

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Bobby Smith,	)	Docket No. 15-ALJ-22-0204-AP
	)	
Appellant,	)	
	)	
vs.	)	
	)	
	)	
South Carolina Department of	)	<b>ORDER AFFIRMING DECISION</b>
Employment and Workforce and	)	
Greenwood Mills, Inc.,	)	
	)	
Respondents.	)	
	)	

**RECEIVED**  
DEC 29 2015  
**SC Court of Appeals**

**STATEMENT OF THE CASE**

This matter came before the Administrative Law Court (“ALC” or “Court”) pursuant to the Notice of Appeal filed by Bobby Smith (“Appellant”). Appellant appealed from an Appellate Panel (“Panel”) Decision of the South Carolina Department of Employment and Workforce (“Department”), that disqualified Appellant from receiving benefits for a period of seventeen (17) weeks pursuant to S.C. Code Ann. § 41-35-120(2)(b) (Supp. 2014). The ALC has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2014). Upon consideration of the briefs and the record on appeal, the decision appealed from is affirmed.

**BACKGROUND**

Bobby Smith (“Appellant”) was employed as an electrician with Greenwood Mills, Inc. (“Greenwood” or “Employer”) from July 28, 2014 through November 30, 2014. Appellant was discharged by Greenwood as a result of failing to follow a directive that required Appellant to call into work by 10:00 a.m. prior to his 4:00 p.m. shift.

On November 30, 2014, Appellant arrived at work and found that his equipment had been removed from a shared lock box. Appellant felt disrespected by the event and became so distraught that he felt too mentally incapacitated to safely remain at work around electrical industrial machinery. Warren Moore (“Moore”), V.P. of Human Resources, granted Appellant’s request to leave work and instructed Appellant to call Brian Hardman (“Hardman”) by 10:00 a.m. the following morning, because Appellant told Moore that he did not know if he would show up for

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work the following day. Appellant's absence left that plant without an electrician on staff and his continued absence would require the plant to find another electrician to cover Appellant's shift.

On the following day, Appellant did not call the plant until approximately 1:45 p.m., at which time he was informed that he was terminated. The parties disagree about whether Appellant was directed to call the plant at 10:00 a.m. or to call only if he did not plan on coming in for his 4:00 p.m. shift.

On December 8, 2014, Appellant filed an initial claims application for unemployment insurance with the Department. On the application, Appellant provided the following statement, in part:

I told [Moore] that I may not come in for work the following day. He told me to call [Hardman] 6hr prior to my shift start of 4pm to let him know if I was not going in, so that way he could schedule someone in my place. There was no need to call because I was planning to go in. Although I did call in 2.5hrs early prior to my shift start for other reasons...

During the claims adjudicator's fact finding investigation, Greenwood provided the following response regarding Appellant's termination:

Mr. Smith left his job 1hr after shift started because he was upset over a work space issue. He told 3 people in management and finally Warren Moore, VP, HR, he was "so emotional that he could not work." Mr. Moore asked him if was aware the plant would be left with no electrician on duty. Mr. Smith said yes. Mr. Moore allowed him to go home with the understanding he must call or see Bryan Hardman by 10:00 a.m. the next day if he wanted to keep the job. He did not call or come see Mr. Hardman.

The Claims Adjudicator concluded from the fact finding that Appellant abandoned his job by voluntarily leaving during his shift without good cause. Appellant was indefinitely denied benefits.

Appellant appealed to the Appeal Tribunal ("Tribunal"), arguing only that he did not voluntarily quit and that he was allowed to leave work due to his mental incapacity. The Notice of Appeal Hearing by Telephone ("Notice") indicated that the issues to be considered would be whether Appellant voluntary quit (for good cause) or whether Appellant was discharged (for disqualifying cause).

At the Tribunal hearing, Appellant participated with his attorney, and Janet Alexander, James Nicholson, and Brian Hardman participated as witnesses for Greenwood. The Tribunal hearing officer questioned the parties individually, and they were also permitted an opportunity to

raise objections to testimony and to ask questions through cross-examination. Additionally, the parties were offered an opportunity to provide rebuttal testimony.

The Tribunal hearing commenced with the parties agreeing that Appellant was discharged and had not voluntarily quit. The Tribunal hearing officer questioned Greenwood's witnesses first, regarding Appellant's conduct and the circumstances that gave rise to his discharge. Over the objections of Appellant, the hearing officer allowed testimony from Greenwood's witnesses about statements made by Moore. Their testimony emphasized that Appellant was allowed to leave work but was directed to call Hardman by 10:00 a.m. the following day. Appellant's argued that he was only required to call work if he did not plan to work his shift.

In its *de novo* review, the Appeal Tribunal modified Appellant's unemployment eligibility from a status of voluntarily quit to discharged for cause, which disqualified Appellant from receiving benefits for a period of seventeen (17) weeks. The Tribunal had determined that Appellant was discharged for failing to adhere to management's instructions. Because there was uncertainty regarding whether Appellant would report to work and whether there was a potential need to find a substitute electrician, the Tribunal considered Greenwood's request for Appellant to call into work reasonable. The Tribunal concluded that Appellant was provided sufficient instructions and acted in a manner which he knew, or reasonably should have known, would jeopardize his employment. As a result, Appellant was discharged with good cause.

Appellant appealed to the Panel contending that the Tribunal erred in its determination that he was discharged with good cause. Appellant argued that he was instructed to call into work the next day by 10:00 a.m. if he was not going to report to work. Appellant also argued to the Panel that he acted reasonably under the circumstances and exceeded Greenwood's expectations by calling a couple hours before his 4:00 p.m. shift.

After a *de novo* review of the record, the Panel determined that the greater weight of the credible evidence established that Appellant failed to follow Greenwood's directive to call by 10:00 a.m. The Panel further concluded that Greenwood's directive was reasonable and that Appellant had not presented evidence of sufficient justification for failing to call as instructed. In upholding the Tribunal, the Panel concluded that Appellant's actions constituted a disregard for the reasonable standard of behavior the employer has a right to expect.

Appellant now appeals to the ALC.

## 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, the 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, 1-23-600(D) (Supp. 2014); 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). Section 1-23-380(5) of the South Carolina Code (Supp. 2014) provides the standard used by appellate bodies to review agency decisions. See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). 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 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.

§ 1-23-380(5) (Supp. 2014).

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)).

When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996). Thus, the party challenging an agency action has the **burden** of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. 219, 467 S.E.2d 913 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994)). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 467 S.E.2d at 917.

### **ISSUES ON APPEAL ASSERTED BY APPELLANT**

- 1. Did the Appellate Panel err in upholding the denial of benefits where the Employer and the Tribunal Hearing Officer knowingly made false statements to prevent the Claimant from receiving benefits?**
- 2. Did the Appellate Panel err in upholding the denial of benefits where the Tribunal Hearing Officer improperly allowed the Employer to argue that Claimant was properly discharged where the argument was not set forth in the notice of the hearing?**
- 3. Did the Appellate Panel err in upholding the denial of benefits where the Tribunal Hearing Officer improperly relied on hearsay evidence as the only evidence supporting the employer's position?**
- 4. Did the Appellate Panel err in upholding the denial of benefits where all of the proper and credible evidence showed that the Claimant acted reasonably in calling in 2.5 hours before his shift began to notify the Employer he would be reporting to work?**

### **DISCUSSION**

As an initial matter, Appellant raised several issues on appeal to this Court that were not properly preserved for review. Specifically, Appellant argued in Issue 1 of his brief that Greenwood violated S.C. Code Ann. § 41-41-30 by alleging in the claims adjudicator fact finding documents that Appellant voluntarily quit. Appellant also argued in Issue 2 of his brief that he was not afforded adequate notice of the issues that would be heard at the Tribunal hearing. Additionally, Appellant argued that Tribunal hearing officer ignored the previous record and created an opportunity for Greenwood to change its story.

The South Carolina Supreme Court has stated the following regarding the preservation of an issue for appellate review:

It is axiomatic that an issue cannot be raised for the first time on appeal, but that must have been **raised to and ruled upon** by the trial judge to be preserved for appellate review. (Emphasis supplied) (Internal citation omitted).

Wilder Corporation v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

However, as to Appellant's argument that the Tribunal failed to observe the record already created, such hearings are a *de novo* review. South Carolina regulations governing appeals to the Appeal Tribunal state, in part, the following:

All Appeal Tribunal hearings shall be *de novo* in nature and conducted informally in conformity with the South Carolina Administrative Procedures Act and in such manner as to ascertain the substantial rights of the parties. The Appeal Tribunal shall include in the record and consider as evidence all records of the Agency that are material to the issues. All issues relevant to the appeal shall be considered and passed upon. Any party to the appeal may present such testimony as may be pertinent to the appeal. Where a party appears in person, the Tribunal shall examine and cross-examine such party and his witnesses, and may examine and cross-examine the witnesses of any opposing party. The Appeal Tribunal with or without notice to any of the parties, may take such additional evidence at the hearing as it deems necessary. After a hearing and prior to actually rendering the decision, the Appeal Tribunal with notice to the interested parties as provided for in Appeal Regulation 47-51, A.5, may call the parties and any witnesses to appear before it for the taking of such additional evidence as it deems necessary. (Italics added).

S.C. Code Ann. Regs. § 47-51(C)(1).

The Court will now address the remaining issues raised by Appellant.

**1. The Appellate Panel did not err by relying upon hearsay evidence in upholding the Tribunal decision.**

Appellant argued in his brief that the Panel erred by crediting the testimony of Greenwood's witnesses, which was hearsay and unreliable second-hand evidence. The Department acknowledged in its brief that any of the testimonial evidence regarding statements made by Moore was technically hearsay because Moore did not participate in the Tribunal hearing. After reviewing the record, the Court finds that the Panel did not err in relying upon the statements of Greenwood's witnesses.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" in the statement. Rule 801(c) of the South Carolina Rules of Evidence (SCRE). "Hearsay is not admissible" unless an exception applies, or "as provided by ... other rules ... or by statute." Rule 802, SCRE.

However, "Though testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence admitted in the case. (internal citation omitted). The admission of evidence is discretionary with the trial judge whose ruling will not be disturbed in the absence of an abuse thereof amounting to an error of law, and prejudice." (internal citation omitted). Starkey v. Bell, 281 S.C. 308, 315-16, 315 S.E.2d 153, 157 (Ct. App. 1984).

Appellant has not shown this Court how he was prejudiced by the statements of Greenwood's witnesses, which corroborates other evidence that is contained in the record, some of which was provided by Appellant, namely the Claims Adjudicator fact finding statements, *supra*, and Appellant's testimony from the Tribunal hearing. See Issue 2, infra. As a result, this Court does not find that the Panel abused its discretion in relying upon the statements of the witnesses pertaining to the directives of Moore.

Additionally, Appellant is not in a position to complain about hearsay when the evidence complained of was offered through his own line of questioning, as shown by the following testimony:

HEARING OFFICER: So how do you know that Mr. Smith was instructed to call you by 10 A.M. the next day?

EMPLOYER WITNESS-2: Because after that conversation... I guess he went back to the shop to give James the phone and let him know that Warren had told... gave him permission to leave and to call me by 10 A.M. the next morning. I came back to the personnel office on my way out the door, Warren was setting in here, in his office, I stopped in, you know, to see if there was anything I need to know and Mr. Warren told me...

CLAIMANT ATTORNEY: I object again.

...

HEARING OFFICER: All right, I note it and I overrule the objection. All right go ahead, Mr. Hardman.

EMPLOYER WITNESS-2: Okay and I stopped then to talk to Warren Moore to ... like to say... see if there was anything I needed to know. Warren told me that Bobby was to contact me by 10 A.M. the next morning or he was going to be terminated...

Despite the objection, Counsel for Appellant engaged in the following line of questioning during the cross-examination of Hardman:

CLAIMANT ATTORNEY: And your testimony is there were instructions to call him... call you at 10 A.M. the next morning?

EMPLOYER WITNESS-2: Yes, sir, there was.

...

CLAIMANT ATTORNEY: And he called you sometime between 1:30 and 2:00 prior to his shift beginning?

EMPLOYER WITNESS-2: Yes, sir, I'd say it was right around 15 to two to 15 after two in that neighborhood.

...

CLAIMANT ATTORNEY: And did he inform whether he was planning on coming back to work that day?

EMPLOYER WITNESS-2: I will be honest; not that I recall but...as soon as he got done telling me why he had done what he done the day before I told him that I was instructed due to the situation of not calling at 10:00 this morning...or that morning that I was instructed to terminate him...

...

CLAIMANT ATTORNEY: Yeah, when did you know that he was terminated, when the decision had been made?

EMPLOYER WITNESS-2: When he didn't call me at 10:00. I came up and discussed it with Mr. Moore. I told him that I did not get a call and [Moore] told me that if [Appellant] did call to let [Appellant] know and of course that I was instructed to terminate him.

Although Appellant's objection was overruled during the hearing officer's direct examination, Hardman's testimony was subsequently offered into the record by Appellant during his own line of questioning on cross-examination without any preservation of his previous objection. *Merrill v. Barton*, 250 S.C. 193, 197, 156 S.E.2d 862, 864 (1967) (No error in admission of evidence where counsel cross-examined witness at length but failed to preserve aforesaid objection that was previously raised during witness' direct examination).

- 2. The Appellant Panel did not err in upholding the Tribunal decision based upon the greater weight of the credible evidence in the record that warranted Appellant's discharge for fault, other than misconduct.<sup>1</sup>**

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<sup>1</sup> Appellant failed to provide any citation of legal authority in support of his argument, as required by SCALC Rule 37(B)(3), which would have provided additional sustaining grounds for upholding the Panel's decision. See *On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

Appellant argued in his brief that the Tribunal abused its discretion by finding that he was discharged for cause connected to his employment and contended that he acted reasonably by calling Greenwood a couple hours before his shift was scheduled to begin. The Court disagrees.

The scope of review of a Tribunal decision by the Appellate Panel is set forth under Section 41-35-710, in part, as follows:

The Department of Employment and Workforce Appellate Panel may on its own motion affirm, modify, or set aside a decision of an appeal tribunal on the basis of evidence previously submitted in the case; direct the taking of additional evidence; or permit a party to the decision to initiate further appeals before it ...

S.C. Code Ann. § 41-35-710 (Supp. 2014).

In reviewing Appellant's appeal, the Panel reviewed the record before it and made the following findings of fact as they pertain to Appellant's failure to follow the request of his employer:

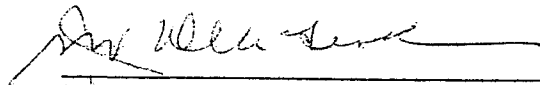
We find the greater weight of credible evidence establishes the claimant failed to follow the employer's directive to call in at 10:00 a.m...The employer has presented sufficient credible evidence to show the claimant was informed he needed to call by 10:00 a.m., regardless of whether he could report to work or not. We find the claimant was at fault in his discharge.

Contrary to Appellant's argument, this Court finds that the Panel's decision was not an abuse of discretion and was supported by substantial evidence. As the record evidences, Appellant felt that he did not have the mental capacity to remain at work and requested to be excused; Appellant admitted to telling his Employer that he was uncertain whether he would report to work the following day; and, Appellant's absence resulted in the plant having no electrician on duty and further absences by Appellant would require Greenwood to find a substitute.

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, supra*. In this instance, the Panel weighed the evidence and found that of the Employer more credible. See § 1-23-380(5) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

Based up this Court's review of the parties' briefs and the record on appeal, **IT IS HEREBY ORDERED** that the decision of the Appellate Panel is **AFFIRMED**.

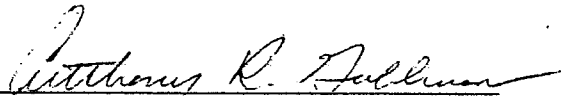
November 25, 2015  
Columbia, S.C.

  
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John D. McLeod, Judge  
South Carolina Administrative Law Court

**CERTIFICATE OF SERVICE**

I, Anthony R. Goldman, 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).

November 25, 2015  
Columbia, S.C.

  
\_\_\_\_\_  
Anthony R. Goldman  
Judicial Law Clerk

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