVED
FEB 14 2012
SC Court of Appeals

"Putting South Carolinians Back to Work"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

MEMORANDUM OF RESPONDENT SOUTH CAROLINA DEPARTMENT
OF EMPLOYMENT AND WORKFORCE REGARDING APPEALABILITY

Sandra Grooms

Sandra Grooms, SC Bar # 640
S.C. Department of Employment and Workforce
P.O. Box 8597
Columbia, SC 29202
(803) 737-2666 (Telephone)
(803) 737-0124 (Facsimile)
sgrooms@dew.sc.gov (E-mail)

Attorney for Respondent S.C. Department of
Employment and Workforce

February 13, 2012
Columbia, South Carolina

RECEIVED
FEB 14 2012
SC Court of Appeals

MEMORANDUM OF LAW

Appellant Nucor Corporation filed a Notice of Appeal on January 9, 2012, from an Order of the Honorable Judge Deborah Brooks Durden issued May 24, 2011. Respondent South Carolina Department of Employment and Workforce (SCDEW) concurs and joins in all the arguments submitted to this Court by Respondent Kim Legette in her Memorandum of Law and reiterates the same herein.

Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits on December 9, 2011, (Exhibit A) which is dispositive on this claim for unemployment benefits. Appellant did not appeal this final decision of the SCDEW to the Administrative Law Court (ALC) and the time for appeal has expired. Moreover, Appellant concedes and does not challenge the final decision of the SCDEW that holds Respondent Legette is eligible for unemployment benefits under S.C. Code Ann. § 41-35-120 (3). This is the specific statute that governs and controls whether or not a claimant is disqualified from benefits whenever a claimant is discharged by an employer for failing a drug test. Appellant premised its initial appeal to the ALC upon its claim that the employer utilized a drug testing lab that was certified in compliance with S.C. Code Ann. §41-35-120 (3). This issue was disputed in the record, and the Appellate Panel did not make a finding on it. Judge Durden ruled that a determination of whether Legette was disqualified from benefits under §41-35-120 (3) was necessary to the resolution of the case, and remanded the case to the Department to make specific findings and conclusions as to the disputed facts under S.C. Code Ann. 41-35-120 (3). Since the decision of the SCDEW under S.C. Code Ann. 41-35-120 (3) is now final and dispositive on this claim for unemployment benefits, the Appellant's attempted appeal of the May 24, 2011, Order of Judge Durden on other issues is irrelevant, immaterial, moot, and not appealable.

PROCEDURAL AND FACTUAL SUMMARY

This is a case arising from Respondent Kim A. Legette's application for unemployment benefits through SCDEW following her termination from Appellant Nucor Corp. Appellant Nucor discharged Respondent Legette for a positive drug test. S.C. Code Ann. § 41-35-120 (3) is the controlling statute and sets forth specific criteria that must be satisfied in order for the Department to disqualify a claimant who is discharged for a positive drug test result.

Administrative Judge Durden held that the Department had incorrectly decided Respondent Legette's eligibility under the standards of S.C. Code Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120(4) – "Discharge for gross misconduct" in her May 24, 2011 Order. (Appellant's Exhibit A). Judge Durden remanded the case back to the SCDEW fact finding body, the SCDEW Appeal Tribunal, and instructed them to determine her eligibility under the statutory section, §41-35-120 (3), that applies to "discharge for illegal drug use".

In its December 9, 2011 Order, the SCDEW Appellate Panel decided that the Appellant/Employer had not met the statutory requirements of §41-35-120(3) because it did not submit the test to a certified laboratory, and held that Respondent/Claimant Legette was eligible for benefits. (Exhibit A, Dec. 9, 2011 Decision). That decision became the final disposition of this entire controversy where Appellant did not pursue its required statutory review remedies through the Administrative Law Court pursuant to S.C. Code Ann. § 41-35-750 within 30 days of mailing of that decision.

ARGUMENT

The issues raised in Appellant's current appeal became moot when the SCDEW Appellate Panel's December 9, 2011 decision became final.

The S.C. Legislature revised § 41-35-120 in 2010 to distinguish eight different grounds for disqualification. In revising the statute, the Legislature laid out very specific grounds for disqualification on the basis of illegal drug use in § 41-35-120(3). Based on the clear language in the statute, that is the only section that can apply when the employer claims that a positive drug test is the grounds for termination.

Appellant/Employer now wants to appeal the prior ALC decision. Appellant's prior appeal to this Court was dismissed because the May 24, 2011 ALC decision was clearly not the final order where it remanded the case back to the Agency. (Ct. App. October 13, 2011 Order). Now Appellant attempts to appeal other aspects of the ALC decision, however, that Decision is not appealable.

First, as discussed above, the final Order on this entire controversy is the December 9, 2011 SCDEW Appellate Panel Order, an Order which is not appealable directly to the Court of Appeals under the statute, and further is no longer appealable to the ALC.

Second, the only controversy in this case, whether Respondent/Claimant is eligible for benefits under § 41-35-120, has been fully decided. The issue raised in Appellant's current Appeal – whether a Judge can rely on an offsite drug test under § 41-35-120(2) or (4) – is moot.

“A case becomes moot when judgment, if rendered, will have no practical effect upon [the]existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346 (1973); *Ex parte Moore*, 346 S.C. 274 (2001); *Seabrook v. City of Folly Beach*, 337 S.C. 304 (1999).

Drug test issues are properly decided under § 41-35-120(3), and the issues raised in the prior Appeal are no longer before this Court in this case. The issue of whether independent drug tests can be considered in determining eligibility would have no bearing on this case where it

was not a basis for determining Respondent Legette's eligibility in the December 9, 2011 final decision. An appellate court will not pass on moot and academic questions where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486 (1997).

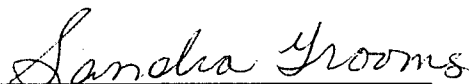
Appellant/Employer is incorrect in stating that the case was remanded on the "narrow issue" of certified laboratory, in fact it was the deciding factor in this case. (May 24, 2011 Order, pg. 5). When an employer discharges an employee where the sole allegation is a positive drug test, none of the other seven grounds for disqualification in § 41-35-120 apply. Then, if as here, that drug test is not performed in accordance with every criteria in § 41-35-120(3), a claimant cannot be held ineligible for benefits.

Here, the December 9, 2011 Order found that the testing laboratory did not meet the certification criteria in § 41-35-120(3)(a)(B), and the Respondent/Claimant is eligible for benefits. Once the December 9, 2011 Order became final, it is the final order regarding Respondent/Claimant's eligibility for unemployment benefits and no controversy remains for this Appeal. Any potential judgment that this Court could make regarding issues raised by Appellant from the May 24, 2011 order would have no practical effect, the SCDEW has made a decision that Respondent/Claimant Legette is eligible for benefits, and that decision is final, making this Appeal moot.

CONCLUSION

Based on the above, Respondent SCDEW respectfully requests that this Court dismiss Appellant's appeal on the basis that neither the May 24, 2011 ALC decision, nor the December 9, 2011 SCDEW decisions, are appealable and that any appeal is Moot.

Respectfully Submitted:



Sandra Grooms, SC Bar # 640
S.C. Department of Employment and Workforce
P.O. Box 8597
Columbia, SC 20202
(803) 737-2666 (Telephone)
(803) 737-0124 (Facsimile)
sgrooms@dew.sc.gov (E-mail)

Attorney for Respondent Department (SCDEW)

February 13, 2012
Columbia, South Carolina

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)

Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

APPELLATE PANEL
DECISION



Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

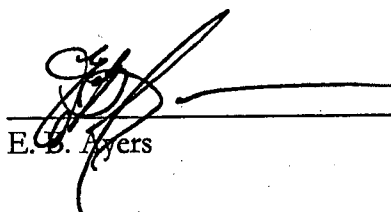
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

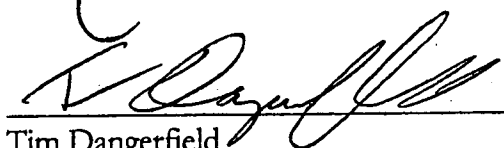
¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

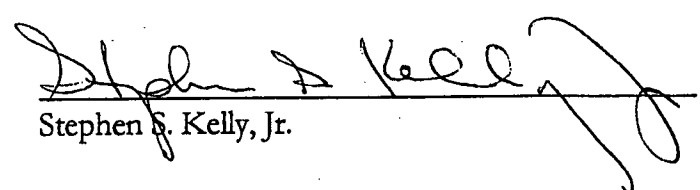
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers

Tim Dangerfield

Stephen S. Kelly, Jr.

Hearing Date: 11/30/11
Date Mailed: 12/9/11
Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

STATE OF SOUTH CAROLINA
In the Court of Appeals

Nucor Corporation,
Appellant,

vs.

South Carolina Department of
Employment and Workforce,
Respondent,

Case Number: 2012206406

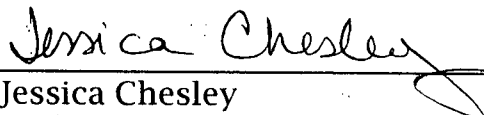
AFFIDAVIT OF SERVICE
BY MAIL

PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Memorandum of Respondent SC Department of Employment and Workforce Regarding Appealability in the above named action on the following:

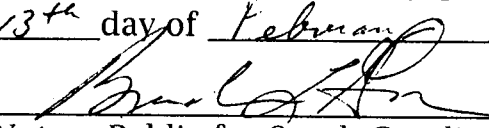
John S. Wilkerson III
Nosizi Ralphata
PO Box 22129
Charleston, SC 29413

Anne E. Mjaatvedt
39 Broad Street, Suite 208
Charleston, SC 29401

That the postage was duly prepaid; and that it was deposited in the United States Mail on the 13th day of February 2012.


Jessica Chesley

SWORN to before me this the
13th day of February, 2012


(L.S.)
Notary Public for South Carolina

My Commission Expires: 2-28-2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Court of Appeals Case Tracking No.: 2012206406

RECEIVED

FEB 13 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that on February 13, 2012, copies of the **Appellant's Memorandum in Support of Appealability** were served upon the following counsel of record by depositing those copies in the United States Mail, postage prepaid, to:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

The undersigned further certifies that a copy of the **Appellant's Memorandum in Support of Appealability** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER, PADGET, GRAHAM & LANEY, P.A.

Nosizi Ralephata/crs

John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

February 13, 2012

Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anne@aemlawyer.com

February 13, 2011

Certified U.S. Mail

Tanya A. Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia SC 29201

RECEIVED

FEB 14 2012

SC Court of Appeals

RE: Nucor Corporation v. SCDEW
Case Tracking Number: 2012206406

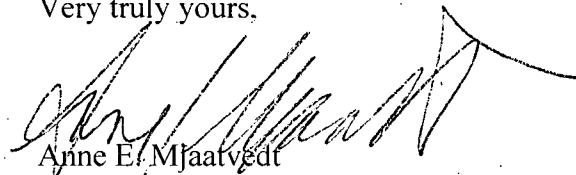
Dear Ms. Gee:

I represent Respondent Kim A. Legette in the above reference matter. Please find enclosed the original and seven copies of the *Memorandum of Respondent Kim A. Legette Regarding Appealability*. This is being submitted in response to this Court's letter of February 2, 2012.

As this is in response to a request from the Court, I was not sure if a motion fee is required. If so, let me know and I will send a check immediately.

Please return a file stamped copy to me in the enclosed envelope, and contact me at any time if you have any questions or concerns.

Very truly yours,



Anne E. Mjaatvedt

Enclosure

Cc: John S. Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Romi Robinson, Esq.
Kim A. Legette

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

RECEIVED

FEB 14 2012

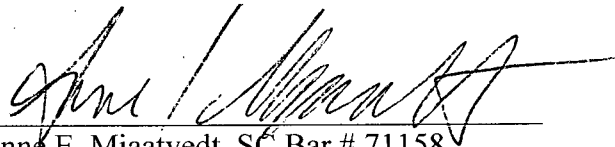
SC Court of Appeals

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

MEMORANDUM OF RESPONDENT KIM A. LEGETTE REGARDING
APPEALABILITY



Anne E. Mjaatvedt, SC Bar # 71158

ANNE MJAATVEDT LAW FIRM, LLC

39 Broad Street, Suite 208

Charleston, SC 20401

(843) 793-4240 (Telephone)

(843) 278-9239 (Facsimile)

anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

February 13, 2012
Charleston, South Carolina

MEMORANDUM OF LAW

On or about January 9, 2012, Appellant Nucor Corporation filed a Notice of Appeal of the May 24, 2011 Order of Honorable Judge Deborah Brooks Durden. In response to this Court's letter of February 2, 2012, Respondent Kim A. Legette submits the following Memorandum of Law.

Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce, attached as Respondent Legette's Exhibit A, disposes of the entire controversy, any issues from the the May 24, 2011 Order are moot and not appealable.

PROCEDURAL AND FACTUAL SUMMARY

This a case arising from Respondent Kim A. Legette's application for unemployment benefits through SCDEW following her termination from Appellant Nucor Corp. Appellant has opposed Respondent Legette's receipt of unemployment benefits based on its position that Respondent Legette was terminated for a positive drug test.

Respondent Legette applied for benefits from SCDEW on or before May 5, 2010. As the procedural history of this case within the Agency and the ALC is correctly summarized in the first paragraph of Respondent Legette's Exhibit A,¹ it will not be reviewed in detail here.

Because the Appellant/Employer's position was that Respondent/Claimant had been discharged for a positive drug test, Administrative Judge Durden held that the Agency had incorrectly decided Respondent Legette's eligibility under the standards of S.C. Code Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120(4) – "Discharge for gross misconduct" in her May 24, 2011 Order. (Appellant's Exhibit A). Judge Durden remanded the case back to the SCDEW fact finding body, the SCDEW Appeal Tribunal, and instructed them to determine

¹ Respondent Kim A Legette is here referred to "Respondent/Legette", or as "Respondent/Claimant" to clarify her position as Claimant in the underlying SCDEW administrative process.

her eligibility under the statutory section, §41-35-120 (3), that applies to “discharge for illegal drug use”.

In its December 9, 2011 Order, the SCDEW Appellate Panel decided that the Appellant/Employer had not met the statutory requirements of §41-35-120(3) because it did not submit the test to a certified laboratory, and held that Respondent/Claimant Legette was eligible for benefits. (Exhibit A, Dec. 9, 2011 Decision). That decision became the final disposition of this entire controversy where Appellant did not pursue its required statutory review remedies through the Administrative Law Court pursuant to S.C. Code Ann. § 41-35-750 within 30 days of mailing of that decision.

ARGUMENT

The issues raised in Appellant’s current appeal became moot when the SCDEW Appellate Panel’s December 9, 2011 decision became final.

The S.C. Legislature revised § 41-35-120 in 2010 to distinguish eight different grounds for disqualification. In revising the statute, the Legislature laid out very specific grounds for disqualification on the basis of illegal drug use in § 41-35-120(3). Based on the clear language in the statute, that is the only section that can apply when the employer claims that a positive drug test is the grounds for termination.

Appellant/Employer now wants to appeal the prior ALC decision. Appellant’s prior appeal to this Court was dismissed because the May 24, 2011 ALC decision was clearly not the final order where it remanded the case back to the Agency. (Ct. App. October 13, 2011 Order). Now Appellant attempts to appeal other aspects of the ALC decision, however, that Decision is not appealable.

First, as discussed above, the final Order on this entire controversy is the December 9, 2011 SCDEW Appellate Panel Order, an Order which is not appealable directly to the Court of Appeals under the statute, and further is no longer appealable to the ALC.

Second, the only controversy in this case, whether Respondent/Claimant is eligible for benefits under § 41-35-120, has been fully decided. The issue raised in Appellant's current Appeal – whether a Judge can rely on an offsite drug test under § 41-35-120(2) or (4) – is moot.

“A case becomes moot when judgment, if rendered, will have no practical effect upon [the]existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346 (1973); *Ex parte Moore*, 346 S.C. 274 (2001); *Seabrook v. City of Folly Beach*, 337 S.C. 304 (1999).

Drug test issues are properly decided under § 41-35-120(3), and the issues raised in the prior Appeal are no longer before this Court in this case. The issue of whether independent drug tests can be considered in determining eligibility would have no bearing on this case where it was not a basis for determining Respondent Legette's eligibility in the December 9, 2011 final decision. A appellate court will not pass on moot and academic questions where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486 (1997).

Appellant/Employer is incorrect in stating that the case was remanded on the “narrow issue” of certified laboratory, in fact it was the deciding factor in this case. (May 24, 2011 Order, pg. 5). When an employer discharges an employee where the sole allegation is a positive drug test, none of the other seven grounds for disqualification in § 41-35-120 apply. Then, if as here, that drug test is not performed in accordance with every criteria in § 41-35-120(3), a claimant cannot be held ineligible for benefits.

Here, the December 9, 2011 Order found that the testing laboratory did not meet the certification criteria in § 41-35-120(3)(a)(B), and the Respondent/Claimant is eligible for benefits. Once the December 9, 2011 Order became final, it is the final order regarding Respondent/Claimant's eligibility for unemployment benefits and no controversy remains for this Appeal. Any potential judgment that this Court could make regarding issues raised by Appellant from the May 24, 2011 order would have no practical effect, the SCDEW has made a decision that Respondent/Claimant Legette is eligible for benefits, and that decision is final, making this Appeal moot.

CONCLUSION

Based on the above, Respondent Legette respectfully requests that this Court dismiss Appellant's appeal on the basis that neither the May 24, 2011 ALC decision, nor the December 9, 2011 SCDEW decisions, are appealable and that any appeal is Moot.

Respectfully Submitted:



Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 20401
(843) 793-4240 (Telephone)
(843) 278-9239 (Facsimile)
anne@aemlawyer.com (E-mail)

Attorney for Respondent Kim A. Legette

February 13, 2012
Charleston, South Carolina

Respondent Legette Exhibit A
December 9, 2011 Appellate Panel Decision

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: [REDACTED])
Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

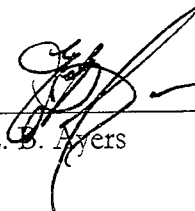
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

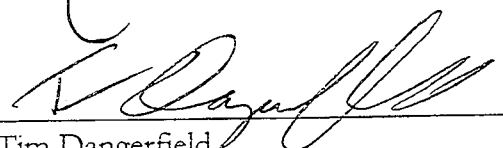
¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

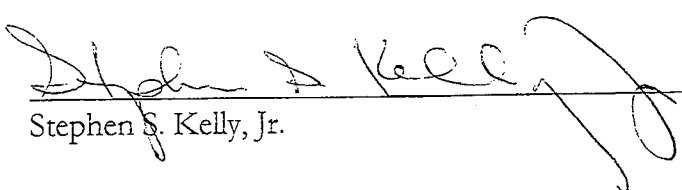
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers

Tim Dangerfield

Stephen S. Kelly, Jr.

Hearing Date: 11/30/11

Date Mailed: 12/9/11

Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

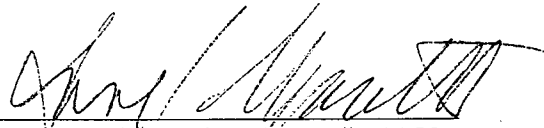
South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Memorandum Of Respondent Kim A. Legette
Regarding Appealability in the above referenced matter by depositing a copy of the same
in the United States Mail on February 13, 2012 to:

John S. Wilkerson, III, Esq.,
Nosizi Ralephata, Esq.
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston SC 29413
Attorneys For Appellant

Romi Y. Robinson, Esq.
S.C. Dept. of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
*Attorney For Respondent South Carolina
Department Of Employment Workforce*



Anne E. Mjaatvedt, SC Bar # 71158
ANNE MJAATVEDT LAW FIRM, LLC
39 Broad Street, Suite 208
Charleston, SC 20401
(843) 793-4240 (Telephone)
(843) 278-9239 (Facsimile)
anne@aemlawyer.com (E-mail)

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

Nosizi Ralephata

REPLY TO:

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1255

February 13, 2012

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
FEB 13 2012
SC Court of Appeals

Re: Nucor Corporation v. SCDEW
Court of Appeals Tracking No.: 2012206406
Our File No.: 5670.111

Dear Ms. Gee:

Enclosed please find the original and one copy of Appellant's Memorandum in Support of Appealability and the original and one copy of the Proof of Service in the above referenced matter. Please file the originals in your office and return a clocked copy with the courier. By copy of this letter, we are herewith serving a copy of the same on all other counsel of record. If you have any questions, please give us a call.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Nosizi Ralephata /uss

Nosizi Ralephata

NXR/adh
Enclosures

cc: Ms. Romi Y. Robinson
Ms. Anne E. Mjaatvedt
The Honorable Jana E. Shealy

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Court of Appeals Case Tracking No.: 2012206406

RECEIVED
FEB 13 2012
SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S MEMORANDUM IN SUPPORT OF APPEALABILITY

Other Counsel of Record:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

SUMMARY OF ARGUMENT

At its heart, this is a simple case of an employee who was terminated from her employment after she failed a workplace drug test administered on behalf of the employer in April 2010. Claimant thereafter sought unemployment benefits, and under normal circumstances, the case would have been resolved by December 2010 at the latest. However, the case has undergone full fact-finding hearings at the Appeals Tribunal on two separate occasions; has been appealed to the Appellate Panel of the South Carolina Department of Employment Workforce (hereinafter “Appellate Panel” or “Agency”) twice; has been appealed to the Administrative Law Court (hereinafter “ALC”) once; and this is Appellant’s second appeal to this Court. The legal issues on appeal fall squarely into the category of issues that are “capable of repetition yet constantly evading review.” The Appellate Panel’s initial unauthorized creation of an exception to the applicable statute based on an off-site independent test that was administered under completely different testing criterion, as basis for reinstating the Claimant’s unemployment benefits has caused the vicious cycle and confusion that is now synonymous with this case. And instead of dealing with this unauthorized creation of an exception to the statute as was required on appeal, the ALC chose instead, to affirm the Appellate Panel without legal basis or authority; improperly framed the legal issues presented as “an invitation to re-weigh the facts”; and remanded based on a red herring issue that had not been raised by Respondent.

The parties have exhausted their administrative remedies, including appealing the legal issues to the ALC. Because the issues raised to the ALC, including issues purportedly remanded for further proceedings have been determined with finality, this case is ripe for appeal pursuant to South Carolina Code Ann. § 1-23-380 and 610. As our Supreme Court observed in *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep’t of Health & Environmental Control*, 387 S.C. 265,

692 S.E.2d 894 (2010), “[t]he right of appeal arises from and is controlled by statutory law.” (citing *Ex parte U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)); see also Rule 201, SCACR. These statutes, by their express terms, permit immediate appellate review of a final order of the ALC and/or the Appellate Panel. The only issue that was remanded by the ALC for additional determination (whether the testing laboratory was certified as required under S.C. Code Ann. § 41-35-120(3)(iii)(C)) has been resolved by the Appellate Panel. The only options available to Appellant Nucor Corporation (hereinafter “Nucor”) are either to accept the ALC Order as the law of the case, or to seek appellate review.

From the beginning, Nucor has argued consistently that: (1) Neither the ALC Judge nor the Appellate Panel had authority to reinstate Legette’s unemployment benefits based on an off-site independent drug test performed after she indisputably failed two tests administered pursuant to Nucor’s Drug and Alcohol Policies; (2) Legette admitted failing the tests administered in compliance with South Carolina law and with Nucor’s drug policies; and (3) Legette’s third test was administered under a different detection standard and could not support a “contradictory results” finding as a matter of law. See, Petition for Judicial Review, attached hereto as Exhibit A. These issues were ignored by the ALC, and now form the basis of Nucor’s present appeal.

It is noteworthy that Legette’s appellate issues have been inconsistent at all levels of review, adapted at every turn in an effort to create factual issues where none otherwise exist. Even though she concedes the proper chain of custody had been followed, Legette initially appealed on the basis that the sample for her Nucor drug screen was improperly collected and handled (a contention clearly contradicted by her own sworn testimony). [June 2, 2010 Appeal]. When that argument failed, she then appealed on the basis that she does not smoke marijuana and that there were contradictory test results. [July 22, 2010 Appeal]. When the Appellate Panel

reinstated Legette's benefits based upon of the alleged "contradictory results," Nucor appealed to the ALC asserting that the Appellate Panel lacked authority to rely on an outside "independent" test. Instead of addressing these legal issues, the ALC remanded for further proceedings the sole issue of whether the testing laboratory was properly certified pursuant to South Carolina law, an issue that is irrelevant to the proper outcome of this appeal. And it is solely on the basis of the certification issue that the Appellate Panel reinstated Legette's benefits. However, even to the extent Nucor concedes the certification issue, Legette is not entitled to benefits because she failed two previous drug tests that complied with the Nucor's Drug and Alcohol Policies and South Carolina law. The failure by the ALC to address the legal issues not only constitutes legal error, but also works a gross injustice because it provides *carte blanche* to disgruntled private sector employees to thwart workplace drug and alcohol policies and procedures in contravention of South Carolina law.

SUMMARY OF FACTS

This appeal arises from Legette's termination on April 22, 2010, from Nucor's steel manufacturing plant in Berkeley County. On April 6, 2010, Legette was tested for drugs pursuant to Nucor's periodic random drug testing policy. Legette verified that the chain of custody had been fully satisfied. Legette also executed the Drug Testing Custody and Control Form certifying that she provided her specimen to the collector, that "the specimen used was sealed with a tamper evident seal in my presence," and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. [R. 28, 37, 40-41,43; Exhibit 4, R. 98-100; Exhibit 5, R. 102-104].¹ Legette's sample tested positive for 1.25 picograms per milligram of marijuana, which constitutes a basis for immediate termination. [R. 23; Exhibit 4, R. 101;

¹ The references to the Record pertain to the documents that form the ALC record on appeal.

Exhibit 6, R. 121]. Legette was adamant that she does not use illegal drugs, and she requested that another test be administered on behalf of Nucor. [Exhibit 1, R. 85-88].

When an employee requests a second test following a positive one, Nucor's standard practice is to administer the second test under a "level of detection"/"limit of detection" criterion. [Exhibit 5, R.103; Exhibit 7, R. 137; Claimant's ALC Response Brief, second page]. Pursuant to the "level of detection" criterion, any amount of marijuana/THC detected in a hair sample at or above .10 picograms per milligram is considered a positive result and is yet another basis for immediate termination. [R. 32]. Legette was aware that the second test administered April 15, 2010, would be performed as a "level of detection" test. [Exhibit 5, R. 103; Exhibit 7, R. 137; Claimant's ALC Response Brief, second page]. As part of the second test, she executed another Custody Form, which clearly indicates the test would be performed under the "level of detection" standard. [Id.] The results of that second test were .78 picograms per milligram of marijuana. Because the results exceeded .10 picograms per milligram of marijuana, the second test also was positive for marijuana and served as a basis for immediately terminating Legette for cause pursuant to Nucor's Drug & Alcohol Policy. [R. 38; Exhibit 5, R. 105; Exhibit 7, R. 136].

Prior to her termination on April 15, 2010, and after twice testing positive for marijuana through a process that she herself verified, Legette sought an additional 'independent' drug test that allegedly yielded a negative result. [R. 51-52, 54, 56; Agency's Supplement to ALC R.]. There is no evidence, neither has it ever been argued, that this third test was subject to the same level of detection standard utilized by Nucor. Regardless, it is undisputed that Nucor does not accept independent tests because it has no control over their administration and no assurances of their reliability.

PROCEDURAL BACKGROUND

Based upon the third, uncontrolled test, Legette sought unemployment benefits, asserting she had been wrongfully terminated and that Nucor improperly collected her hair sample. On May 26, 2010, the Claims Adjudicator notified Legette she was disqualified from receiving benefits based on her violation of Nucor's Drug Testing Policy. The Claims Adjudicator also found that failure to comply with company policies constitutes discharge for cause in connection with the work pursuant to S.C. Code Ann. § 41-35-120(2). [R. 13, 85].

Legette appealed to the Appeal Tribunal on June 2, 2010, on the basis that the Adjudicator's decision was in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. After a full evidentiary hearing, the Appeal Tribunal found Legette disqualified to receive benefits based on illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). [R. 274-276].

Legette then appealed to the Appellate Panel, this time on the alternate bases that she does not smoke marijuana and that there were contradictory test results. The Appellate Panel held a hearing on November 17, 2010, observed that the disparate testing results were of concern, and found that "*while an employer may not accept an off-site drug test*, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." [R. 1-2]. (Emphasis added) As a result, the Appellate Panel erroneously determined Legette was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4), and reversed the Appeal Tribunal's Decision. [R. 1-2].

On December 14, 2010, Nucor submitted a Petition for Judicial Review to the ALC, arguing that the Appellate Panel's acceptance of an independent drug test as controlling, with no

evidence that it comported with the statute, was in contravention of the statute's mandate and outside the scope of the Agency's authority. Nucor also argued that the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute. Nucor further argued that Legette's test was administered under a different detection standard and could form the basis of a "contradictory results" finding as a matter of law. These issues were presented as questions of law for the ALC to resolve. *See*, Nucor's brief to the ALC, attached hereto as Exhibit B.

On May 24, 2011, the Honorable Deborah Brooks Durden (hereinafter "Judge Durden") issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. In so holding, Judge Durden found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, *including the negative test results cited by the Appellate Panel in its order.*" Order, at p. 4. (Emphasis added). The order remanded to the Department on the single and narrow issue of whether disqualification from benefits comported with the requirements set forth under S.C. Code Ann. §41-35-120(3)(iii)(C) which deals with certification of the testing laboratories. *Id.* *See*, Exhibit C.

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" (Exhibit D) (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal in this Court challenging Judge Durden's application of S.C. Code Ann. §41-35-120(2) and (4) to the present dispute. Thereafter, this Court issued its October 13, 2011 Order dismissing the appeal as one that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority v. S.C.*

Dep't of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). *See*, Ct. App. October 13, 2011 Order, attached hereto as Exhibit E.

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order. At that Hearing, Nucor again presented testimony that it has a drug policy that was communicated to the Legette and that Nucor does not consider outside tests performed at an employee's request. Nucor objected to Legette's testimony regarding the outside test or any reference thereto throughout the hearing. The Appeal Tribunal issued a new decision on August 18, 2011, finding that the Claimant was indefinitely disqualified from benefits pursuant to S.C. Code Ann. § 41-35-120(3) and that the laboratory was certified as required under the Statute.

Legette again appealed to the Appellate Panel, raising as her sole issue that the Appeal Tribunal erred as a matter of law in finding that the laboratory was certified as required under the Statute. *See*, Claimant's Appeal to Appellate Tribunal, attached hereto as Exhibit F.

On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties "come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services." *See*, Appellate Panel correspondence attached hereto as Exhibit G.

On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the statute. On December 9, 2011, the Appellate

Panel issued its decision regarding the narrow issue of whether the laboratory was certified as contemplated pursuant to S.C. Code Ann. § 41-350120(3), which provides that a testing laboratory must be certified by the NIDA, CAP or SLED. The Appellate Panel held that the laboratory was not certified at the time of the subject test as required. Neither party appealed this decision, which is a final order pursuant to S.C. Code Ann. § 1-23-380 and became the law of the case.

Nucor filed a Notice of Appeal in this Court asserting that Judge Durden's Order is now final since the only issue on remand had been disposed of by the Appellate Panel. Nucor also explained that the Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct and that the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B) had now been ruled on.

Since neither party appealed the Appellate Panel's decision regarding the issue of the laboratory's certification (the only issue remanded), the ALC's Order is now final as to all issues raised to that body by Appellant and comprises a final order which is ripe for appeal under well-established precedent.

ARGUMENT

I. STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-610(A)(1) (Supp.2009) provides that judicial review may only be sought from a *final* decision of the ALC. *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010). (Emphasis in original). If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Id.* citing *Hooper*

v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

Pursuant to S.C. Code Ann. § 1-23-380(A)(6), an Agency's decision may be reversed or modified if it exceeds the Agency's authority, is affected by other error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. For purposes of the substantial evidence test, "substantial evidence is not 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 the administrative agency reached in order to justify its action." *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. South Carolina Public Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

In addition, "[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Smith v. Regional Medical Center of Orangeburg and Calhoun Counties*, 2011 WL 2535556, 1 (Ct. App. 2011), quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). See also, *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). Both the ALC and the

Court of Appeals are free to decide matters of law with no particular deference to the fact finder. S.C. Code Ann. § 1-23-610 (B)(a) and (d) (Supp. 2009). *See also, Pressley v. REA Constr. Co.*, 374 S.C. 283, 287–88, 648 S.E.2d 301, 303 (Ct. App. 2007).

II. THE APPEAL IS RIPE FOR ADJUDICATION AND SHOULD NOT BE DISMISSED.

The questions presented to the ALC, and which form the bases of this appeal require construction of S.C. Ann. § 41-35-120 to determine whether, in analyzing eligibility for unemployment benefits, the statute permits the Agency (or the ALC) to rely upon third-party drug tests *not* performed on behalf of the employer and using a detection criterion that differs from that utilized by the employer.² The statute in question provides, in relevant part, as follows:

An insured worker is ineligible for benefits for:

* * * * *

(2) Discharge for cause connected with the employment. . . .“Cause connected with the employment” as used in this item requires more than a failure in good performance of the employee as the result of inability or incapacity.

(3)(a) Discharge for illegal drug use, and is ineligible for benefits . . . if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label

² These issues are largely the same issues that formed the bases of Nucor’s appeal to the ALC. *See, Appellant’s ALC Briefs, including Statement of Issues on Appeal.*

test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.

....

(4) Discharge for gross misconduct, . . . if he is discharged due to:

(i) wilful or reckless employee damage to employer property that results in damage of more than fifty dollars;

(ii) employee consumption of alcohol or being under the influence of alcohol on employer property in violation of a written company policy restricting or prohibiting consumption of alcohol;

(iii) employee theft of items valued at more than fifty dollars;

* * * * *

S.C. Code Ann., § 41-35-120.

On appeal to the ALC, Nucor presented legal issues for review by the ALC Judge. Nucor also requested that the ALC Judge interpret and apply the plain language of the statute. Nucor further raised the issue that in actuality, while purporting to rely on Section 41-35-120(4) as basis for overturning the Appeal Tribunal, the Appellate Panel in effect, crafted an unauthorized exception to Section 41-35-120(3) by relying on off-site drug test results not administered on behalf of the employer. The legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains a non-statutorily compliant drug test after failing a statutorily-compliant company drug test. Indeed, the legislature did not provide *any* exception

under which the Commission can disregard the mandate of Section 41-35-120(3); and thus, the Appellate Panel acted outside the scope of its authority as a matter of law.

However, on May 24, 2011, Judge Durden issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. [May 24, 2011 Order, at p. 4]. In so holding, the Judge Durden improperly relied on the Appellate Panel's unauthorized creation of an exception to the statute, including the Appellate Panel's erroneous ruling that there were "contradictory test results." The ALC then remanded the case to the Department on the single and narrow issue of whether the laboratory was certified as required under S.C. Code Ann. §41-35-120(3)(iii)(C). *Id.*

The Appellate Panel heard argument on the certification issue and held the laboratory was not certified. Neither party appealed that ruling; thus, all the issues forming the basis of Nucor's appeal to the ALC have now been decided with finality.

South Carolina Code Ann. § 1-23-610 provides for appellate review of final judgment of the ALC. The ALC's Order is final and constitutes the law of the case unless appealed because all issues have been decided; thus, the ALC's order is the law of the case as to interpretation Section 41-35-120 and its application to the facts of this case. It is also just as clear that if, as a matter of law, neither the Appellate Panel nor the ALC had authority to make *any* findings based on the outside test, there would be no "contradictory" results to speak of and no basis upon which to challenge termination under Section 41-35-120(2) and (4).

Similarly, the *Charlotte-Mecklenburg* decision emphasizes the long-standing rule that a final order is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* provides that "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what

has been determined.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where “there is some further act which must be done by the court prior to a determination of the rights of the parties.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission.

Here, the ALC’s Order concluded, as a matter of law, that Nucor’s arguments regarding S.C. Code Ann. § 41-35-120(2) and (4) lacked merit, and this ruling impermissibly relied on the Appellate Panel’s erroneous conclusion that an outside test was not only authorized under the statute, but also constituted a proper basis for reversing the Appeal Tribunal’s decision. Moreover, the only issue remanded by the ALC has now been conclusively resolved. Now that the issue on remand has been determined with finality, the ALC’s Order is final, and the only opportunity that Nucor has resolve these legal issues (issues that are capable of repetition but have thus far evaded review) is by appeal to this Court.

The ALC’s reliance on the Appellate Panel’s finding regarding “contradictory” test results has no legal support, is contrary to South Carolina law and Nucor’s policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at Nucor’s facility. Further, the ALC order is final and warrants appellate review given its far reaching consequences on South Carolina employers, as well as for its potential to pave the way for future instances of unauthorized reliance on outside tests as a means to challenge otherwise proper and justified terminations for cause. The ALC order unjustifiably eviscerates Nucor’s drug policies, of which Legette was apprised and to which she consented, and imposes an

obligation on Nucor and potentially all employers to accept off-site drug testing results without justification or legal authority. Left unchallenged, the ALC Order (and the underlying Appellate Panel Order) will require virtually every South Carolina employer to accept outside drug test results proffered by terminated employees seeking unemployment benefits in spite of their violation of known drug and alcohol policies.

These issues are ripe for appeal. To hold differently, and to dismiss this appeal, would contravene South Carolina law and work a gross injustice upon Nucor and all similarly situated South Carolina employers. Absent immediate review in this Court, there is nothing left to be done except to execute the erroneous final orders of the ALC and the Appellate Panel.

CONCLUSION

For all of the reasons stated herein, Nucor respectfully submits that its appeal is proper and the issues raised therein are ripe for immediate adjudication.

Respectfully submitted,

Nosizi Ralephata /css

Nosizi Ralephata

Turner Padget Graham & Laney P.A.

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, SC 29413

Telephone: 843-576-2807

Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

February 13, 2012
Charleston, South Carolina

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

February 6 2012

Nosizi Ralephata, Esq.
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413

Re: Nucor v. SC DEW and Kim Legette
Request for Transcript

Dear Ms. Ralephata:

We have received your request for a transcript of the hearing before the Appellate Panel on November 30, 2011. Appellate Panel hearings are not recorded and there would not be a transcript.

If you have any further questions, please contact me.

With kind regards, I am,

Sincerely,

Derrick McFarland, Esq.
General Counsel
SC Dept. of Employment and Workforce

cc: Anne E. Mjaatvedt, Esq.
Tanya Gee, Clerk SC Court of Appeals
Jana E. Shealy, Clerk SC Administrative Law Court

RECEIVED
FEB 08 2012
FEB 08 2012
SC Court of Appeals

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

February 6, 2012

Ms. Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED

FEB 07 2012

SC Court of Appeals

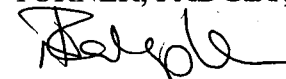
Re: In the Matter of Kim A. Legette v. Nucor Corporation and S.C. Department of
Employment and Workforce
Decision Number: 2011-P-2740; Appeal Number: 10129-15740
Our File Number: 5670.111

Dear Ms. Gee:

Please find enclosed the original and one copy of our Motion for Extension n the referenced matter, along with our check in the amount of \$25.00. Please cause the Motion to be filed and return the copy to us in the self-addressed stamped envelope enclosed.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/kmm

Enclosures

cc: Ms. Anne E. Mjaatvedt
Mr. Romi Y. Robinson

TPGL 4278604v1

TPGL 4278604v1

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED

FEB 07 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

MOTION FOR EXTENSION

The Appellant, by and through its undersigned attorneys, pursuant to Rule 224 of the South Carolina Appellate Court Rules, hereby moves for a thirty day extension of time in which to file and serve its Initial Brief, now due on February 9, 2012. This request is made to allow counsel to address the Court's February 2, 2012 request for a brief regarding the appealability of the issues raised herein. Counsel for Kim A. Legette consents to this Motion.

For these reasons, Appellant respectfully requests that this Court extend its deadline for filing and serving the Initial Brief until March 12, 2012.

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT

February 6, 2012

Other Counsel of Record:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

RECEIVED

FEB 07 2012

The Honorable Deborah Brooks Durden

SC Court of Appeals

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

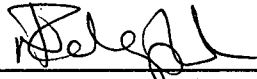
PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that on February 6, 2012, copies of the **Motion for Extension** was served upon the following counsel of record by depositing those copies in the United States Mail, postage prepaid, to:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT

February 6, 2012



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 2, 2012

John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Turner, Padgett, Graham,
& Laney, P.A.
P.O. Box 22129
Charleston, SC 22129

Re: Nucor Corp. v. SCDEW(2)
Case Tracking #: 2012206406

Dear Counsel:

This will acknowledge receipt of your Notice of Appeal from the order of the Honorable Deborah Brooks Durden dated May 24, 2011 in the above entitled matter. A preliminary review of the accompanying order shows it might not be appealable.

Accordingly, it is requested that you submit a memorandum to the court addressing the issue of appealability within ten (10) days of the date of this letter. Opposing counsel may also submit a memorandum addressing the matter within the same time period. Upon receipt of the memoranda, the matter will be taken under consideration and you will be notified as soon as action has been taken.

The time limits for perfecting the appeal are held in abeyance pending the court's decision of appealability.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 26, 2012

John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Turner, Padgett, Graham,
& Laney, P.A.
P.O. Box 22129
Charleston, SC 22129

Re: Nucor Corp. v. SCDEW
Case Tracking #: 2012206406

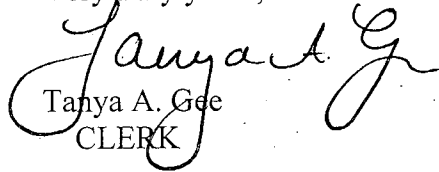
Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within 10 days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,


Tanya A. Gee
CLERK

TAG/ec

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Docket No. 10-ALJ-22-0938-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

RECEIVED

JAN 10 2012

SC Court of Appeals

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

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, a 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, and 1-23-600(D) (Supp. 2010); 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). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

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. Dep’t 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)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

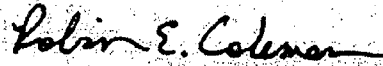


Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
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

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

Nosizi Ralephata

REPLY TO:

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1255

January 9, 2012

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

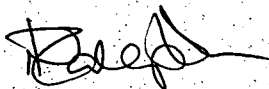
Re: Kim A. Legette v. Nucor Corporation
Appeal 10129-15740
Decision No.: 2011-P-2740
Our File No.: 5670.111

Dear Ms. Gee:

Enclosed are the following materials: (1) the original and one copy of the Notice of Appeal, and (2) the original and one copy of the Proof of Service along with our firm's check in the amount of \$100.00 for the filing fee. Please file the originals and return the stamped copies to me in the enclosed self addressed, postage paid envelope. Thank you for your kind assistance.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NXR/adh
Enclosures

cc: Ms. Ann E. Mjaatvedt
Ms. Romi Y. Robinson
Ms. Jana E. Shealy

RECEIVED
JAN 10 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

NOTICE OF APPEAL

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011. Appellant received written notice of the entry of this Order on May 24, 2011. Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct, and as basis for her ruling, the ALC Judge relied on offsite independent test results. However, she remanded to the

RECEIVED

JAN 10 2012

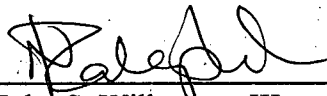
TPGL 4227866v1

SC Court of Appeals

lower tribunals the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B).

The South Carolina Department of Employment Workforce Appellate Panel issued its Order regarding the laboratory's certification and whether such certification comports with the Statute's mandate on December 9, 2011, and Appellant received a copy of the Order on or about December 12, 2011. The Appellate Panel's Order is not attached because Appellant are not challenging the decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory. As a result, Judge Durden's Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT

January 9, 2012

Other Counsel of Record:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

RECEIVED
JAN 10 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

RECEIVED

JAN 10 2012

SC Court of Appeals

The undersigned, an attorney in this matter for the Appellant, certifies that on January __,
2012, copies of the **Notice of Appeal** were served upon the following counsel of record by
depositing those copies in the United States Mail, postage prepaid, to:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

The undersigned further certifies that a copy of the **Notice of Appeal** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III
Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2801
fax: (843) 576-1649
Email: JWilkerson@TurnerPadget.com
NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT

January 9, 2012

FIRST CLASS

Hasler

01/09/2012

US POSTAGE

FIRST-CLASS MAIL

\$01.68⁰



ZIP 29401
011D11610850

First Class Mail

FIRST CLASS

FIRST CLASS

FIRST CLASS

FIRST CLASS



TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

EXHIBIT A

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Nosizi Ralephata

E-Mail: NRalephata@TurnerPadget.com
Writer's Direct Dial: (843) 576-2807
Direct Fax: (843) 577-1655

December 14, 2010

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Petition for Judicial Review
In the Matter of Kim A. Legette v. Nucor Corporation and S.C. Department of
Employment and Workforce
Order of Appellate Panel Decision, dated November 19, 2010
Decision No. 2010-C-2253
Appeal No. 10377-11778
Our Client -- Nucor Corporation

Dear Ms. Shealy:

Please accept this letter as a **Petition for Judicial Review** pursuant to S.C. Code Ann. § 41-35-750 and Rule 33 of the Rules of Procedure for the Administrative Law Court, and our check for filing fee in the amount of \$100.00. Consequently, on behalf of our client, Nucor Corporation, we hereby request an administrative review of the above-identified Appellate Panel Decision. We have enclosed a copy of the questioned decision for your convenience, and copies of our Hearing Transcript Request and Certificate of Service. A copy of the decision was mailed on November 19, 2010 and received by Nucor Corporation ("Nucor") on November 22, 2010, which is, of course, less than 30 days prior to date of the Petition for Judicial Review. Nucor Corporation's Human Resources contact and representative is Ms. Meleah B. Reynolds, at P.O. Box 2259, Mount Pleasant, SC, 29465; telephone number: (843) 336-6668. The undersigned is attorney for Nucor Corporation and can be contacted using the above information.

On November 17, 2010, the Appellate Panel reversed the Appeal Tribunal's decision, and determined that the Claimant, Ms. Kim A. Legette ("Claimant") was eligible for benefits effective April 18, 2010, for having been separated under non-disqualifying circumstances. For the reasons set forth in detail below, it is evident that the Appellate Panel's Decision is erroneous

TPGL 3559438v1

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 2

and unsupported by the facts and the law, and has potential far-reaching consequences for substantially all South Carolina employers.

Nucor's steel manufacturing plant is a heavy industrial facility that employs approximately 900 hundred employees. In order to create as safe a work environment as possible, Nucor implemented a zero tolerance policy with regard to illegal drug and substance use. Pursuant to its Drug & Alcohol Policy, Nucor regularly conducts random drug tests weekly on all employees, including the Plant Manager. The disciplinary action for violation of the policy concerning illegal drugs is set forth in Nucor's Policy E-3-6, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." At the beginning of the employment relationship, each employee is provided with an Employee Handbook that contains Nucor's Drug & Alcohol Policy. Claimant was provided with a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. Claimant was at all relevant times, aware of the Drug & Alcohol Policy, and had been subject to random drug tests at Nucor on previous occasions.

In compliance with its Drug & Alcohol Policy and the South Carolina Workforce/Employment Rules and Regulations, Nucor partnered with AccuDiagnostics, a national provider of diagnostic testing, to process its employees' drug test samples. AccuDiagnostics is SAMHSA-certified and reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process. Accudiagnosics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Safety Office. The Safety office then notifies those selected for testing, and provides them with 24 hours to report to the Safety Office for testing.

On April 6, 2010, Claimant was tested for drugs randomly pursuant to Nucor's periodic random drug testing policy. Hair samples were collected at the plant from the 15 employees that had been selected for testing that week. Claimant's samples were taken by a certified Nurse Practitioner employed by Nucor, and the samples were sent to Accudiagnosics' testing laboratory in Mogadore, Ohio. Further, Claimant completed Step 5 of the Drug Testing Custody and Control Form, certifying that she provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. That hair sample taken from Claimant tested positive for 1.25 picograms per milligram of marijuana.

Once an employee tests positive for drugs, that employee meets with the Plant Manager to discuss and determine whether the employee prefers to resign voluntarily in lieu of termination. However, if during that meeting with the Plant Manager, the employee is adamant

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 3

that they did not use any illegal drugs or substances, the Plant Manager offers them the opportunity to undergo a second drug test. The Plant Manager also explains that if an employee opts to undergo a second test, that second test will not be subject to a "limit of detection" minimum cut-off amount, but that the results will be based on any detectable amount above .10 picograms per milligram of marijuana. In other words, any amount of marijuana that is above .10 picograms per milligram of marijuana would be a positive result. Claimant opted to undergo a second test on April 15, 2010, and the results of that second test were .78 picograms per milligram of marijuana. Because the results were above .10 picograms per milligram of marijuana, the second test was also positive for marijuana, and thus, basis for immediately terminating Claimant for cause pursuant to Nucor's Drug & Alcohol Policy.

However, prior to her termination, on April 15, 2010, after testing positive for marijuana twice at Nucor, through a system that she verified herself as having followed the chain of command, Claimant, later the same day, sought an additional independent drug test outside Nucor, which allegedly came back negative for drugs. Based on this independent negative test result, the Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free."

Even assuming for purposes of argument that Claimant did indeed obtain a negative drug test result outside the Nucor facility, there is no question that Claimant was tested at Nucor, according to its drug testing policies and procedures, in compliance with South Carolina laws, and was positive for marijuana on two separate occasions. Nucor, like any employer, is entitled to rely upon drug tests conducted by an outside, certified laboratory for the safety of all employees. The Appellate Panel's Decision is premised on two faulty assumptions: (1) That the independent test that Claimant sought was administered using the same administrative minimum requirement for detecting any amount above .10 picograms per milligram of marijuana; and (2) Nucor should have somehow ignored the two positive drug test results in favor of Claimant's independent test results obtained outside of Nucor, and under unknown conditions. Both assumptions have no legal support, are contrary to South Carolina law and Nucor's policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at its facility.

Pursuant to S.C. Code Ann. § 41-35-120, an employee is disqualified for benefits if she is terminated for cause as follows:

Disqualification for benefits.

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 4

(2) Discharge for cause connected with the employment.

(b) An insured worker is considered to have been discharged for cause pursuant to this item, and is ineligible for benefits if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) any initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or more accurate scientifically accepted methods approved by the National Institute on Drug Abuse

See, S.C. Code Ann. § 41-35-120

Both of the drug tests leading to Claimant's termination were conducted by an outside laboratory, and in compliance with S.C. Code Ann. § 41-35-120. The samples were obtained by a Certified Nurse Practitioner. Both Claimant and the Nurse Practitioner acknowledged in writing that the chain of custody had been complied with. The samples were tested by a national laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division, and were confirmed positive in compliance with S.C. Code Ann. § 41-35-120(2).

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 5

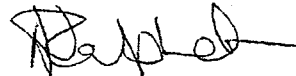
The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site independent drug test where there was evidence that Claimant had failed two drug tests administered in compliance with South Carolina law and with Nucor's drug policy. Further, the Appellate Panel's Decision is of great importance and warrants Judicial Review because of its far reaching consequences on South Carolina employers. Based on the Appellate Panel's Decision, arguably, virtually every employer in South Carolina will be required to accept outside drug test results proffered by disgruntled employees and will owe them unemployment benefits in spite of their violation of the employer's drug and alcohol policies. Outside drug tests are completely out of an employer's control, and there is no way to verify whether the alleged negative results were obtained by an employee through valid means. The Appellate Panel's Decision must therefore be struck down to ensure that every employer's legal right to enforce drug and alcohol policies designed for the protection of its employees is preserved.

As a result, we submit this Petition for Judicial Review on the grounds that Claimant was terminated for cause after failing two drug tests administered by an independent laboratory at the Nucor facility. The Appellate Panel's decision basically and unjustifiably eviscerates Nucor's drug policies, which Claimant was aware of while she was an employee, and instead, imposes an obligation on Nucor to accept off-site independent drug results, without justification or legal authority.

The evidence presented to the Appellate Panel indisputably establishes that Nucor Corporation complied with employment laws of this State and terminated Claimant for cause. As noted by the Appellate Panel, there is no requirement that Nucor Corporation accept off-site independently administered drug tests, and the Appellate Panel's Decision is not supported by the law and the evidence.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/kmm
Enclosures

cc: Ms. Kim A. Legette
Legal Department – S.C. Department of Employment and Workforce
Mr. Cary Farris

TPGL 3559438v1

November 19, 2010

**SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina**

LETTER OF TRANSMITTAL OF APPELLATE PANEL DECISION

Attached is a copy of the Appellate Panel Decision in your case. If you have questions about the effect of the decision, you may consult an agency representative at the local SCDEW office in your area or at the Benefits Division at the central office in Columbia, S.C.

If you wish to obtain judicial review of the decision, you must comply with the requirements of S.C. Code Ann. §41-35-750 and the Rules of Procedure for the Administrative Law Court.

The law requires that a Petition for Judicial Review must be filed and served within thirty (30) days after the agency's final decision (**see the mailing date above**). The Court may require a filing fee.

The Petition must be filed in the S.C. Administrative Law Court in Columbia, South Carolina:

**Jana E. Shealy, Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
803.734.0550 (phone)**

RECEIVED
NOV 22 2010

RECEIVED
NOV 22 2010

You must name the SCDEW and any other party in the case as defendants in the action and you must serve a copy of the Petition for Judicial Review at the following address:

**Legal Department
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202**

For assistance or guidance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Legette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)

Nucor Corporation)
c/o Human Resources)
PO Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

APPELLATE PANEL
DECISION

NUCOR STEEL BERKELEY

LEV 22 2010

MELEAH REYNOLDS

Appellant: Claimant

The claimant appealed Appeal Tribunal Decision 2010-A-11555 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified for having been discharged for cause connected with the work. This decision modified the claims adjudicator's determination.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2010-A-11555 is reversed. The claimant is eligible for benefits effective April 18, 2010, for having been separated under nondisqualifying circumstances.

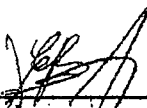
The claimant worked for the employer from August 24, 1998, through April 22, 2010, as a cold mill scheduler. The claimant was discharged after testing positive for an illegal drug in a random drug screen. The claimant asserted the drug testing was faulty. The claimant had previously tested positive for 6.25 picograms per milligram of marijuana on February 13, 2010, only to test negative ten days later. On April 6, 2010, she tested 1.25 picograms and then retested a trace amount of .78 on April 15, 2010. The claimant underwent testing at a different facility that used the same laboratory as the employer and tested negative for any drugs on three occasions, including April 15, 2010. The claimant was adamant that she did not use drugs, and

although the employer stated they do not accept off-site drug testing results, the claimant's drug expert made a point of using the same laboratory so they could be assured the testing was not undermined. The process of collecting the samples was different and may have made a difference in the results, according to the claimant's drug testing expert.

S.C. Code Ann. § 41-35-120 (4) requires that an indefinite benefit disqualification be imposed when the Department finds that a claimant has been discharged for gross misconduct connected with the employment. "Gross Misconduct" includes failure to comply with drug use regulations.

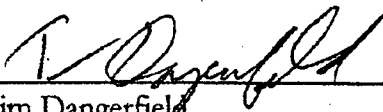
The burden of proving that a claimant has been discharged for cause rests with the employer and after a thorough review of the evidence in this case we have concluded that the employer has not met that burden. The disparate testing results concern us and while the employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free. Therefore, we find the claimant was separated under nondisqualifying circumstances and the Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**

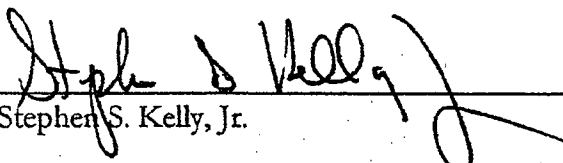


E. B. Ayers

Hearing Date: 11/17/10
Date Mailed: 11/19/10
Mailed By: _____



Tim Dangerfield



Stephen S. Kelly, Jr.

In the Matter of Kim A. Legette v. Nucor Corporation
Decision No. 2010-C-2253
Appeal No. 10377-11778

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2010, a copy of the *Petition for Judicial Review*
and Hearing Transcript Request has been served upon the following by placing same in the
United States Mail, postage prepaid, to:

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Legal Department
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

Ms. Kimberly A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418

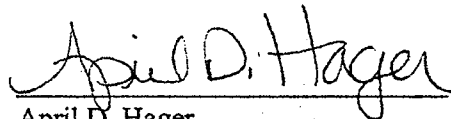

April D. Hager

EXHIBIT B

STATE OF SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

INITIAL BRIEF OF NUCOR CORPORATION

Ms. Nosizi Ralephata
Turner Padgett Graham & Laney, PA
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Phone: 843-576-2807
Email: nralephata@turnerpadgett.com
Attorney for Appellant Nucor Corporation

Ms. Romi Y. Robinson
Legal Department-Dept. of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
Phone: 803-737-2666
Email: legal@dew.sc.gov
Attorney for Agency/Respondent

Ms. Kim A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418
Phone: 843-709-7073
Email: kimlegette@yahoo.com
Claimant/Respondent

FILED

FEB 17 2011

SC ADMIN. LAW COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
I. THE APPELLATE PANEL'S REVERSAL OF THE APPEAL TRIBUNAL'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	1
II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35- 120(3)	1
III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	1
IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	9
ARGUMENT	10
I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	10

II.	THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3)	15
III.	A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	17
IV.	THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY	21
	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Curtis v. Mississippi Employment Sec. Com'n</i> , 878 So. 2d 1094 (Miss. Ct. App. 2004).....	19, 20
<i>Deese v. South Carolina State Bd. of Dentistry</i> , 286 S.C. 182, 184- 5, 332 S.E.2d 539, 541 (Ct. App. 1985).....	10
<i>Farm Fresh Dairy, Inc. v Blackburn</i> , 841 P2d 1150, (Okla. 1992).....	20
<i>Grace Drilling Co. v. Director of Labor</i> , 31 Ark. App. 81, 790 S.W.2d 907 (1990).....	21
<i>Lee v. South Carolina Employment Sec. Commission</i> , 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982)	13, 18
<i>McNabb v. Department of Revenue</i> , 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005)	20
<i>Milliken & Co. v. SC Emp. Comm'n</i> , 315 SC 492, 445 SE2d 640 (1994)	15, 16, 18
<i>Overstreet v. Dept. of Employment Sec.</i> , 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988).....	20
<i>Pressley v. Lancaster County</i> , 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).....	10
<i>South Carolina Dept. of Corrections v. Mitchell</i> , 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008).....	10
<i>Stewart v. Duke Mfg. Co.</i> , 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009).....	20
<i>Stone Mfg. Company v. S. C. Employment Security Commission, et al.</i> , 219 S.C. 239, 64 S.E.2d 644 (1951)	13
<i>Waters v. S.C. Land Res. Conservation Comm'n</i> , 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)	10

Statutes

S.C. Code Ann. § 1-23-380(A)(6) (2005)	10, 24
S.C. Code Ann. § 41-35-120.....	1, 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24

Treatises

78 ALR4th 180 § 5-7, "*Drugs-Unemployment Compensation*." 14

STATEMENT OF ISSUES ON APPEAL

- I. THE APPELLATE PANEL'S REVERSAL OF THE APPEAL TRIBUNAL'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW.
- II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3).
- III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.
- IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY.

STATEMENT OF THE CASE

Nucor Steel Berkeley ("Nucor" or "Employer") is a steel manufacturing plant located in Berkeley County, South Carolina, which has approximately 900 hundred employees. Ms. Kimberly A. Legette ("Ms. Legette" or "Claimant") was an employee of Nucor from August 24, 1998 until her termination on April 22, 2010. [ROA 23]. In order to create and ensure a safe work environment, Nucor maintains a zero tolerance policy with regard to illegal drug and substance use. [Exhibit 1, ROA 86-88]. At the beginning of the employment relationship, each employee is provided an Employee Handbook that contains Nucor's Drug and Alcohol Policy. [ROA 24]. Claimant was provided a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. [ROA 28-29; Exhibit 3, ROA 97].

Pursuant to its Drug and Alcohol Policy, Nucor regularly conducts random drug tests. All employees, including the Plant General Manager, are subject to random testing. [ROA 24; Exhibit 1, ROA 86-88]. The consequences for violating the Drug and Alcohol Policy are set forth at Page E-5, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." [Exhibit 1, ROA 88]. Claimant was at all relevant times aware of the Drug and Alcohol Policy and the consequences of violating it, and had been subject to random drug tests at Nucor on previous occasions. [ROA 42; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Nucor's drug testing policies and procedures do not permit or otherwise consider any off-site, independent drug tests obtained by an employee on the employee's own initiative. [ROA 25, 27, 58].

Nucor's drug testing policies and procedures were designed to comply with South Carolina Code Ann. § 41-35-120. To ensure compliance with the statute, Nucor partnered with Omega Laboratories, a national provider of diagnostic testing, to process its employees' drug test samples. [ROA 20-21, 25-27, 70-72]. Omega is certified by the College of American Pathologists and the U.S. Department of Health and Human Services, and is also SAMHSA-certified. Thus, its credentials are beyond dispute. [ROA 27, 69-70; ROA 89-96]. Omega reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process, as required under S.C. Code Ann. § 41-35-120. [ROA 27, 69-70; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85]. In addition, Nucor also partnered with Accudiagnosics LLC., to be its third party administrator for the drug testing program. [ROA 68-69]. Accudiagnosics is responsible for generating the random drug testing selections and facilitates the processing and reporting of the drug test results. [Id]. Accudiagnosics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Nucor Safety Office. [Exhibit 6, ROA 123]. The Safety Office then notifies those selected for testing via internal e-mail. [ROA 42].

On April 6, 2010, Claimant was selected and tested for drugs pursuant to Nucor's periodic random drug testing policy. [ROA 23, 35 - 36]. Hair samples were collected at the plant from Claimant and the 14 other employees randomly selected for testing that week. [ROA 71-75; Exhibit 6, ROA 123]. Claimant's samples were collected by a certified Nurse Practitioner [Exhibit 8, ROA 272-273] employed by Nucor, and the samples were sent to Omega's testing laboratory in Mogadore, Ohio. [ROA 25, 28, 35-

37, 81-82; Exhibit 6, ROA 127-128]. The collection process involves multiple steps, each of which is documented, and the employee/donor verifies in writing that each step has been followed in his or her presence. The following is a summary of the steps taken in the collection process:

- (1) At the time that an employee enters the testing room, he or she is provided with a Drug/Alcohol Authorization and Release Consent Form ("Release"). The Release requires the employee to fill out their full name and give Nucor authorization to collect a sample for processing by an accredited and certified laboratory. Refusal to sign the Release results in immediate termination as outlined in Drug and Alcohol Policy [Exhibit 1, ROA 86-88]. Claimant executed the Release for both the initial confirmatory test on her hair sample collected on April 6, 2010, and the second test of April 15, 2010. [ROA 28; Exhibit 4, ROA 98; Exhibit 5, ROA 102].
- (2) The second step involves the completion of the drug Testing Custody and Control Form ("Custody Form"). The Custody Form is filled out in the presence of the employee, and outlines each step of the collection process. The employee is given the option to choose what part of the body they would like the hair sample to be collected from. The Nurse then collects the sample and places it in an envelope, which is sealed in front of the employee. Claimant requested that the hair sample be taken from her head for both the April 6, 2010 and April 15, 2010 tests. [ROA 28, 37, 40; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (3) After the sample is sealed in the envelope, Section 5 of the Custody Form is required to be executed by the employee, which certifies that the employee provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. Claimant signed Section 5 of the Custody Form, and verified that the chain of custody had been followed and that her sample had been collected as specified on the Custody Form for both the April 6, 2010 and April 15, 2010 tests. [ROA 43-44, 48-49; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (4) The Custody Form is then placed in a plastic bag, together with the envelope containing the sample, and the plastic bag is deposited in a lock box in the presence of the employee. Claimant admitted at the Hearing that this step was completed in her presence for both the

April 6, 2010 and April 15, 2010 tests. [ROA 43; Exhibit 4, ROA 99-101; Exhibit 5, ROA 103-104].

- (5) After the sample is collected and deposited in the lock box, employees are provided with yet another verification step: they have to complete a Drug Testing Procedure for Post Incident and Random Drug Screen form ("Post Incident Form"). This Form requires the employee to confirm that the Release/Consent form was explained; - the option of choosing where the hair sample would be collected from was provided; - the instruments were cleaned with alcohol wipes prior to collection; - the hair sample was placed in the envelope in the presence of the employee; - the employee was required to witness the sealing of the pouch containing their hair sample; and - the employee was provided with a copy of the Custody Form. Again, Claimant executed the Post Incident Form (- for both the April 6, 2010 and April 15, 2010 samples), and checked "Yes" to all the questions (with the exception of the question relating to pubic hair collection, which did not apply as she opted to have her sample collected from her head). [ROA 28, 37, 40-41, 43, 48; Exhibit 4, ROA 100; Exhibit 5, ROA 104].

The hair sample collected from Claimant on April 6, 2010 was confirmed positive for 1.25 picograms per milligram of marijuana (THC), an illegal substance. [ROA 23; Exhibit 4, ROA 101; Exhibit 6, ROA 121]. Pursuant to Nucor's Drug and Alcohol Policy, disciplinary action testing positive is immediate termination. [Exhibit 1, ROA 85-88].

After testing positive for marijuana on April 6, 2010, Claimant, like any other employee that tests positive for illegal drugs, was provided an opportunity to meet with the General Manager to discuss and determine whether she preferred to resign voluntarily in lieu of termination. [ROA 23-25]. Claimant was adamant that she did not use any illegal drugs or substances and opted to undergo a second test at Nucor on April 15, 2010 instead of voluntarily resigning. [*Id.*] As is standard practice, for the second test Nucor required and requested that Claimant's sample be tested pursuant to a "level of detection"/"limit of detection" standard. [ROA 30, 36; Exhibit 5, ROA 102-105; Exhibit

7, ROA 136]. Under the "level of detection" standard, any amount of marijuana/THC detected in Claimant's hair sample at or above .10 picograms per milligram is considered a positive result and is basis for immediate termination. [ROA 32]. Claimant was aware that the second test would be performed as a "level of detection" test, and she executed the Custody Form on April 15, 2010, which clearly indicates that the test would be performed under the "level of detection" standard. [Exhibit 5, ROA 103; Exhibit 7, ROA 137]. Likewise, her toxicology expert testified that the April 15, 2010 test was a "limited detection test," which is "below the limit of detection on a standard test." [ROA 63-64].

In addition to Claimant's verification that Steps 1-5 above had been complied with during the second test, Claimant's Manager was also present and witnessed the entire process. [ROA 37, 47]. At no point did Claimant object to the manner in which the sample was collected. [ROA 39]. She admitted that Nucor's nurse was "professional about [collecting the sample]. She cleaned the scissors which I had not seen done before, cleaned the area, and cut my hair, and that was the first test..." Further, Claimant testified that she observed the nurse collect the sample and place it in an envelope which she then sealed, placed in a lock box, and Claimant signed and dated the envelope. [ROA 43-44, 48-49]. Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse in collecting Claimant's hair sample and forwarding it to the processing laboratory was proper and correct. [ROA 60-61]. He further testified that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62].

The results of Claimant's second test showed .78 picograms per milligram of marijuana. [ROA 38; Exhibit 5, ROA 105; Exhibit 7, ROA 136]. Because the amount of marijuana detected exceeded .10 picograms per milligram, the second test was also a positive test for marijuana and grounds for immediately terminating Claimant pursuant to Nucor's Drug and Alcohol Policy. Accordingly, Claimant was terminated upon Nucor's receipt of the second test results on April 22, 2010.

Prior to her termination and after her second test, Claimant allegedly took an additional independent drug test which she alleges came back negative for drugs. [ROA 51-52, 54, 56]. Although Claimant alleges that her negative independent test was performed on the same day as her second Nucor test (April 15, 2010), she did not produce any documentation evidencing when the independent test was performed, nor what criterion or level of detection was used for that independent test. In fact, *Claimant did not produce the independent test at any point during the underlying proceedings.* Thus, there is no documentary evidence in the record regarding the independent test or its results, nor even evidence that an independent test was taken at all. Regardless, it is undisputed that Nucor has not, and does not accept independent tests because it has no control over their administration and no assurances of their reliability.

Based on this alleged (and undocumented) independent test, Claimant sought unemployment benefits on the basis that she had been wrongfully terminated and that Nucor improperly collected her hair sample. [Discharge for Cause Fact Finding, dated 05/03/2010, ROA 11-12]. On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. [Claims Adjudicator's Determination, ROA 13, 85]. The

determination also noted that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120. [Id.]. Finally, the determination confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory using gas chromatography/mass spectrometry (GC/MS) or a scientifically equivalent method. [Id.].

Upon receipt of the Claims Adjudicator's Determination, Claimant filed a Notice of Appeal to Appeal Tribunal on June 2, 2010, asserting that the Adjudicator's decision was issued in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. [Notice of Appeal to Appeal Tribunal, ROA 14]. A Hearing was scheduled for July 7, 2010 before Joan Marshall, Administrative Officer. [Notice of Hearing Before Appeal Tribunal, ROA 15].

On July 12, 2010, both Nucor and Claimant presented testimony and evidence to the Administrative Officer at the Hearing in Charleston, South Carolina.¹ [ROA 19 - 84]. On July 19, 2010, the Appeal Tribunal mailed a copy of its decision to Nucor and Claimant. [Decision of Appeal Tribunal, ROA 275-276]. The Appeal Tribunal found that Claimant was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana. [Id.]. As a result, the Appeal Tribunal held that Claimant was disqualified from receiving benefits upon a finding that Claimant was discharged for illegal drug use under S.C. Code Ann. § 41-35-120(3). [Decision of Appeal Tribunal, ROA 274-275].

¹ The recitation of facts herein is based on the Transcript of Testimony before Joan Marshall, Administrative Hearing Officer. [ROA 19-84].

On July 22, 2010, Claimant appealed the Decision of the Appeal Tribunal to the Appellate Panel on the basis that she does not smoke marijuana and that there were contradictory test results. [Application for Leave To Appeal To Commission, ROA 276]. The Appellate Panel held a Hearing on November 17, 2010 in Columbia, South Carolina. [Notice of Hearing Before Appellate Panel, ROA 278]. After the Hearing, the Appellate Panel issued its Decision, which was mailed on November 19, 2010. [Appellate Panel Decision, ROA 2]. The Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." As a result, the Appellate Panel held that Claimant was separated under non-disqualifying circumstances, and reversed the Appeal Tribunal's Decision. [Appellate Panel Decision, ROA 1-2].

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review an Administrative Law Court ("ALC") must apply when reviewing an agency's decision:

"The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision 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(A)(6) (2005). *See also, South Carolina Dept. of Corrections v. Mitchell*, 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008). Moreover, when appealing an agency's decision, the burden rests on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

A governmental body's 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." *Id.* quoting *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). "The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

ARGUMENT

I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW.

The Appellate Panel held that Claimant was entitled to benefits because Claimant was not terminated as a result of "gross misconduct" pursuant to S.C. Code Ann. § 41-35-120(4). This holding is erroneous as a matter of law because the applicable section

governing ineligibility for benefits due to illegal drug use is S.C. Code Ann. § 41-35-120(3). Section 41-35-120(3) mandates that a Claimant is ineligible for benefits in the event of "discharge for illegal drug use" and provides in pertinent part:

An insured worker is ineligible for benefits for:

(3)(a) Discharge for illegal drug use, and is ineligible for benefits beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.

.....

Pursuant to sub-section 41-35-120(3) of the statute, so long as the employer has communicated a policy prohibiting the illegal use of drugs, the violation of which may

result in termination; and the employer administers the drug test in compliance with the three subparts of 3(a)(iii), the Claimant *is ineligible for benefits*. (Emphasis added). The language of Section 41-35-120(3) is not discretionary; it is mandatory. Claimant admitted at the Hearing that Nucor has a Drug and Alcohol Policy; that Nucor communicated this policy to her; and that she was aware that testing positive for illegal drugs was grounds for immediate termination based on the Policy. [ROA 24, 28-29, 42; Exhibit 1, ROA 85-88; Exhibit 3, ROA 97; Claims Adjudicator Decision dated 5/26/2010, ROA 13; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Thus, the evidentiary record indisputably establishes that Nucor met the requirements of Section 41-35-120(3)(a)(i).

Likewise, the evidence on the record firmly establishes that Nucor complied with the provisions of subsection 41-35-120(3)(a)(iii): Claimant tested positive for marijuana on two separate occasions, with results confirmed positive using the gas chromatography/mass spectrometry method conducted by an SAMHSA-certified laboratory, also certified by the American College of Pathologists. [ROA 27, 62, 69-70; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105]. The hair samples were collected by a licensed health care professional - a certified nurse practitioner certified in hair test collection. [ROA 81; Exhibit 8, ROA 272-273]. Again, these facts are undisputed and establish that Nucor met the requirements of subsections 41-35-120(3)(a)(i) and (iii).

Based on the record, Nucor unquestionably met its burden under the applicable statutory provision -- S.C. Code Ann. § 41-35-120(3). Accordingly, Claimant is

ineligible for benefits as a matter of law under the mandatory and unequivocal language of the statute.

The Appellate Panel's decision, based on an inapplicable subsection dealing with employees terminated for gross misconduct, was clear error. *See*, S.C. Code Ann. § 41-35-120(4). Indeed, the basis for terminating Claimant was violation of Nucor's Drug and Alcohol Policy, not gross misconduct. The Appeal Tribunal applied and relied on § 41-35-120(3) (as required by the Statute) in determining that Claimant was ineligible for benefits because she was terminated for violating Nucor's Drug & Alcohol Policy. Gross Misconduct (S.C. Code Ann. § 41-35-120(4)) was never at issue. [Decision of Appeal Tribunal, ROA 274-275].

However, even assuming *arguendo* that the Appellate Panel somehow had authority to look beyond and ignore the undisputed basis for Claimant's termination (which is expressly denied by Appellant), the Appellate Panel's Decision would still be wrong as a matter of law. The Appellate Panel itself observed in its Order that "Gross Misconduct" includes failure to comply with drug use regulations. [Appellate Panel Decision, ROA 2]. In determining the meaning of the term "misconduct" courts in South Carolina look to the general purpose of the act. *Lee v. South Carolina Employment Sec. Commission*, 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982), citing *Stone Mfg. Company v. S. C. Employment Security Commission, et al.*, 219 S.C. 239, 64 S.E.2d 644 (1951). In *Stone*, the South Carolina Supreme Court held that the term "fault" is not limited to something that is blameworthy, culpable of wrong and that "'fault' must be construed as meaning failure or volition." *Lee*, at 588, 291 S.E.2d at 379, citing *Stone* 219 S.C. at 246-247, 64 S.E.2d 644. The court in *Lee* found that "it was clearly the intent of the

legislature that persons unemployed due to their own fault be penalized in some manner from receiving benefits." *Id.* The court looked to other cases, which have generally indicated that "misconduct" includes (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee's interests, duties or obligations. *Id.* (internal citations omitted). Certainly, violation of a drug control policy would constitute fault and gross misconduct under any interpretation of the law. The general purpose of the unemployment statutes – to grant benefits to eligible and deserving claimants – is served by denying benefits to individuals who not only violate workplace policies, but also violate the law by using illegal drugs.

Further, the majority of states define illegal drug use as willful misconduct in the area of unemployment benefits. *See generally*, 78 ALR4th 180 § 5-7, "*Drugs-Unemployment Compensation*." (Citing cases). The prevailing case law establishes that where an individual is terminated due to her failure to comply with company substance abuse policies, she is precluded from receiving state unemployment benefits. *Id.* Thus, Claimant would be disqualified from unemployment benefits for gross misconduct based on her positive drug test results, even if Section 41-35-120(4) was the applicable statute.

In sum, it was an error of law for the Appellate Panel to reverse the Appeal Tribunal's decision disqualifying Claimant from unemployment benefits based on § 41-35-120(4) because another directly applicable section of the statute governs the issue. Regardless, it was error to reverse based on § 41-35-120(4) because Claimant's illegal

drug would meet the standard of "gross misconduct" under the plain meaning and intent of the statute. Accordingly, the Appellate Panel's decision should be overturned.

II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3).

The legislature specifically enacted Section 41-35-120(3) to govern in instances where a Claimant is discharged for illegal drug use. The Appellate Panel erred as a matter of law by failing to apply the proper statute, as discussed above, and/or in its application of the statute. Indeed, the Appellate Panel failed to abide by the specific requirements of subsection 41-35-120(3) by accepting a phantom, independent drug test as controlling, with no evidence that it comported with the statute, nor even evidence of its existence or results. Just as in its application of a different statute above, the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute.

The case of *Milliken & Co. v. SC Emp. Comm'n.*, 315 SC 492, 445 SE2d 640 (1994) (*reversed on other grounds*) is instructive on this point. In *Milliken*, the Commission denied benefits to claimant Gantt under Section 41-35-120(2) finding that acts committed *in the break area* did not qualify as "cause connected with his most recent work." *Id.* at 496. The S.C. Court of Appeals disagreed and reversed the decision, emphasizing the necessity of deciding cases based on the language of the statute as written by the legislature:

The Commission concluded the alleged disruptive behavior occurred, if at all, in the break area while Gantt was off duty. In our view, the legislature declined to designate the proximity in which the conduct must occur. Instead, the statute only requires the cause of discharge to be connected to Gantt's employment. The legislature shows no intent to limit where the

"cause" for discharge occurred. We, therefore, disagree with the circuit court's reading of the Commission's findings. We find the Commission erred, as a matter of law, in its application of the statute by failing to consider conduct in the break area sufficient to warrant discharge.

Id. at 498, 644.

Similarly here, the legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains an independent drug test after failing a statutorily-compliant company drug test. Indeed, the legislature did not provide *any* exception under which the Commission can disregard the mandate of Section 41-35-120(3). Rather, the legislature sets forth specific criteria for an employer to satisfy in the case of disqualification for benefits upon discharge for illegal drug use, all of which were satisfied here.

First, Section 41-35-120(3)(a)(iii) specifically requires that the drug test be administered on behalf of the employer:

"(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, ..."

S.C. Code Ann. § 41-35-120(3)(iii) (emphasis added). Thus, Claimant's alleged independent drug test is not allowed and has no bearing on whether Claimant was eligible for benefits under Section 41-35-120(3).

Additionally, Section 41-35-120(3) enumerates specific criteria that must be satisfied to establish a drug test's reliability and allow its use as a basis for disqualification for benefits. Nucor's drug tests indisputably complied with the statute and Claimant clearly failed two drug tests which were confirmed positive in compliance with South Carolina law. The statute requires that the sample be procured by a health care professional; that the drug test be performed by a certified laboratory; and mandates

that the results be confirmed positive using the gas chromatography/mass spectrometry method. The legislature imposed these requirements to ensure consistency, uniformity and reliability of the drug testing systems utilized by employers in South Carolina. There is no dispute that Nucor complied with each of these requirements and Claimant failed both tests. [ROA 19-84; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105; Exhibit 6, ROA 106-135; Exhibit 7, ROA 136-271].

On the other hand, there is absolutely no documentary evidence in the record that would show the criteria utilized in processing Claimant's alleged "independent drug test" or whether such "independent test" complied with any of the statutory requirements for reliability. Indeed, there is no documentary evidence that the absent independent drug test was in fact "negative" or that it even exists. Again, the Appellate Panel applied an exception to Section 41-35-120(3) not intended or allowed by the legislature: that the criteria of Section 41-35-120(3)(a)(iii) do not have to be satisfied by a test administered on behalf of the employer.

Claimant's alleged "independent drug test" is irrelevant because it was not performed *on behalf of the employer*, as required by Section 41-35-120(3)(a)(iii). Thus, the Appellate Panel's reliance on the independent test was outside the mandate of the statute and clearly erroneous as a matter of law. Claimant is therefore ineligible for benefits based on discharge for illegal drug use under Section 41-35-120(3) and the Appellate Panel decision must be overturned.

III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.

Pursuant to the correct and applicable statute - S.C. Code Ann. § 41-35-120(3), Claimant is ineligible for benefits as a matter of law. Section 41-35-120(3) provides that where an employer establishes that it discharged an employee for failing a drug test based on a program implemented to promote safety in the employer's workplace, and which was a condition of employment, the terminated employee is disqualified from receiving unemployment benefits as a matter of law. *See also, Milliken & Co. v. SC Emp. Comm'n., and Lee v. SC Employment Sec. Comm'n., supra. Milliken & Co. v. SC Emp. Comm'n., and Lee v. SC Employment Sec. Comm'n., supra.*

In this case, the testimony at the Appeals Tribunal hearing and the documents offered as evidence conclusively establish that Nucor terminated Claimant for failing a drug test administered to promote the safety of all Nucor employees; that the testing was a condition of Claimant's employment; and that Claimant's test was administered in compliance with the strict requirements of South Carolina law. These facts are undisputed. Further, Claimant executed the Custody Form verifying that the proper chain of custody had been complied with, and her expert confirmed that the test was performed properly. [ROA 42-43, 48-49, 60-61]. At no point did Claimant object to the manner in which the sample was collected, and she admitted that Nucor's nurse was "professional about [collecting the sample]." [ROA 39]. Claimant could not fault the manner in which the sample was collected or the chain of custody followed. [ROA 57].

Despite this overwhelming and undisputed evidence establishing that Nucor complied with the requirements of Section 41-35-120(3), the Appellate Panel accepted Claimant's appeal based on "contradictory results." This was clear error. There were no "contradictory results" in the record, nor would there be if Claimant actually produced

her supposed "negative test" results. Rather, the alleged "contradictory results" argument is a red herring that Claimant uses as a last resort to obtain benefits that she is disqualified from receiving. There is no dispute that Nucor's second drug test, performed at the request of Claimant, was administered as a "level of detection" test [ROA 30, 30; Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Claimant's alleged independent "negative" test was administered under a different criterion. [ROA 30, 63-64]. The reason for using "level of detection" cut-offs for second tests is to detect trace amounts of illegal drugs that may otherwise escape detection because of the passage of time between tests. Claimant's alleged test would not detect trace amounts and thus is not comparable, nor "contradictory", to Nucor's second test. Had Claimant's independent test been performed using the same criteria, there likely would not have been a different or "contradictory" result. It would have shown the presence of marijuana found in the two previous and admittedly valid tests. And since there is no evidence regarding when it was taken, how it was taken, or whether it was taken at all, it is wholly unreliable. Nucor established an uninterrupted chain of custody, and Claimant verified same. [ROA 43-44, 48-49, 57, 60-62; Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137]. Thus, there were no "contradictory results" and Claimant was properly terminated for violating Nucor's Drug and Alcohol policy, and she is disqualified from unemployment benefits under the correct and applicable statute.

Other jurisdictions have rejected similar arguments and attempts to avoid positive drug test results that led to disqualification for unemployment benefits. For example, in *Curtis v. Mississippi Employment Sec. Com'n*, 878 So. 2d 1094 (Miss. Ct. App. 2004), a claimant's positive test for marijuana following a random drug test was found to

constitute misconduct disqualifying him from receipt of unemployment benefits. The court found that nothing in the record suggested that claimant was singled out or treated differently from any other employees, and nothing in the record supported claimant's assertion that he was "set up" or that his urine was switched. *Id.* Similarly, in *Stewart v. Duke Mfg. Co.*, 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009), an unemployment compensation claimant was disqualified from receiving benefits after being discharged after testing positive for cocaine. The claimant had previously been notified of employer's alcohol and controlled substances policy, and the claimant's test sample was collected and tested in accordance with Department of Transportation (DOT) procedures. *Id.* Likewise, in *Farm Fresh Dairy, Inc. v Blackburn*, 841 P2d 1150, (Okla. 1992), the employer fired an employee for failing a drug test that was part of program to promote safety in employer's workplace, and which was an agreed to condition of employment. There, the court held that the employee was disqualified from receiving unemployment benefits and observed that under such circumstances, the Employment Security Commission may not require employer to make a further showing, such as impairment or strange conduct on job. *Id.*

Additionally, in *Overstreet v. Dept. of Employment Sec.*, 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988), the court held that a police officer was ineligible for unemployment benefits after being terminated following a positive drug test result. The court considered the police officer's abuse of cocaine "willful misconduct" under the applicable state unemployment statute. *Id.* The court in *McNabb v. Department of Revenue*, 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005), also reached the same result and held that violation of the employer's drug policy disqualified the employee

from unemployment benefits. In *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990), the Court of Appeals of Arkansas held that Grace's former employee's failure to pass a drug test, without more, was a willful violation of Grace's rules, and disqualified the former employee from unemployment benefits. The Grace Drilling court observed: "Such a result is particularly appropriate where, as here, passing such a test was an agreed condition of employment." *Id.*

The authority from this and other jurisdictions makes it clear that employees who fail properly administered company drug tests rarely, if ever, qualify for unemployment benefits. If an employer's drug testing policy and procedure complies with the guidelines and statutes provided by the state, ineligibility is all but presumed in a case of a failed test. The authority establishes that the burden of rebutting that presumption is significant and rarely met. Here, it certainly was not met with Claimant's undocumented, unreliable test and an unsupported claim of "contradictory results". Accordingly, the Appellate Panel's decision, which ignores the clear dictates of Section 41-35-120(3), contradicts the overwhelming authority of this and other jurisdictions, and is against the weight of the undisputed evidence in the record, was error requiring reversal.

IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY.

The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site, unreliable, independent drug test where there was undisputed documentary evidence that Claimant had failed two drug tests administered on behalf of Nucor, in full compliance with South Carolina law and Nucor's drug testing policy. Indeed, the

Appellate Panel's application of an irrelevant statute and creation of an exception to the correct and applicable statute were clear errors of law. Further, blind acceptance of Claimant's unsupported theory of "contradictory results" went against the great weight of evidence in the record and was also error.

In addition to being procedurally and legally incorrect, the Appellate Panel's decision violates public policy. Indeed, the decision significantly constrains employers' ability to enforce drug-free workplace policies and renders Section 41-35-120(3) a nullity. The Appellate Panel's Decision arguably requires every employer in South Carolina to accept and consider outside drug test results proffered by employees who fail company drug tests, without regard to validity, accuracy, reliability or legitimacy, even if the outside test directly contradicts their own tests administered according the rules set forth by statute. Further, the decision suggests that a discharged employee *need not even produce the independent drug test nor prove its results, much less its compliance with statutory testing requirements*. Rather, an employer's overwhelming evidence establishing a test's accuracy, validity and compliance with statutory requirements can be overcome with a simple plea of "I didn't do it." In sum, the Appellate Panel's decision basically and unjustifiably eviscerates Nucor's and every other South Carolina employers' drug control policies that are in full compliance with the law.

Further, the mandates of Section 41-35-120(3) are rendered impotent if a claimant is able to side-step them with an independent test. The requirements of Section 41-35-120(3) are designed to promote uniformity and reliability in drug testing standards, and provide specific guidelines for employers to follow. It is clear that the legislature had the bigger picture in mind when enacting Section 41-35-120(3). Indeed, the legislature also

intended to give teeth to an overriding policy promoting safety and drug-free workplaces by unequivocally denying benefits to those who test positive for illegal drugs at work. It is doubtful that the legislature envisioned that the policy could be circumvented by an outside, independent drug test with no indicia of reliability. Outside, independent drug tests are completely out of an employer's control, and there is no way to verify whether results are obtained by an employee through valid means. Likewise, independent drug tests, accepted in lieu of valid workplace tests, allow for the very real possibility that an employee can work under the influence of illegal drugs without recourse. In short, they fly in the face of what the legislature intended by enacting Section 41-35-120(3).

In this case, Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse was proper and correct, [ROA 61-62] and that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62]. Based on Claimant's expert witness' testimony, it is also clear that the independent test did not conform to the criterion utilized by Nucor in instances where an employee who has already had a confirmed positive drug test, and requests a second test to prove that she is drug free. [ROA 62-63]. Similarly, Claimant admitted under oath that the chain of custody was strictly adhered to. [ROA 43-44, 48-49, 57, Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137].

The Appellate Panel erred in disregarding this evidence undisputed and compelling evidence. Therefore, the Appellate Panel erred in reversing the Appeal Tribunal and public policy demands that the Appellate Panel's decision be overturned.

CONCLUSION

Nucor complied with employment laws of this State and terminated Claimant for cause, and Claimant is disqualified from unemployment benefits as a matter of law. The Appellate Panel's Decision is not supported by the facts or evidence, and is contrary to the mandate of S.C. Code Ann. § 41-35-120(3) and public policy, and should be overturned pursuant to subsections (a), (c) – (e) of S.C. Code Ann. § 1-23-380(A)(6).

Respectfully submitted,



Nosizi Ralephata
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Telephone: 843-576-2807
Email: nralephata@turnerpadget.com

ATTORNEYS FOR NUCOR CORPORATION

February 17, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

I hereby certify that on February 17, 2011, a copy of the *Initial Brief of Nucor Corporation* has been served upon the following parties via overnight delivery, in the United States Mail, postage prepaid, to:

Ms. Romi Y. Robinson
Legal Department-Dept. of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
Phone: 803-737-2666
Email: legal@dew.sc.gov
Attorney for Agency/Respondent

Ms. Kim Legette
517 Laurel Ridge Road
North Charleston, SC 29418
Claimant/Respondent

April D. Hager
April D. Hager

FILED

FEB 17 2011

SC ADMIN. LAW COURT

EXHIBIT C

STATE OF SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

Docket No. 10-ALJ-22-0938-AP

ORDER

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

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, a 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, and 1-23-600(D) (Supp. 2010); 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). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

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. Dep’t 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)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:
 - (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and
 - (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*
 - (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

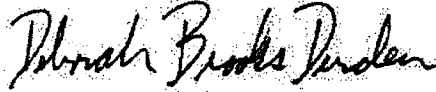
The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

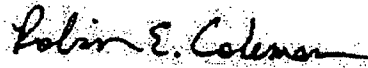


Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
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

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011

SC ADMIN. LAW COURT

EXHIBIT D

From: Robin Coleman [<mailto:rcoleman@scal.c.net>]

Sent: Tuesday, June 14, 2011 2:16 PM

To: Ralephata, Nosizi; legal@dew.sc.gov; kimlegette@yahoo.com

Subject: Nucor Corporation v. S.C. DEW, and Kim A. Legette; Docket No. 10-ALJ-22-0938-AP

Ms. Ralephata, Ms. Robinson, Ms. Legette: This Court has received several pieces of correspondence in the above-referenced case since Judge Durden's Order remanding the matter back to the Department, namely Appellant's Motion for Hearing/Oral Argument, Appellant's Notice of Request for Protection, and Respondent's Return to Motion for Hearing/Oral Argument. Please be advised that this Court no longer has jurisdiction in the matter because Judge Durden's Order is a final order in this matter.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

This email and any attached files are confidential and intended solely for the intended recipient(s). If you are not the named recipient you should not read, distribute, copy or alter this email. Any views or opinions expressed in this email are those of the author and do not represent those of the South Carolina Administrative Law Court .

EXHIBIT E

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Legette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 10-ALJ-22-0938-AP

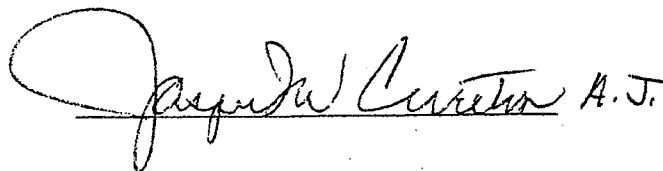
ORDER

Kim A. Legette (Legette) filed a claim for unemployment benefits on April 23, 2010, with the Department of Employment and Workforce (Department) after being discharged from her employment with Nucor Corporation (Nucor). The claims adjudicator found Nucor discharged Legette for cause connected with the employment and that accordingly, subsection 41-35-120(2) of the South Carolina Code (Supp. 2010) disqualified Legette from receiving benefits. The Appeal Tribunal affirmed the claims adjudicator's decision to deny Legette benefits, but found subsection 41-35-120(3), which addresses discharge for illegal drug use, disqualified her from receiving benefits. Legette appealed, and the Appellate Panel reversed the Appeal Tribunal's decision, finding Nucor failed to prove it discharged Legette for cause pursuant to subsection 41-35-120(2) or for gross misconduct pursuant to subsection 41-35-120(4). Nucor appealed the Appellate Panel's decision, and the Administrative Law Court

(ALC) affirmed the Appellate Panel's holding that Legette was not disqualified from receiving unemployment benefits pursuant to subsections 41-35-120(2) or (4). However, the ALC found the Appellate Panel failed to address whether subsection 41-35-120(3), regarding illegal drug use, disqualified Legette from receiving unemployment benefits. Accordingly, the ALC remanded the matter to the Department for a determination of whether Legette's discharge disqualified her from receiving benefits pursuant to subsection 41-35-120(3). Nucor appealed the order to this Court, and Legette filed a motion to dismiss, arguing the order was not immediately appealable.

After a careful consideration of the parties' memoranda and other filings, this Court dismisses this appeal as not immediately appealable because the underlying order was not a final decision. See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (holding section 1-23-610 of the South Carolina Code (Supp. 2010) governs the appealability of appeals from the ALC and limits review to final decisions); id. at 267, 692 S.E.2d at 894-95 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. . . . A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined (internal citations omitted)).

IT IS SO ORDERED.

 J. Duane Carter A.J.

FILED
10/18/11

Columbia, South Carolina

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson, Esquire
Nosizi Ralephata, Esquire

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

DATE 11/11/01 BY SP-10
11/11/01
11/11/01
11/11/01

11/11/01
11/11/01
11/11/01
11/11/01

EXHIBIT F

235-11-8079-1

4-17-11

SCDEW

AUG 24 2011

Lower Authority Appeals

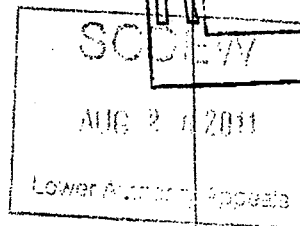
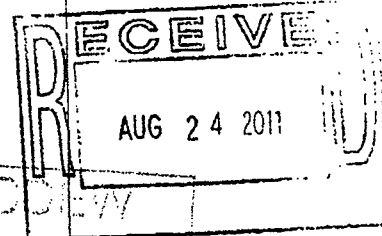
Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anna@aemlawyer.com

1110129

August 22, 2011



Serv
8/25
AK

Via Facsimile and Certified Mail, Return Receipt Requested

Appellate Panel

South Carolina Department of Employment and Workforce

P.O. Box 995

Columbia, SC 29202

App 111

RE: Appeal of Decision No: 2011-A-15157
Claimant: Kim A. Legette

Hearing Date: August 15, 2011
Employer: Nucor

To the Honorable Appellate Panel:

I represent the Claimant, Kim A. Legette, in the above-referenced matter. On August 19, 2011, Ms. Legette received Decision No. 2011-A-15157, mailed August 18, 2011.

By this letter, the Claimant timely appeals the Tribunal's decision and here requests that the Appellate Panel overturn that decision as being clearly erroneous as a matter of law and incorrect based on facts in the record, and/or grant an appeal hearing before the full Panel.

The grounds for this appeal is that the Tribunal's decision was in error as a matter of law where it incorrectly found that Omega Laboratory, the drug testing laboratory, meets the certification qualifications required by S.C. Code Ann. § 41-35-120(3)(a)(iii)(B). The Tribunal based its decision on the erroneous assumption that any "HHS" certification places a drug test laboratory in compliance with the statute. This finding is incorrect. Omega does not meet the certification requirements as a matter of law where it is not on the list in the Federal Register as being certified by "HHS/SAMHSA (formerly: HHS/NIDA)".

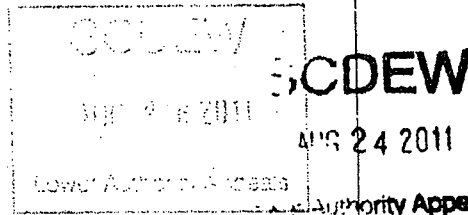
The Employer here claimed that Claimant was discharged for illegal drug use. Because the consequences of a finding of discharge for illegal drug use are so severe, the Legislature established specific requirements for employers that subject their employees to work place drug testing. The Legislature required that both the sample collector and the laboratory testing the samples meet certain qualifications. Most relevant here, the testing laboratory must be certified by the National Institute of Drug Abuse ("NIDA"), the College of American Pathologists or SLED. S.C. Code Ann. § 41-35-120(3)(a)(iii)(B).

The problem arises as NIDA no longer exists. However, under a federal reorganization in 2006, its functions for oversight of the National Laboratory Certification Program that was the basis of NIDA certification now resides with the Substance Abuse and Mental Health Services Administration (SAMHSA). The Federal Register ("FR") for April 2, 2010 and May 14, 2010, entered as Agency exhibits, contain a list of the laboratories currently certified. Omega is not on that list. Further, the FR clearly states "HHS/SAMHSA (formerly: HHS/NIDA)". The Decision is incorrect in its finding that any "HHS" certification is sufficient.

SC Dept. of
Employment & Workforce

AUG 25 2011

Received Benefits Div.



Where the S.C. Legislature enacted the statute requiring NIDA certification, the intent of the Legislature can only be effectuated by requiring SAMHSA certification of laboratories. Therefore, Omega's only certificate, through the Centers for Medicare and Medicaid Services at HHS, is not sufficient under the law. Omega is not certified pursuant to S.C. Code § 41-35-120(3), therefore, the Employer has not, and cannot meet its burden to show that Claimant is ineligible for benefits. This is not a matter of factual proof, it is a matter of law that a laboratory must be "HHS/SAMHSA (formerly: HHS/NIDA)" certified under the S.C. statute.¹ Claimant moves this Appellate Panel to take judicial notice that Omega is not certified HHS/SAMHSA and therefore is not NIDA certified as required under the statute.

Further, Employer's own evidence makes it clear that HHS certification cannot reflect the Legislature's intent in requiring employer's to use laboratories qualified to perform forensic laboratory analysis. Employer's exhibit 2 is an organizational chart of the U.S. Department of Health and Human Services. This department is organized into over 31 offices and programs, among them SAMHSA, Office of Civil Rights, Food and Drug Administration and the Office of Global Affairs, clearly offices with highly disparate programs, where SAMHSA is the only appropriate certification. The employer's agent's testimony regarding whether SAMHSA only certifies urine testing is irrelevant to the Legislature's intent to require laboratories with nationally recognized forensic drug test qualifications.

As Respondent admitted that Omega is not CAP or SLED certified, the only remaining issue at the August 15 hearing was whether Omega was NIDA certified under the statute, and as a matter of law, it is not. The Decision is incorrect where it finds that any certification from the Federal Department of Health and Human Services (HHS) complies with the statute in lieu of NIDA certification.

It is on this basis that the Claimant appeals the Tribunal's Decision and respectfully requests that the Commission find that Claimant was separated under nondisqualifying circumstances and reverse the Appeal Tribunal's decision.

Very truly yours,

Anne E. Mjaatvedt

SC Dept. of
Employment & Workforce

AUG 25 2011

¹ This Appellate Panel originally held the Employer had not met its burden of proof of cause for discharge (Appellate Panel Decision 2010-C-2253). Employer appealed the Commission's finding to the ALJ, who upheld the Panel's decision regarding no cause under 41-35-120(2) and (4), and ordered that the case be remanded to the Appeal Tribunal due to reference to the incorrect portion of the relevant statute regarding work place drug testing. It is the decision of the Appeal Tribunal following the August 15, 2011 hearing that is the subject of this appeal.