

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE
ADMINISTRATIVE LAW COURT

DEC 15 2015
SC Court of Appeals

Docket No. 14-ALJ-22-454-AP

CHARLES E. STUBBS,

Appellant,

vs.

**SOUTH CAROLINA
DEPARTMENT OF
EMPLOYMENT AND
WORKFORCE AND JSE
LLC,**

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

December 14, 2015

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QUESTION PRESENTED

- 1. Is Appellant's argument preserved for appeal when it was raised before and ruled upon by the Department?**
- 2. Is the plain language of the Department's S.C. Reg. 47-52, which provides for timely appeal to the Appellate Panel within ten calendar days from the date of mailing or notification, a valid exercise of the Department's authority to promulgate regulations and therefore enforceable?**

ARGUMENTS

1. Appellant's argument is preserved for appeal because it was raised before and ruled upon by the Department.

The South Carolina Department of Employment and Workforce's claim that Appellant's argument is not preserved for appeal is without merit. While it is true that a court sitting in an appellate capacity may not consider issues not raised or ruled on by the administrative agency, in the present case, the issue of timeliness, and more particularly, the issue of how to calculate the deadline for appeal, were both raised and ruled upon. *See Carson v. S. C. Dep't of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002). The Department conceded in its brief to the Administrative Law Court that Appellant raised the issue of the "notification" provision of S.C. Reg. 47-52 before Appellate Panel. (R. p. ____). However, the Department errs in claiming that the Appellate Panel failed to rule on this issue. The Appellate Panel was faced with the same question that the Administrative Law Court examined, and which is before this Court—whether to apply its strict interpretation of S.C. Code Ann. § 41-35-680, which provides a deadline for appeal running ten calendar days from the date of mailing regardless of when and whether the decision is received, or whether to apply the plain language of Department's regulation, S.C. Reg. 47-52, which provides for ten calendar days to appeal from the date of mailing or notification. The Appellate Panel chose to apply its reading of S.C. Code Ann. § 41-35-680 and to ignore the "notification" language of its regulation, which is the same argument that the Department has consistently made both before the Administrative Law Court and this Court. It may sometimes be necessary for a party to secure a ruling on an issue by bringing a post-trial motion. *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 276, 772 S.E.2d 159, 161 (2015). However, because the issue of the calculation of the deadline to appeal

was raised and ruled on, there was no requirement for the Appellant to file a post-trial motion to secure any further ruling from the Appellate Panel.

The Department makes, for the first time, the argument that the issue of the applicability of S.C. Reg. 47-52 is not preserved for appeal because this specific issue was not raised at the Appeal Tribunal level. This argument is itself not preserved for review because it is being raised for the first time on appeal to this Court and was not previously raised at the Administrative Law Court. Moreover, the argument is without merit because there is no requirement for Appellant to make a legal argument about the applicability of S.C. Reg. 47-52 at the initial Appeal Tribunal level. The Department's reliance upon *Doe v. Doe* is misplaced because that case is a family court case and not an administrative appeal. 37 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006). Appellant was required to raise the issue before the Department and secure a ruling, which Appellant did. *Carson* at 120.

- 2. The plain language of the Department's S.C. Reg. 47-52, which provides for timely appeal to the Appellate Panel within ten calendar days from the date of mailing or notification, is a valid exercise of the Department's authority to promulgate regulations and is therefore enforceable.**

The Department exercised its statutory authority under S.C. Code Ann. § 41-29-110 to "fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978). The Department's regulation states:

[a]ny party aggrieved by the decision of an Appeal Tribunal, may apply for leave to appeal from such decision to the Appellate Panel, by filing at the office where the claim was filed, or at the office of the Appellate Panel in Columbia, South Carolina, *within ten (10) calendar days after the date of notification* or mailing of the decision of the Appeal Tribunal, an

Application for Leave to Appeal to the Appellate Panel. S.C. Reg. 47-52(A)(1)[emphasis added].

The Department relies heavily on *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control* for its argument that the plain language of its own regulation providing ten days to appeal from date of notification should be ignored. 390 S.C. 418, 702 S.E.2d 246 (2010). In that case, the South Carolina Supreme Court examined a statutory deadline under the Department of Health and Environmental Control's (DHEC's) contested case procedures requiring a timely appeal to be filed within fifteen days of the date of mailing by certified mail. S.C. Code Ann. § 44-1-60(E).¹ Contrary to the current case, DHEC had not promulgated a regulation explicitly providing ten days to appeal from date of notification. The Court did not make any holding that would invalidate a duly promulgated regulation construing a statutory deadline for appeal. Indeed, the Court upheld a regulation that significantly expanded DHEC's obligation to provide notice of its actions to interested parties beyond statutory requirements. In concluding that the regulation does not alter or add to the statute, the Court held that "[a]n administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010), citing *McNickel's Inc. v. S.C. Dept. of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998).

In the present case, to determine whether the plain language of S.C. Reg. 47-52 alters or adds to the statute, it is necessary to consider whether the regulation "is reasonably related to the purpose of the enabling legislation." *Id.* The Legislature eloquently spoke to

¹ DHEC's appeals process in contested cases provides significantly greater protections to ensure parties before that agency receive notice and an opportunity to appeal than the Department of Employment and Workforce's appeals process; these additional protections include sending decisions by certified mail to ensure mailing and receipt and providing fifteen calendar days from the mailing date of the decision to appeal rather than ten. See S.C. Code Ann. § 44-1-60(E) and S.C. Reg. 61-101.

the purposes of the Unemployment Compensation Law:

...the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life. S.C. Code Ann. § 31-27-10.

The notification provision of S.C. Reg. 47-52 is consistent with the stated purposes of the Unemployment Compensation Law to lighten the burden of unemployment “which so often falls with crushing force upon the unemployed worker and his family.” *Id.* The vast majority of claimants for unemployment benefits are unrepresented in the appeal process, many of whom have limited education and experience with legal processes. It takes time to receive an Appeal Tribunal decision, discern its meaning, and determine a course of action. The Department’s regulation is reasonably related to the purposes the Unemployment Compensation Law because it ensures that parties before the Department’s Appeal Tribunal have the opportunity to receive the Department’s Appeal Tribunal decisions with sufficient time to appeal. That this is a reasonable interpretation is supported by well-established precedent that the Unemployment Compensation Law is remedial in nature and should be liberally construed to give effect to its beneficent purposes. *Hartsville Cotton Mill v. S.C. Emp’t Sec. Com.*, 224 S.C. 407, 414, 79 S.E.2d 381, 384 (1953). See also *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) (holding “[a] statute remedial in nature should be liberally construed in order to accomplish the objective sought.”)

Moreover, the Legislature may authorize an administrative agency “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement

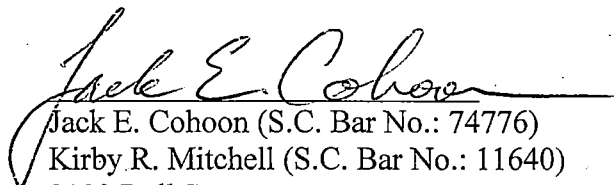
of the law within its expressed general purpose. *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978). As discussed in the Appellant's Brief, it is necessary for the law to take into consideration situations in which a party may not receive an Appeal Tribunal decision due to agency or postal error, or receives the decision with an unreasonably short time to act upon it. It is reasonable for the Department to promulgate S.C. Reg. 47-52 to fill up the details of the appellate process by making provision for such scenarios that would otherwise produce an absurd result depriving parties of due process. S.C. Reg. 47-52 constitutes a valid exercise of the Department's authority to create a workable appeal system that comports with the remedial nature of this law and the requirements of meaningful notice and an opportunity to be heard guaranteed by both the U.S. and South Carolina Constitutions. S.C. Const. art. I, § 3, and U.S. Const. amend. XIV, § 1.

Conclusion

It is troubling that the Department now seeks to disavow its own regulation in order to deny a South Carolina worker an opportunity to appeal an improper denial of his benefits. The issue before this Court was raised and ruled upon by the Department's Appellate Panel. The plain language of the Department's own regulation provides for timely filing of Appeal Tribunal decisions within ten calendar days of mailing or notification. S.C. Reg. 47-52(A)(1). This regulation neither alters nor adds to the statute because it is reasonably related to the purpose of the Unemployment Benefits Law and fills out the statutory scheme. The Appellant asks that this Court find that the plain language of S.C. Reg. 47-52(A)(1) provides for ten days from the date of mailing or notification for parties to file appeals to the Appellate Panel, that this regulation is a valid exercise of the Department's authority to promulgate regulations under S.C. Code Ann. § 41-29-110, and that Appellant's appeal to the Appellate Panel was timely filed.

Respectfully submitted,

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December 15, 2015

CERTIFICATE OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on South Carolina Department of Employment and Workforce and on JSE LLC by U.S. Mail, Postage Paid on December 15, 2015 to the following addresses:

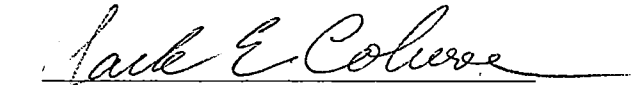
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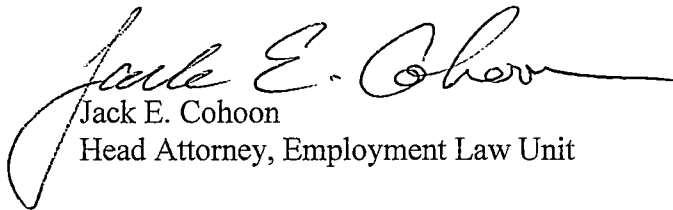
Re: Charles E. Stubbs v. SCDEW and JSE,LLC
Appellate Case No.: 2015-001490
Case No.: 14-ALJ-22-454-AP
Our File No.: 14-0623723

Dear Ms. Kitchings:

Please find enclosed the *Initial Reply Brief of Appellant* and *Certificate of Service* in the above-referenced case.

Please call me at (803) 744-4166 if I can be of any assistance.

Sincerely,



Jack E. Cohoon
Head Attorney, Employment Law Unit

Enclosures

Cc: Debra S. Tedeschi, Esq., Attorney for Respondent SCDEW
JSE LLC

