THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

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

CHARLES E. STUBBS, Appellant,

vs.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE AND JSE LLC, Respondents.

BRIEF OF APPELLANT

February 3, 2016

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Issue on Appeal 1

Statement of the Case 2

1. Procedural History 2

2. The Evidence Presented 5

Standard of Review 7

Argument 9

Conclusion 16

TABLE OF AUTHORITIES

Cases

Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008).....14

Bauer v. S.C State Housing Auth., 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978).....9, 14

Curtis v. State, 345 S.C. 557, 569-570, 549 S.E.2d 591, 597 (2001).....13

Deese v. State Bd. Of Dentistry, 286 S.C. 182, 184-85; 332 S.E.2d 539, 541 (1985).....8

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d772, 775 (2004).....15

Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).....11

Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 533 (1995).....14

Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (1995).....13

Hall v. United Rentals, 371 S.C. 69, 79, 636 SE.2d 876, 882 (Ct. App. 2006).....7

Hamm v. South Carolina Public Service Com. 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985)..... 11-14

Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).....10

Hartsville Cotton Mill v. S.C. Emp't Sec. Com., 224 S.C. 407, 414, 79 S.E.2d 381, 384 (1953).....14

Houston v. DeLoach & DeLoach, 378 S.C. 543, 550, 663 SE.2d 85, 89 (Ct. App. 2008)..7

Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126; 623 S.E.2d 860, 863 (Ct. App. 2005).....8

McEachern v. South Carolina Emp. Sec. Commission, 370 S.C. 553, 635 SE.2d 644 (S.C. Ct. App. 2006).....7

Merck v. South Carolina Employment Security Commission, 290 S.C. 459, 461,351 SE.2d 338 (1986).....8

S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012).....9

State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) 10-12

State v. Allen, 370 S.C. 88, 94; 634 S.E.2d 653, 656 (2006) 8

Stubbs v. S.C. Dep't of Empl. & Workforce, 407 S.C. 288, 755 S.E.2d 114, (Ct. App. 2014) 4

Constitutions

S.C. Const. art. I, § 3 13

U.S. Const. amend. XIV, § 1 13

Statutes

S.C. Code Ann. § 1-23-310 7

S.C. Code Ann. § 1-23-380(A) 7, 11-12

S.C. Code Ann. § 1-23-610 7

S.C. Code Ann. § 41-29-110 9

S.C. Code Ann. § 41-35-680 ..... 4, 9, 11, 14-16

S.C. Code Ann. § 41-35-750 7

Regulations

S.C. Code Ann. Regs. 47-52(A)(1) 4, 10, 14, 16

Secondary Sources

"Notice," *Black's Law Dictionary,* 870 (Abr. 7th ed. 2000) 10

"Notification," *Black's Law Dictionary,* 873 (Abr. 7th ed. 2000) 10

ISSUE ON APPEAL

Did the Administrative Law Court err by finding that Stubbs' appeal was untimely when the uncontradicted evidence of record establishes that Stubbs placed his appeal in the mail within ten days of the date of notification, as provided by S.C. Code Ann. Regs. 47-52(A)(1)?

STATEMENT OF THE CASE

1. Procedural History

This case is before the Court on appeal from an Order of the South Carolina Administrative Law Court (ALC) following a lengthy series of remands and appeals. Appellant Charles E. Stubbs worked for Respondent JSE LLC ("the Employer"), a staffing business, from October 28, 2009 to January 2, 2011, as an assembler. (R. pp. 18-19) Stubbs applied for unemployment benefits and Respondent South Carolina Department of Employment and Workforce ("the Department") found him eligible without disqualification. (R. p. 116) The Employer appealed the decision and the Department set a hearing before its Appeal Tribunal. (R. p. 81) The hearing was held on June 14, 2011, and both Stubbs and the Employer participated. Stubbs was unrepresented at the hearing. The Appeal Tribunal found that Stubbs had injured his foot in a car accident on December 18, 2010 and that he had undergone surgery and remained under a doctor's care with restrictions from prolonged standing until May 2011. (R. p. 77) The Appeal Tribunal also found that the Employer did not offer Stubbs medical leave or provide him with any assignments that would accommodate his doctor's restrictions. (R. p. 77) The Appeal Tribunal concluded that Stubbs was completely disqualified from receiving benefits because he voluntarily quit his position with the Employer due to health-related reasons:

> Although the Agency is not unsympathetic to the claimant's circumstances, the employer did not alter the claimant's condition of hire. Furthermore, the claimant filed a claim for benefits prior to making himself available for addition [*sic*] work with subject employer. Therefore, the Tribunal finds that the reason the claimant voluntarily quit without good cause. [*sic*] (R. p. 78)[1]

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1 In reaching its decision, the Appeal Tribunal failed to consider the applicability of S.C. Code Ann. § 41-35-125(d)(), which provides that workers who are separated from employment due to "compelling family circumstances" are eligible for benefits. "Compelling family circumstances" includes separation from employment "because of the illness or disability of the claimant and, based upon available information, the

Representing himself, Stubbs appealed the Appeal Tribunal's decision to the Department's Appellate Panel. (R. p. 83) The Appellate Panel dismissed the appeal as untimely by letter of the Department's Higher Authority Appeals office. (R. p. 85) Stubbs appealed this dismissal to the Appellate Panel. (R. p. 90) The Appellate Panel remanded the case to the Appeal Tribunal for a hearing on the timeliness of Stubbs' appeal, which was conducted on November 9, 2011. (R. pp. 35-116) Based upon the testimony and evidence developed at that hearing, the Appellate Panel issued a decision on the timeliness of Stubbs' appeal on November 29, 2011. (R. pp. 74-75) The Appellate Panel found that the Department mailed its decision to Stubbs' address of record on June 17, 2011; that Stubbs received the decision on June 20, 2011; and that the appeal period expired on June 27, 2011. It acknowledged that Stubbs testified under oath that he placed his appeal letter in the outgoing mail slot at his apartment complex on June 21, 2011 and that he believed that it was collected and processed in accordance with the normal course of business of the United States Postal Service. The Appellate Panel omitted any finding about Stubbs' credibility but simply concluded:

> "[t]he claimant was aware he was mailing a time-sensitive document, and it was his responsibility to ensure that the appeal was timely filed. The claimant filed an untimely appeal due to his own error or neglect. Therefore the appeal is dismissed as untimely." (R. p. 75)

The Appellate Panel's decision was the final agency decision.

Stubbs appealed the Appellate Panel's decision to the ALC. On March 26, 2012, Judge John D. McLeod issued an Order finding the appeal untimely based upon a finding that Stubbs did not deposit the appeal in a United States postal box. (R. pp. 72-73) Stubbs moved for reconsideration based upon errors of law and moved for the ALC to take judicial

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department finds that it was medically necessary for the claimant to stop working or change occupations."

notice that his apartment complex's outgoing mailbox is indeed a United States postal box. The ALC denied this motion on May 15, 2012. (R. p. 71)

Stubbs appealed to the South Carolina Court of Appeals. In a published March 5, 2014 decision, this Court vacated the ALC's order upon a finding that the ALC had made an improper finding of fact—that Stubbs' mailbox was not a United States postal box—which violated the ALC's standard of review. (R. pp. 66-70) The Court remanded the appeal back to the ALC. *Stubbs v. S.C. Dep't of Empl. & Workforce*, 407 S.C. 288, 755 S.E.2d 114, (Ct. App. 2014).

In an April 15, 2014 Order, the ALC found the Appellate Panel's decision insufficiently detailed to enable the ALC to determine whether the findings are supported by the evidence and whether the law has been correctly applied to those findings, and it remanded the case to the Department. (R. pp. 64-65)

The Appellate Panel requested briefing and conducted a hearing on August 27, 2014. (R p. 132) This time, the Appellate Panel found that the appeal period expired on Monday, June 27, 2011; that Stubbs' testimony that he had placed the appeal in the mail on June 21, 2011 was not credible; and that he had mailed it on June 29, 2011, the date of the postmark. In a divided opinion, the Appellate Panel again found the appeal untimely.[2] (R. pp. 60-62)

Stubbs again appealed to the ALC. (R. pp. 54-55) Stubbs argued that the Department erred by finding Stubbs' appeal was untimely when the uncontradicted evidence of record is that he placed the appeal in the mail within ten days of the date of notification, as provided by S.C. Code Ann. Regs. 47-52(A)(1). Stubbs also argued that the

2 Administrative Law Judge E. B. Ayers dissented from the Appellate Panel's decision.

Department erred by finding his appeal untimely when the uncontradicted evidence of record is that he placed his appeal in the mail within ten days of the Department's mailing it to him, as provided by S.C. Code Ann. § 41-35-680 (Supp. 2013). Judge McLeod declined to consider whether Stubbs' appeal was timely under the notification provision of the Department's regulation because he concluded that the regulation improperly added to the statute. (R. p. 6) He concluded that the only important date to determine timeliness is the date of mailing, and he affirmed the Department's decision that the appeal was untimely. (R. p. 7) This appeal proceeds therefrom.

2. The Evidence Presented

The facts regarding the timeliness of Stubbs' appeal were developed at a hearing before the Appeal Tribunal on November 9, 2011. The Department asserts that it mailed the Appeal Tribunal decision at issue to Stubbs on June 17, 2011. Stubbs testified that he received the decision on Monday, June 20, 2011. (R. p. 96, lines 15-17) He mailed his appeal on June 21:

> HEARING OFFICER: Okay, when did you receive that in the mail?
> CLAIMANT: I would have to say probably around the 20th, which I checked the calendar the 17th, was a Friday, so I probably got it that Monday.
> HEARING OFFICER: Okay.
> CLAIMANT: And put it back in the mail that Tuesday.
> (R. p. 96, lines 14-19)

Stubbs explained that he mailed his appeal by placing it in the outgoing mailbox at his home on June 21, 2011:

> HEARING OFFICER: Well, how...did you mail this?
> CLAIMANT: I mailed this at my house. I got a...they got a box where the mailman comes, and he...you got little slots where you can...outgoing mail.
> HEARING OFFICER: Right.

CLAIMANT: And he…he takes it out. I…I don't know what happened with that, I don't. I have no idea.
HEARING OFFICER: And when you say you put it in that slot…
CLAIMANT: I put it in that slot on the…had to be the 21st.
(R. p. 98, lines 16-23)

Stubbs did not know why the appeal was postmarked June 29, 2011. (R. p. 101, line 17) He testified "I don't know what happened with the letter." (R. p. 102, lines 4) Stubbs asked the hearing officer to take into consideration "that the mail might have made a mistake…the mail is an entity in itself and…I have no control over it in any kind of way." (R. p. 103, lines 12-13)

STANDARD OF REVIEW

S.C. Code Ann. § 41-35-750 provides that "[i]n a judicial proceeding under [Title 41, Chapter 35], the findings of the department as to the facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the court must be confined to questions of law." The Administrative Procedures Act (APA) sets forth the bases for review of a decision of the ALC. S.C. Code Ann. § 1-23-610 (Supp. 2014). The South Carolina Department of Employment and Workforce is an "agency" within the scope of the APA. *Id.* at § 1-23-310(2). An appellate court may affirm or remand a decision of the ALC, or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(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. *Id.* at § 1-23-610(B)

The "substantial evidence" standard governs factual findings under the APA. *See e.g. Hall v. United Rentals*, 371 S.C. 69, 79, 636 SE.2d 876, 882 (Ct. App. 2006) (Worker's Compensation case), *McEachern v. South Carolina Emp. Sec. Commission,* 370 S.C. 553, 635 SE.2d 644 (Ct. App. 2006). An appellate court may not overturn an agency's finding of fact when it is supported by substantial evidence. Substantial evidence requires a showing of more than a "mere scintilla of evidence." *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 550, 663 SE.2d 85, 89 (Ct. App. 2008). To be substantial, evidence must be such that reasonable minds can reach the same conclusion that the agency reached. *Merck v. South Carolina Employment Security Commission*, 290 S.C. 459, 461,351 SE.2d 338

(1986).

The appellant court's review is "plenary" when the agency's decision is controlled by an error of law. *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126; 623 S.E.2d 860, 863 (Ct. App. 2005). An appellate court may "freely and absolutely" review a trial court's or agency's error of law. *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 552, 663 SE.2d 85, 90 (S.C. Ct. App. 2008) (*citing Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005)).

An error of law is present when the agency's decision is based upon:

> [A]pplication of the wrong legal principle; or when based upon factual conclusions, the ruling is without evidentiary support; or when the trial court is vested, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. *State v. Allen*, 370 S.C. 88, 94; 634 S.E.2d 653, 656 (2006).

A decision is considered 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 . . . or is governed by no fixed rules or standards." *Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184-85; 332 S.E.2d 539, 541 (1985).

ARGUMENT

The Administrative Law Court erred by finding that Stubbs' appeal was untimely when the uncontradicted evidence of record establishes that Stubbs placed his appeal in the mail within ten days of the date of notification, as provided by S.C. Code Reg. 47-52(A)(1).

The ALC's decision should be reversed because it is unsupported by substantial evidence of the whole record and is controlled by a serious error of law. It is undisputed that Stubbs placed his appeal of the Department's Appeal Tribunal decision in the mail within ten calendar days of his receipt of that decision, which was timely according to the plain language of the Department's own regulation. The statutory provision governing appeals to the Appellate Panel provides, in relevant part, that "[the Appeal Tribunal decision] must be considered the final decision of the department, unless within ten days after the date of mailing the decision a further appeal is initiated pursuant to Section 41-35-710." S.C. Code Ann. § 41-35-680 (Supp. 2013). 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. Code Ann. Regs. 47-52(A)(1)[emphasis added].

Regulations are construed using the same canons of construction as statutes. *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012). In interpreting regulations, it is axiomatic that courts "give words their plain and ordinary

meaning, and will not resort to a subtle or forced construction that would limit or expand the [regulation's] operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). According to the plain and ordinary language of this regulation, a party seeking to appeal a decision may timely do so within ten calendar days of notification of the decision. "Notification" is a synonym for "notice." *Black's Law Dictionary,* 873 (Abr. 7th ed. 2000). "Notice" is:

> [l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right or title...A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received a notice of it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording." *Id.* at 870.

Stubbs received notification of the Appeal Tribunal decision when he received the decision in the mail on June 20, 2011. (R. p. 37, lines 15-17) Stubbs met the requirements of the Department's regulation to file his appeal within ten calendar days of notification. The Department mailed its Appeal Tribunal decision to him on June 17, 2011. (R. p. 106) The Department does not dispute that Stubbs received the decision on June 20, 2011. This would be the first notification of the Appeal Tribunal decision that Stubbs received. Under the Department's regulation, Stubbs' deadline to file an appeal would therefore be June 30, 2011, ten days after his receipt of notification of the decision. Though Stubbs testified that he mailed his appeal on June 21, 2011, the Department's Appellate Panel chose instead to rely upon the postmark date of June 29, 2011 as the mailing date. (R. p. 62) Even accepting the Department's finding that Stubbs actually filed the appeal by placing it in the mail on June 29, 2011, he filed it "within ten (10) calendar days after the date of notification" S.C. Code Ann. Regs. 47-52(A)(1). It must therefore be considered timely and the Department's

appeal must be reversed as unsupported by substantial evidence and affected by error of law.

The ALC refused to apply the plain language of the Department's regulation and instead relied solely on a narrow reading of S.C. Code Ann. § 41-35-680 to conclude that "in order to timely file an appeal, an appellant must file within ten days of the date of mailing." The ALC erred by ignoring the Department's regulation. It must be presumed that the Department, in promulgating this regulation, "intended by its actions to accomplish something and not to do a futile thing." See, *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964); see also *Florence County Democratic Party v. Florence County Republican Party,* 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)("The statutory language must be constructed in light of the intended purpose of the statute [citation omitted]. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."). The ALC's interpretation renders the regulation futile and meaningless. The Department had a reason for referring to notification in the regulation. Likewise, the General Assembly had a reason for approving the particular language in the regulation.

Though the Department now chooses to disavow the plain language of S.C. Code Ann. Regs. 47-52(A)(1), it promulgated the regulation for a good reason—the South Carolina Supreme Court has held that in an administrative appeal, an appeal deadline must be based upon notice to avoid "an absurd result not possibly intended by the legislature." *Hamm v. South Carolina Public Service Com.* 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985). In *Hamm*, the Court examined an administrative appeal from a final agency decision under S.C. Code Ann. § 1-23-380, which provides that appeals from agency

rulings must be commenced within thirty days after the decision. S.C. Code Ann. § 1-23-380(b)(Supp. 1984). The Public Service Commission issued a decision raising electric rates on March 30, 1984. Hamm, the Consumer Advocate for South Carolina, did not receive the decision due to a mail error. He later learned of the decision and obtained a copy on April 4, 1984. Hamm filed an appeal thirty days after receiving a written copy of the decision and over sixty days after the final agency decision under appeal. Despite the plain language of the statute requiring an appeal to be filed within thirty days after the decision, the Supreme Court found that the appeal period started upon Hamm's receipt of written notice of Hamm's appeal:

> [w]hile a literal reading of Section 1-23-380(b) suggests the thirty days to appeal runs from the time the decision is made, we believe the statute must be read to allow a party thirty days after notice of a decision to bring an appeal. However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature. *State, ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E. (2d) 778 (1964). If time to appeal ran from the date a decision was actually made, an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run. Such a result could not have been intended by the legislature. We hold that under Section 1-23-380(b), a party has thirty days after receiving written notice to appeal an agency decision. 287 S.C. 180, 181-182, 336 S.E.2d 470, 471 (1985).

The Court's rationales for applying a notice standard in *Hamm*—"to avoid an absurd result" and to ensure an opportunity to obtain judicial review—are even stronger for claimants for unemployment benefits. While Hamm was a government official with employees and resources sufficient to challenge the actions of another government agency, many recipients of unemployment benefits are, like Stubbs, of limited financial means, education, experience, and sophistication. While Hamm had a statutory thirty-day deadline to appeal, under the Department's current practice unemployed workers with limited education and no experience with legal processes must take the necessary steps to appeal in less than ten

days from receipt of notice, if they receive any notice at all. Like Hamm, claimants for unemployment benefits are at the mercy of a government agency to promptly mail decisions and at the mercy of the United States Postal Service to promptly and correctly deliver mailed decisions.[3]

Under the Administrative Law Court's analysis, whether aggrieved parties even learn of the adverse action taken against them is irrelevant—claimants are expected to appeal an Appeal Tribunal decision within ten calendar days of the Department's placing it in the mail, even if they never actually receive it. This is one of the "absurd results" contemplated by the Court in *Hamm*, and it justifies the Department's regulation providing that the deadline to appeal runs from the date of notification.

Under the ALC's interpretation, parties may not receive a decision with enough time to act upon it, or even receive the decision at all, before the appeal deadline has run. Such an interpretation violates the requirement of due process that persons threatened with government action be afforded notice and an opportunity to be heard. S.C. Const. art. I, § 3, and U.S. Const. amend. XIV, § 1. It is well established that a possible constitutional construction must prevail over an unconstitutional interpretation. *Curtis v. State*, 345 S.C. 557, 569-570, 549 S.E.2d 591, 597 (2001). S.C. Code Ann. Regs. 47-52(A)(1) provides that constitutional construction by ensuring that parties receive a sufficient opportunity to learn of an adverse decision and exercise their right to obtain review.

The ALC found that to provide appealing parties ten calendar days from the date of

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3 In considering the timeliness of a motion with a delayed postmark, the South Carolina Supreme Court refused to "assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through. We find no abuse of discretion in the trial court's finding that the motion was timely served by mail." *Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (1995).

"notification," as stated in the Department's regulation, would improperly "alter or add to a statute." *Goodman v. City of Columbia*, 318 S.C. 488, 491, 458 S.E.2d 531, 533 (1995). This conclusion is in error. An actual review of *Goodman* establishes the difference between a regulation that improperly alters or adds to a statute and a regulation that properly "fill[s] up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Bauer* at 232, 232, 246 S.E.2d 876. The regulation at issue in *Goodman* improperly added requirements for appeal not found in the statute, such as the requirement that parties appealing worker's compensation decisions file eight copies of a particular form. This and other requirements imposed by the regulation in *Goodman* truly added to the statute and burdened parties attempting to appeal adverse decisions, and the Court properly invalidated the regulation in that case. In the present case however, S.C. Code Ann. Regs. 47-52(A)(1) imposes no new burdens on parties but simply "fills up the details" of S.C. Code Ann. § 41-35-680 by reconciling the statute with the requirements of *Hamm* that statutory deadlines for appeal begin to run upon notice and the requirements of constitutional due process to provide adequate notice.

The ALC also erred by strictly construing S.C. Code Ann. § 41-35-680 to find Stubbs' appeal untimely. It is well-settled 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 object sought."). One need look no further than the Department's

own regulation, S.C. Code Ann. Regs. 47-52(A)(1), for a reasonable, liberal construction of S.C. Code Ann. § 41-35-680. Such an interpretation is consistent with well-settled case law, constitutional due process, and the remedial purposes of the law.

The ALC affirmed the Department's decision based upon its conclusion that an "appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004). This holding is inapplicable to the present case because Stubbs does not seek to be "rescued" from a delinquent filing. It is undisputed that his appeal was *not* delinquent under the plain language of S.C. Code Ann. Regs. 47-52(A)(1). Rather, Stubbs simply asks the Court to find his appeal timely under the Department's regulation.

CONCLUSION

For the reasons stated above, the Department should not be permitted to disavow the plain language of its own regulation to deny an appeal to a South Carolina worker who complied with that regulation. Appellant Charles E. Stubbs respectfully requests that this Court reverse the decision of the Administrative Law Court, find that the deadline to appeal under S.C. Code Ann. § 41-35-680 and S.C. Code Ann. Regs. 47-52(A)(1) runs from date of notification, find Stubbs' appeal timely, and remand the case for a hearing before the Appellate Panel on his separation from employment.

Respectfully submitted,

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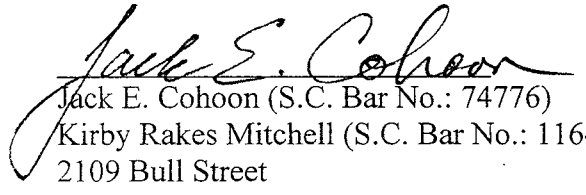

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The undersigned hereby certifies that this Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I certify that I have served the *Brief of Appellant* on Respondents South Carolina Department of Employment and Workforce and JSE LLC by U.S. Mail, Postage Paid on February 3, 2016 to the following addresses:

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