THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 14-ALJ-22-0597-AP

Appellate Case No. 2015-001458

Cynthia L. Aviles,

Respondent,

v.

South Carolina Department of Employment and Workforce, and Accusweep Services, Inc.,

Defendants,

Of whom, South Carolina Department of Employment and Workforce is

Appellant.

FINAL REPLY BRIEF OF APPELLANT

Debra S. Tedeschi (SC Bar #15307)
Deputy General Counsel
E.B. "Trey" McLeod (SC Bar # 73642)
Assistant General Counsel
SC Dept. of Employment and Workforce
PO Box 8597
Columbia, SC 29202
Attorneys for Appellant SCDEW

Christopher S. Leonard
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
Attorney for Respondent

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II. **DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY DECIDING AVILES WAS ENTITLED TO UI BENEFITS WHEN HER SEPARATION FROM EMPLOYMENT WAS A DIRECT RESULT OF BEING INCARCERATED FOR OVER FOUR MONTHS?**

ARGUMENT

I. There is substantial evidence in the Record supporting the Appellate Panel's Decision finding Respondent voluntarily left her employment without good cause within the meaning of S.C. Ann. 41-35-120(1).

Respondent argues in her brief that the Appellate Panel ("Panel") erred in its decision, and the Administrative Law Court (ALC) properly reversed, because "a review of the entire record would not lead a reasonable person to conclude Respondent voluntarily abandoned her job due to not communicating with her employer." (Resp. Brf. p. 8.) However, the Department submits that it would be altogether reasonable to conclude that Respondent left work "without good cause" when her extended absence from work without any notification to Employer was the result of her four-month incarceration. S.C. Code Ann. § 41-35-120(1).

The Court must review this case under the well-established and controlling standard of review on appeal from a final decision of the Department, the substantial evidence standard. This standard requires the appellate court to affirm the Department's decision if the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135-36, 276 S.E.2d 304, 307 (1981). Substantial evidence "is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [the Panel's] finding from being supported by substantial evidence." *Id.* at 136, 276 S.E.2d at 307. Furthermore, an appellate court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Id.* Finally, the Department's Appellate Panel is the ultimate finder of fact in UI benefits cases. *See Merck v. S.C. Emp. Sec. Comm'n*, 290 S.C. 459, 460, 351 S.E. 2d 338 339 (1986).

In her recitation of the Facts, Respondent inaccurately states that the "only reason [Respondent] no longer worked for [Employer] was because she did not show up for work after she was arrested." (Resp.Brf.p.6.) This paraphrasing fails to address the testimony of Employer's witness, Fredrick McCaskill, who stated the following:

> On the, after the second I guess the next day she was supposed to come into work, **didn't hear anything from her**. I'd asked my night shift supervisor if he'd heard anything. Nobody seemed to know where she was. Not the first time I've had an employee just not come back. So I've had that happen before. **I waited a couple days to see if she would contact me. I asked on a regular basis had anybody heard from her and nobody had**. So on the 6th I sent in the Employee Separation Notice for failed to return, **no contact,** which we considered a voluntary resignation.

(R.p.59, lines 24-32) (emphasis added). The Record is clear that Respondent's job separation resulted from the combination of her failure to return to work **and** her failure to contact Employer.

Therefore, contrary to Respondent's arguments and the ALC's finding, there is substantial evidence in the Record to support the Panel's ultimate conclusion that Respondent left work "without good cause attributable to the employment." (R.p.18).

It is worth noting that public policy of the UI system is to achieve social security by encouraging stable employment. *See* S.C. Code Ann. § 41-27-20. Therefore, a UI claimant is eligible for benefits only if she is unemployed through "no fault" of her own. *See* S.C. Code Ann. §§ 41-27-20, 41-35-110(5) (1986 & Supp. 2014). When making an eligibility determination, the Department is also responsible for imposing a disqualification, when appropriate. *See generally* S.C. Code Ann. § 41-35-120. This means, for example, if the Department finds a claimant left her job "voluntarily, without

good cause[1]", then an indefinite disqualification must be imposed. S.C. Code Ann. § 41-35-120(1). Stated another way, only a UI claimant who demonstrates that she has left employment **with good cause** is eligible to receive UI benefits.

Here, it is undisputed that Employer did not discharge or fire Respondent, (R. p. 44, lines 33-39; p.59, lines 24-32); therefore, **the sole issue before the Panel was whether Respondent's separation from employment was with or without good cause**. The Panel determined, as a matter of fact, that Respondent's assertions that "she had no means of contacting the employer to notify them of her circumstances" lacked credibility. (R. p. 18). The Panel further concluded that Respondent "abandoned her job when she missed multiple scheduled shifts without contacting the employer." *Id.* Both of these key determinations are factual in nature and are supported by substantial evidence in the Record.

Therefore, the ALC exceeded its scope of review by "substitut[ing] its judgment for that of the agency as to the weight of the evidence on questions of fact." *Lark v. Bi-Lo, Inc.*, 276 S.C. at 136, 276 S.E.2d at 307. The ALC failed to follow South Carolina precedent when it interpreted leaving work "voluntarily" as the equivalent to whether it was Respondent's "free choice" to end her employment. (R.p.5; ALC Order on Reconsideration p.4, dated June 10, 2015). Instead, the proper inquiry is whether the job separation was due to a cause attributable to, or connected with, employment. *See State-Record Pub., supra; Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n*, 219 S.C. 239, 247, 64 S.E.2d 644, 647 (1951).

[1] South Carolina Courts have "on more than one occasion, construed the phrase 'without good cause' as meaning without good cause connected with employment." *State-Record Pub. Co. v. S. Carolina Employment Sec. Comm'n*, 254 S.C. 1, 9, 173 S.E.2d 144, 147 (1970)

Put simply, the ALC erred when it parsed the statutory phrase, "voluntarily, without good cause," and focused **only** on the term "voluntarily," while ignoring the precedential meaning of without good cause." *See id.;* S.C. Code Ann. § 41-35-120(1).[2] In doing so, the ALC failed to contextualize the meaning of the term with the intent and purpose of the law.[3]

Respondent also asserts in her brief that "there is no evidence in the record to attack Aviles' credibility as a witness." (Resp.Brf.p.8). Besides unfairly characterizing a credibility determination as an "attack," this statement disregards that, as the ultimate fact finder, the Panel has the duty to assess the credibility of the witnesses and the weight to be accorded evidence. *Merck, supra*; *cf. Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct. App. 2011) (as the ultimate fact finder, the Workers' Compensation Commission's Appellate Panel "is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence"). In other words, making credibility findings and assigning the weight to evidence in the Record are exclusively within the purview of the Panel.

Respondent takes issue with the Panel's finding that Respondent's testimony lacked credibility mainly because her testimony was undisputed in the hearing. However, "[t]he fact that testimony is not contradicted directly does not render it undisputed."

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[2] Indeed, in its analysis, the ALC cited no binding South Carolina precedent specific to leaving work "voluntarily, without good cause," S.C. Code Ann. § 41-35-120(1), and instead cited only a non-binding ALC decision.

[3] *See Stone Mfg.,* 219 S.C. at 246, 64 S.E.2d at 646 ("the term 'involuntary unemployment' as used in the declaration of policy [S.C. Code Ann. § 41-27-20] 'had reference to unemployment resulting from a failure of industry to provide stable employment', and that the statute was not intended 'to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances.")(*quoting Judson Mills v. S. Carolina Unemployment Comp. Comm'n.*, 204 S.C. 37, 28 S.E.2d 536 (1944))

Vinson v. Hartley, 324 S.C. 389, 410, 477 S.E.2d 715, 726 (Ct. App. 1996). Indeed, there is always "the question of **the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation**." *Id.* (emphasis added).

Respondent was the only witness to testify on her behalf. In rendering its final decision, the Panel found Respondent's self-serving assertions that she had **no means** by which to contact her employer improbable. Given the nature of this case, the Panel had to reach its conclusions by evaluating, among other considerations, the credibility of Respondent's testimony. The Record is devoid of any evidence that confirms Respondent had no means whatsoever to communicate with Employer during her extended incarceration. Without such corroboration, the Panel acted within its discretion by weighing Respondent's testimony against the obvious improbability of her having no means of getting word to Employer for nearly four months.

Under the substantial evidence standard of review, a reviewing court must "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." *Lark v. Bi-Lo, Inc.*, 276 S.C. at 136, 276 S.E.2d at 307 (citation and internal quotation marks omitted). Clearly, the Panel's credibility determination regarding whether Respondent had "no means of contacting" the employer to communicate her circumstances must be upheld because it is reasonable to conclude that Respondent's testimony lacked credibility. *Id.*[4]

[4] *Accord Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731, 740 (Mo. Ct. App. 2001). In her Reply brief, Respondent cites *Moore* for the proposition that so-called "innocent incarceration" is not a "disqualifying reason." While the *Moore* court did find that a job separation caused by incarceration was not a voluntary quit, it nevertheless held the claimant

Appellant further implies that the Panel erred in reversing the Tribunal because it should have deferred to the hearing officer "who had the direct ability to view" respondent. (Resp.Brf.p.8). As noted above, however, the Panel is the ultimate fact finder, and therefore, it "has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal." *Merck*, 290 S.C. at 460, 351 S.E.2d at 339; *see also Milliken & Co. v. S.C. Emp. Sec. Comm'n*, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996) (where the South Carolina Supreme Court stated: "on questions of witness credibility we defer to the judgment of the agency"). Thus, Respondent's contention finds no support in applicable law and must also be rejected.

II. Because the specific issue of law raised by the Department did not arise until the ALC's Order reversed the Department's decision, the issue of law regarding ineligibility due to incarceration is properly preserved for this Court's review.

As in all appellate matters, issue preservation is required in administrative appeals. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

On appeal to this Court, the Department has raised the following two issues:

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disqualified for "misconduct connected with work." The Missouri Court of Appeals plainly stated the following:

> In this case, although no doubt the circumstances related to his incarceration were somewhat difficult, the record nevertheless is undisputed that Mr. Moore *could have* communicated with Employer during November 15 through 17, 1999 to call in or otherwise report his absences during those days, but did not do so. As the Commission found, "his decision not to communicate with the employer is an action over which he had control."

Therefore, even the case cited by Respondent as being in her favor actually supports the Panel's factual finding that over the course of **four months**, it strains credulity to believe that Respondent had absolutely no means of contacting her employer.

I. DID THE ADMINISTRATIVE LAW COURT ERR IN REVERSING THE DEPARTMENT'S DECISION THAT AVILES WAS INDEFINITELY DISQUALIFIED FROM RECEIVING UNEMPLOYMENT INSURANCE (UI) BENEFITS, WHICH WAS BASED ON THE DEPARTMENT'S FACTUAL FINDING THAT RESPONDENT LEFT HER MOST RECENT WORK VOLUNTARILY, WITHOUT GOOD CAUSE DUE TO HER INCARCERATION?

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Interestingly, Appellant's Issue on Appeal to the ALC was the following:

> THE DEPARTMENT ERRED IN FINDING THAT CYNTHIA AVILES VOLUNTARILY QUIT WHEN SHE WAS ARRESTED WITHOUT PROBABLE CAUSE AND UNABLE TO COMMUNICATE WITH HER EMPLOYER.

Therefore, the issue fundamentally has remained the same throughout this entire process: is Respondent entitled to UI benefits when, as a direct result of her incarceration, she was separated from her employment for failure to appear at work or contact her employer? On appeal to this Court, the Department naturally has made both a factually-based argument (subject to the substantial evidence rule) as well a legally-based argument on this single dispositive issue.

Respondent maintains in her Brief that the Department's second issue is unpreserved for the Court's review because it was not raised by the Department to the Panel or the ALC.

As stated above, the issue has remained the same over the course of these proceedings, both before the Panel and on judicial review. After all, the precise issue of law clearly did not arise until June 10, 2015, when the ALC upheld its reversal of the Department's decision in its Order on Reconsideration. Even if it arguably arose when the ALC first reversed the Department's final decision on April 29, 2015, the Department

filed a Motion for Rehearing/Reconsideration. In that motion, the Department argued, *inter alia*, that the "intent and purpose behind the Employment and Workforce Law requires a disqualification in the present case." (ALC Order dated April 29, 2015 R.pp.8-13; DEW Motion for Rehearing, pp.5-7, dated May 12, 2015, R.pp.103-112). Thus, the issues are clearly preserved and ripe for this Court's review.

Respondent suggests that the Department should have raised this issue in its brief to the ALC. However, there was no issue for the Department to object to until the ALC actually reversed the Panel's decision. Respondent herself recognizes that when the Department filed a Motion for Rehearing/Reconsideration from the ALC Order issued on April 29, 2015, it raised the issues now on appeal to this Court. (Resp.Brf.p.9); *see State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991)(An appellant must "object at his first opportunity to preserve an issue for appellate review.") Accordingly, the Department's issues on appeal are preserved for this Court's review because they were raised to the ALC (when the Department moved for rehearing/reconsideration) and ruled upon by the ALC in its June 10, 2015, "Order on Reconsideration."

Lastly, in the Department's brief to the ALC it argued that a UI claimant "may be charged with quitting a job by action or inaction with unavoidable ramifications." *Samuel v. S.C. Emp. Sec. Comm'n*, 285 S.C. 476, 477-78, 330 S.E.2d 300, 301 (1985) (ALC Brief of Respondent DEW, p.6). This is essentially the Department's argument on appeal to this Court. While the Department has cited numerous persuasive authorities from other states, the primary argument is that, based on South Carolina precedent,[5] Section 41-35-120(1) does not allow DEW to grant UI benefits to individuals who were separated from their jobs because they were in jail or prison.

CONCLUSION

For all the reasons discussed above, as well as in the Department's opening Brief, the decision of the ALC should be reversed.

Respectfully submitted,

Debra S. Tedeschi (SC Bar # 15307)
Deputy General Counsel
E.B. "Trey" McLeod, III (SC Bar # 73642)
Assistant General Counsel
S.C. Dept. of Employment & Workforce
Post Office Box 8597
Columbia, SC 29202
(803) 737-0395
legal@dew.sc.gov
Attorneys for Appellant

March 1, 2016

[5] *See, e.g., Samuel v. S.C. Emp. Sec. Comm'n*, 285 S.C. 476, 477-78, 330 S.E.2d 300, 301 (1985); *Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n*, 219 S.C. 239, 247, 64 S.E.2d 644, 647 (1951).

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PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief upon Respondent by depositing a copy of it in the United States Mail, first class postage prepaid, on March 1, 2016, to the following addresses:

Christopher S. Leonard, Esq.
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
Attorney for Respondent

March 1, 2016

Kristi Chesley
Office Manager
SC Dept of Employment and Workforce
PO Box 8597
Columbia, SC 29202
803-737-0395