THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Court Judge

Appellate Case No. 2015-001490

Charles E. Stubbs,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and JSE, LLC,

Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant, Charles E. Stubbs (Appellant) filed a claim with Respondent, the South Carolina Department of Employment and Workforce (DEW or Department) for unemployment insurance (UI) benefits. On April 29, 2011, the Department initially found that Appellant had been discharged without cause from his most recent employment and that he was eligible to receive benefits (R.p.80).

On May 4, 2011, Appellant's employer, JSE, LLC (JSE), appealed the initial determination to the Appeal Tribunal (Tribunal) pursuant to S.C. Code Ann. § 41-35-660. (R.p.81). The Tribunal conducted an evidentiary hearing where both JSE and Appellant participated. (R.p.94). The resulting decision, mailed to the parties' addresses of record on June 17, 2011, reversed the initial determination finding Appellant had voluntarily quit his employment without good cause, and he was therefore disqualified from receiving UI benefits. (R.pp.77-78).

Thereafter, Appellant mailed a letter of appeal from the Tribunal decision which the Department's Appellate Panel (Panel) received on June 30, 2011. (R.p.83). This letter of appeal had no date on the face of the document; however, the letter of appeal arrived in an envelope postmarked June 29, 2011, by the United State Postal Service (R.p.84).

In a letter dated August 3, 2011, the Panel dismissed the untimely appeal. (R.p.85). On August 10, 2011, Appellant requested a reconsideration of the Panel's dismissal. R.pp.87-88). Pursuant to S.C. Code Ann. § 41-35-710, the Panel remanded the case to the Tribunal for the sole purpose of receiving testimony regarding the timeliness of Appellant's letter of appeal. (R.p.92). The Tribunal held an in-person hearing on November 9, 2011, for this purpose. (R.p.94).

On November 29, 2011, the Panel issued a final agency decision that dismissed the appeal as untimely. (R.pp.74-75).

On December 21, 2011, Appellant timely appealed the Panel's decision to the South Carolina Administrative Law Court (ALC). (R.pp.117-118). On March 26, 2012, the ALC issued an order affirming the Panel decision. (R.pp.72-73). Appellant filed a Motion for Rehearing, but the ALC denied the Motion for Rehearing on May 15, 2011. (R.p.71).

On June 14, 2012, Appellant filed a Notice of Appeal from the ALC decision in the South Carolina Court of Appeals. (R.p.122). On March 5, 2014, the Court of Appeals issued Stubbs v. S.C. Dep't of Emp. & Workforce, 407 S.C. 288, 755 S.E.2d 114 (Ct. App. 2014), which vacated the ALC decision and remanded the case back to the ALC. (R. pp. 66-70).

On remand, the ALC found the Panel's 2011 decision not sufficiently detailed to enable it to determine whether the findings are supported by the evidence and whether the law has been correctly applied to those findings. Accordingly, on April 15, 2014, the ALC issued an Order remanding the case to the Panel for more detailed findings. (R.pp.64-65).

On August 29, 2014, in compliance with the ALC's remand Order, the Panel issued a more detailed decision dismissing Appellant's appeal as untimely. (R.pp.60-62). Appellant appealed this decision to the ALC.

On June 12, 2015, the ALC affirmed the Panel decision. (R.pp.1-7). On July 9, 2015, Appellant timely appealed to this Court seeking further judicial review of the ALC decision.

STATEMENT OF THE FACTS

The overriding issue in this case is whether Appellant's appeal to the Panel was properly dismissed as untimely.

Appellant sought to appeal from a Tribunal decision which was mailed to him on June 17, 2011. The statutory time period for appealing from this decision expired on June 27, 2011, pursuant to S.C. Code Ann. § 41-35-680. Because Appellant's appeal to the Panel was postmarked by the United States Postal Service (USPS) on June 29, 2011, the Panel dismissed the appeal as untimely. (R.p.84).

Appellant further protested and the Panel remanded to the Tribunal for a hearing on the timeliness issue. (R.pp.90-93). During the hearing held November 9, 2011, Appellant acknowledged he received the decision "probably around the 20th" of June. (R.p.96, line 15). However, Appellant provided inconsistent testimony as to when he mailed the letter of appeal. Initially, he stated he received the decision and placed it in the mail on Tuesday, **June 21, 2011.** (R.p.96, lines 15-19). However, in Appellant's letter to the Panel dated October 1, 2011, he asserted that he had placed the letter of appeal in the mail on **June 25, 2011.** (R. p. 113).

Based on the ROA as a whole, the Panel held:

> The Department properly mailed the Appeal Tribunal decision to [Appellant]'s address of record....**Although [Appellant] consulted a calendar to deduce when he probably mailed his appeal, we do not find his statement that he mailed the appeal June 21, 2011, to be credible.** His statements show he was not certain as to when he actually received the decision. [Appellant] has provided inconsistent information regarding the date he appealed: in his October 2011 supplementary appeal he wrote he mailed his letter on June 25, 2011, and in testimony on November 9, 2011, he stated he "probably" put it in the outgoing mail slot at his apartment complex on Tuesday, June 21, 2011. Further, [Appellant] has not shown that the 8-day delay between the date he allegedly placed

> his letter in the apartment complex's mail slot and the date the letter was postmarked by the Postal Service was due to postal error. He noted that the mail was usually picked up the following day. [Appellant] has not provided evidence of other outgoing mail being delayed in being picked up by the Postal Service, and has not provided any testimony from witnesses to support the assertion he placed the appeal in the mail before June 27, 2011. **In the absence of consistent and verifiable testimony and evidence, we rely on the Postal Service postmark to determine the point in time when [Appellant] provided notice to the Department of his intent to appeal the Appeal Tribunal decision. As the postmark was stamped on June 29, 2011, two (2) days after the expiration of the appeal period, we find the greater weight of the credible evidence shows [Appellant]'s appeal to the Appellate Panel was not mailed on June 21, 2011, as [Appellant] stated, but was mailed on June 29, 2011, after the appeal period expired.** Therefore, the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

(R.pp.60-62) (emphasis added).

On appeal to the ALC, Appellant argued that the Panel erred because the "uncontradicted evidence" in the Record of Appeal (Record) shows: (1) Appellant placed his appeal in the mail within ten days of the date of notification, as provided by S.C. Code Ann. Reg. 47-52(a)(l), and (2) Appellant placed his appeal in the mail within ten days of the Department's mailing, as provided by S.C. Code Ann. § 41-35-680. (R.pp.8-20). The ALC rejected both arguments. First, the ALC found that the notification language in Regulation 47-52(a)(1) improperly adds to the statute. The ALC specifically stated that: "The regulation cannot add to the statute, and therefore the date of mailing of the decision is the only date of importance in determining whether an appeal is timely filed." (R.p.6). Additionally, the ALC further found that the Panel's decision that the appeal was untimely "was not clearly erroneous in light of the substantial evidence in the record, and that the record supports the decision. (R. p.7).

ARGUMENT

Standard of Review

DEW is an agency governed by the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

> [A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S.C. Emp. Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." Id. at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

> [S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984). Stated differently, substantial evidence is "evidence which, considering the record as a whole, would allow 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).

Furthermore, the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp.

2011). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health & Human Services Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Id.

I. THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRMED BECAUSE THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE APPELLATE PANEL'S DECISION THAT APPELLANT'S APPEAL WAS UNTIMELY FILED.

Appellant argues that the Record is devoid of substantial evidence supporting the Panel's decision that his appeal was untimely. The Court should reject this argument because substantial evidence can readily be found in the Record to support the Panel's decision.

Section 41-35-680 states that the Tribunal's decision will become the final decision of the Agency "unless **within ten days after the date of mailing the decision** a further appeal is initiated pursuant to Section 41-35-710." (Emphasis added). Here, there is substantial evidence in the record to support the Panel's decision that Appellant's appeal was untimely.

This Court has stated that although not dispositive, "the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue." See Green v. Green, 320 S.C. 347, 350, 465 S.E.2d 130, 132 (Ct. App. 1995).

It is uncontested that the Tribunal decision was mailed to Appellant's address of record on June 17, 2011. (R.pp.77-78). It is also undisputed that Appellant actually received the decision several days before June 27, 2011, the statutory deadline for timely filing.[1] (R.p.96, lines 15-19). Finally, it is further uncontroverted that the USPS postmark date on Appellant's letter of appeal to the Panel was June 29, 2011. (R. p.108).

Clearly, these undisputed facts constitute substantial evidence that Appellant initiated his appeal too late. See Green v. Green, supra; see also Friends of the Earth, supra (where the South Carolina Supreme Court stated that substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency"). The Panel specifically considered the compelling evidence of the USPS postmark date and weighed that against the inconsistent testimony of Appellant. The Panel concluded:

> Although [Appellant] consulted a calendar to deduce when he probably mailed his appeal, we do not find his statement that he mailed the appeal June 21, 2011, to be credible. His statements show he was not certain as to when he actually received the decision. [Appellant] has provided inconsistent information regarding the date he appealed: in his October 2011 supplementary appeal he wrote he mailed his letter on June 25, 2011, and in testimony on November 9, 2011, he stated he "probably" put it in the outgoing mail slot at his apartment complex on Tuesday, June 21, 2011.

(R.pp.60-62).

Appellant argues that the Panel's findings are in error because Appellant's testimony in this case was "uncontradicted." However, "[t]he fact that testimony is not contradicted directly does not render it undisputed." Black v. Hodge, 306 S.C. 196, 198,

[1] Appellant suggests in his brief that "claimants are expected to appeal an Appeal Tribunal decision within ten calendar days ... even if they never actually receive it." (Appellant Br. P.13). Because Appellant testified that he actually received the Tribunal decision prior to the expiration of the appeal period, Appellant's due process arguments are not relevant to the instant case.

410 S.E.2d 595, 596 (Ct. App. 1991) accord Terwilliger v. Marion, 222 S.C. 185, 72 S.E.2d 165 (1952); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000).

Moreover, ("[e]ven where the evidence is uncontradicted, the [fact finder] may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to [fact finder] to decide." Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). Thus, while Appellant's testimony may technically be characterized as undisputed, the Panel is not required to accept undisputed evidence as establishing the truth where there is reason for disbelief. Id.; Johnson v. Painter, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983) ("The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief.").

Here, the Panel found Appellant's testimony inconsistent and therefore not credible. Accordingly, the Panel had "reason for disbelief" of Appellant's testimony, id., and it was not arbitrary or erroneous for the Panel to give greater weight to the compelling evidence of the June 29th USPS postmark date in making its decision. See Merck v. S.C. Emp. Sec. Comm'n, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986) (because DEW's Panel "has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal," the Panel is the ultimate finder of fact in unemployment matters); see also Milliken & Co. v. S.C. Emp. Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996)("[O]n questions of witness credibility we defer to the judgment of the [Panel].").

Because the Record contains direct evidence and inferences which could lead to at least two different conclusions, the question is one of fact for the Panel. See Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 259, 315 S.E.2d 373, 376 (Ct. App. 1984) ("Where the evidence...is conflicting or where more than one inference can be derived therefrom, the question is one of fact.")

Accordingly, the Panel's decision is supported by substantial evidence.

II. THE ADMINISTRATIVE LAW COURT CORRECTLY FOUND THAT THE PLAIN LANGUAGE OF S.C. CODE ANN. § 41-35-680 REQUIRING AN APPEAL TO BE FILED WITHIN 10 DAYS OF "THE DATE OF MAILING THE DECISION" GOVERNS THIS CASE, AND NOT THE "NOTIFICATION" LANGUAGE IN S.C. REG 47-52.

Appellant argues that the Panel's decision is based on an error of law because S.C. Code Ann. Regs. 47-52[2] allows filing of a notice of appeal from the date of "notification" of an Department determination, rather than from the date of mailing as mandated in S.C. Code Ann. § 41-35-680. This Court must reject Appellant's argument.

First, Appellant is procedurally barred from raising the issue before this Court. Appellant did not raise this issue during the initial hearing before the Tribunal. Cf. Doe v. Doe, 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006) ("To preserve an issue for appellate

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[2] Regulation 47-52(A)(1) provides as follows:

> Any 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 on the form provided, setting forth the information required thereon and the grounds for the appeal.

(Emphasis added).

review, the **issue cannot be raised for the first time on appeal**, but must have been raised to and ruled upon by the [hearing officer]") (emphasis added); see also Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (a court sitting in appellate capacity may not consider issues not raised or ruled on by the administrative agency).[3]

Second, on the merits, Appellant's argument should be rejected because the application of S.C. Regs. 47-52 to the circumstances of this case would contradict the applicable statute. The right of appeal arises from, and is controlled by, statutory law. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Sections 41-35-610 through 41-35-750 of the Code provide the procedure to obtain review of Department determinations. Indeed, S.C. Code Ann. § 41-35-690 explicitly states that the "procedure provided in this chapter...is the **sole and exclusive** appeal procedure." Id. (emphasis added).

If a party disagrees with an agency determination, the appeal first goes to the Tribunal – as long as the appeal is initiated within ten days of the mailing date. See S.C. Code Ann. § 41-35-660 ("The claimant or any other interested party may file an appeal from an initial determination...not later than ten days after the determination was mailed to his last known address."). Likewise, if a party disagrees with the Tribunal's decision,

[3] Additionally, on remand Appellant failed to secure a ruling from the Panel on the issue either initially or in a timely post-hearing motion. See Rhame v. Charleston Cty. Sch. Dist., 412 S.C. 273, 276, 772 S.E.2d 159, 161 (2015), reh'g denied (June 4, 2015) (S.C. Code Ann. § 1–23–380(1) "allow[s] motions for rehearing before all administrative agencies that are governed by the [APA]"). Accordingly, this issue is not preserved for appeal and must be rejected. Only issues raised and ruled upon by the Appellate Panel are cognizable on appeal. See Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) ("As in other appellate matters, [the court] require[s] issue preservation in administrative appeals"); see also Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 208, 712 S.E.2d 428, 433 n.5 (2011) ("[The] Court has long enforced and relied upon issue preservation rules in administrative appeals.").

it may appeal further to the Panel within ten days from the date of **mailing** of the decision. See S.C. Code Ann. § 41-35-680 (the 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.") (emphasis added).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.... When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 425-26, 702 S.E.2d 246, 250 (2010) (internal citations omitted).

The plain meaning of Section 41-35-680 is that there is a ten-calendar-day time period, from the mailing date of the decision, to file an appeal to the Panel. Id.

S.C. Code Regs. 47-52(A)(1) states that an appeal from the Tribunal may be within ten calendar days after the "notification or mailing" of the Tribunal decision.

While a regulation does have the force of law, a regulation cannot "alter or add to a statute." Goodman v. City of Columbia, 318 S.C. 488, 491,458 S.E.2d 531, 533 (1995). Furthermore, DEW may not enforce regulations that "conflict with, or ... change in any way the statute conferring such authority."

Because the applicable statute only allows a ten-day appeal period from **the mailing** of the decision, the regulation cannot alter or add to Section 41-35-680. The

statute refers only to the mailing date of the decision, and does not refer at all to the date of notification or receipt.[4]

As the ALC correctly recognized, "if the regulation is read as Appellant interprets, the term 'mailing' [in Section 41-35-680] would be irrelevant, **as the date of notification would always be after the date of mailing, and therefore the term 'mailing' would not be needed**." (R. p.6) (emphasis added). Accordingly, the regulation is invalid as to the notification language.

The only date relevant to the inquiry on timeliness of filing an appeal to DEW's Panel is the mailing date of the Appeal Tribunal's decision. S.C. Code Ann. § 41-35-680. Yet Appellant persistently contends that notification is the triggering date. The South Carolina Supreme Court has outright rejected such an argument. S.C. Coastal Conservation League, 390 S.C. at 426, 702 S.E.2d at 250-51 ("The clear and unambiguous language in the statute provides that the staff decision becomes final 'fifteen days after notice of the department decision **has been mailed**...' Had the legislature intended for the time period to begin running from the date a party receives notice of the decision, the statute would have been drafted accordingly.") (emphasis in original).

Thus, Appellant's contention that his appeal should have been considered timely, based on the regulation's "notification" language is clearly without merit. Id.

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[4] Indeed, when the Legislature amended S.C. Code Ann. § 41-35-680 in 2002, the Legislature noted that the legislation was in part "to specify that determinations and decisions of the [Department] must be mailed to the party, rather than mailed or delivered to the party." Act No. 203, 2002 S.C. Acts., eff. April 10, 2002; see Lindsay v. S. Farm Bureau Cas. Ins. Co., 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972) ("It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.").

CONCLUSION

For the reasons discussed above, this Court should affirm the ALC's decision which in turn affirmed DEW's final decision that Appellant filed an untimely appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on February 3, 2016, addressed to the Appellant Attorney and Employer at their addresses of record:

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