THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

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APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

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Nucor Corporation,..... ..Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, .....Respondents.

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# INITIAL BRIEF OF NUCOR CORPORATION

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## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

Claimant, Ms. Kimberly A. Legette ("Ms. Legette" or "Claimant") was an employee of Nucor Steel Berkeley ("Appellant" or "Nucor") from August 24, 1998, until her termination on April 22, 2010. (ROA 23.) Nucor is a steel manufacturing plant located in Berkeley County, South Carolina, with approximately 900 employees. (ROA __.) In order to create and ensure a safe work environment, Nucor maintains a zero tolerance policy with regard to illegal drug and substance use. (Exhibit 1, ROA 86-88.) At the beginning of the employment relationship, Nucor provides each employee with an Employee Handbook that contains Nucor's Drug and Alcohol Policy. (ROA 24.) Claimant was provided a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. (ROA 28-29; Exhibit 3, ROA 97.)

On April 6, 2010, Legette was tested for drugs pursuant to Nucor's periodic random drug testing policy. (ROA 23, 24, 35-36; Exhibit 1, ROA 86-88.) The consequence for violating the Drug and Alcohol Policy is immediate termination. (Exhibit 1, ROA 88.) Nucor's drug testing policies and procedures do not permit or otherwise consider any off-site, independent drug tests obtained by an employee on the employee's own initiative. (ROA 25, 27, 58.) Legette was at all relevant times aware of the Drug and Alcohol Policy and the consequences of violating it, and had been subject to random drug tests at Nucor on previous occasions. (ROA 42; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2; Claimant's Response Brief.)

Nucor's drug testing policies and procedures were designed to comply with South Carolina Code Ann. § 41-35-120 ("the Statute"). To ensure compliance with the Statute, Nucor partnered with Omega Laboratories, a national provider of diagnostic testing, to process its employees' drug test samples as required by the Statute. (ROA 20-21, 25-27, 70-72.) In addition, Nucor also partnered with Accudiagnostics LLC, to be its third party administrator for the drug testing program. (ROA 68-69.) Accudiagnostics is responsible for generating the random drug testing selections and facilitates the processing and reporting of the drug test results. (*Id.*) Accudiagnostics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Nucor Safety Office. (Exhibit 6, ROA 123.) The Safety Office then notifies those selected for testing via internal e-mail. (ROA 42.)

During the April 6, 2010, periodic random drug test, hair samples were collected at the plant from Legette and the 14 other employees randomly selected for testing that week. (ROA 71-75; Exhibit 6, ROA 123.) Legette's samples were collected by a certified Nurse Practitioner (Exhibit 8, ROA 272-273] employed by Nucor, and the samples were sent to Omega's testing laboratory in Mogadore, Ohio. (ROA 25, 28, 35-37, 81-82; Exhibit 6, ROA 127-128.) The collection process involves multiple steps, each of which is documented, and the employee/donor verifies in writing that each step has been followed in his or her presence. The following is a summary of the steps taken in the collection process:

(1) At the time that an employee enters the testing room, he or she is provided with a Drug/Alcohol Authorization and Release Consent Form ("Release"). The Release requires the employee to fill out their full name and give Nucor authorization to collect a sample for processing by an accredited and certified laboratory. Refusal to sign the Release results in immediate termination as outlined in the Drug

and Alcohol Policy (Exhibit 1, ROA 86-88.) Claimant executed the Release for both the initial confirmatory test on her hair sample collected on April 6, 2010, and the second test of April 15, 2010. (ROA 28; Exhibit 4, ROA 98; Exhibit 5, ROA 102.)

(2) The second step involves the completion of the drug Testing Custody and Control Form ("Custody Form"). The Custody Form is filled out in the presence of the employee, and outlines each step of the collection process. The employee is given the option to choose what part of the body they would like the hair sample to be collected from. The Nurse then collects the sample and places it in an envelope, which is sealed in front of the employee. Claimant requested that the hair sample be taken from her head for both the April 6, 2010 and April 15, 2010 tests. (ROA 28, 37, 40; Exhibit 4, ROA 99; Exhibit 5, ROA 103.)

(3) After the sample is sealed in the envelope, Section 5 of the Custody Form is required to be executed by the employee, which certifies that the employee provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. Claimant signed Section 5 of the Custody Form, and verified that the chain of custody had been followed and that her sample had been collected as specified on the Custody Form for both the April 6, 2010 and April 15, 2010 tests. (ROA 43-44, 48-49; Exhibit 4, ROA 99; Exhibit 5, ROA 103.)

(4) The Custody Form is then placed in a plastic bag, together with the envelope containing the sample, and the plastic bag is deposited in a lock box in the presence of the employee. Claimant admitted at the Hearing that this step was completed in her presence for both the April 6, 2010 and April 15, 2010 tests. (ROA 43; Exhibit 4, ROA 99-101; Exhibit 5, ROA 103-104.)

(5) After the sample is collected and deposited in the lock box, employees are provided with yet another verification step: they have to complete a Drug Testing Procedure for Post Incident and Random Drug Screen form ("Post Incident Form"). This Form requires the employee to confirm that the Release/Consent form was explained; - the option of choosing where the hair sample would be collected from was provided; the instruments were cleaned with alcohol wipes prior to collection; the hair sample was placed in the envelope in the presence of the employee; the employee was required to witness the sealing of the pouch containing their hair sample; and the employee was provided with a copy of the Custody Form. Again, Claimant executed the Post Incident Form (for both the April 6, 2010 and April

> 15, 2010 samples), and checked "Yes" to all the questions (with the exception of the question relating to pubic hair collection, which did not apply as she opted to have her sample collected from her head). (ROA 28, 37, 40-41, 43, 48; Exhibit 4, ROA 100; Exhibit 5, ROA 104.)

The hair sample collected from Claimant on April 6, 2010 was confirmed positive for 1.25 picograms per milligram of marijuana (THC), an illegal substance. (ROA 23; Exhibit 4, ROA 101; Exhibit 6, ROA 121.) After testing positive for marijuana on April 6, 2010, Legette, like any other employee who tests positive for illegal drugs, was provided an opportunity to meet with the General Manager to discuss and determine whether she preferred to resign voluntarily in lieu of termination. (ROA 23-25.) Legette was adamant that she did not use any illegal drugs or substances and opted to undergo a second test at Nucor on April 15, 2010 instead of voluntarily resigning. (*Id.*]

When an employee requests a second test after failing the initial one, Nucor's standard practice is to administer this second test under a "level of detection"/"limit of detection" criterion. (ROA 30, 36; Exhibit 5, ROA 102-105; Exhibit 7, ROA 136; Claimant's ALC Response Brief, second page.) Pursuant to the "level of detection" criterion, any amount of marijuana/THC detected in Claimant's hair sample at or above .10 picograms per milligram is considered a positive result and is basis for immediate termination. (ROA 32.) Legette was aware that the second test would be performed as a "level of detection" test, and she executed the Custody Form on April 15, 2010, which clearly indicates that the test would be performed under the "level of detection" standard. (Exhibit 5, ROA 103; Exhibit 7, ROA 137; Claimant's ALC Response Brief, ROA_.) Likewise, her toxicology expert testified that the April 15, 2010 test was a "limited detection test," which is "below the limit of detection on a standard test." (ROA 63-64.)

As with the April 6, 2010 test, Legette also verified in writing that Steps 1-5 above had been complied with during the second test. In addition, her manager was also present and witnessed the entire process. (ROA 37, 47.) At no point did Legette object to the manner in which the sample was collected. (ROA 39.) She admitted that Nucor's nurse was "professional about (collecting the sample.) She cleaned the scissors which I had not seen done before, cleaned the area, and cut my hair, and that was the first test..." Further, Legette testified that she observed the nurse collect the sample and place it in an envelope which she then sealed, placed in a lock box, and Claimant signed and dated the envelope. (ROA 43-44, 48-49.) Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse in collecting Claimant's hair sample and forwarding it to the processing laboratory was proper and correct. (ROA 60-61.) He further testified that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. (ROA 62.)

The results of Claimant's second test showed .78 picograms per milligram of marijuana. (ROA 38; Exhibit 5, ROA 105; Exhibit 7, ROA 136.) Because the amount of marijuana detected exceeded .10 picograms per milligram, the second test was also a positive test for marijuana and grounds for immediately terminating Claimant pursuant to Nucor's Drug and Alcohol Policy. Accordingly, Claimant was terminated upon Nucor's receipt of the second test results on April 22, 2010. (ROA __.]

At some point between her second drug test on April 15, 2010, and her termination on April 22, 2010, Claimant underwent an additional independent drug test which she alleges came back negative for drugs. (ROA 51-52, 54, 56; Agency's Supplement to ALC, ROA__.) There is no evidence, neither has it ever been argued, that

this independent test was subject to the same level of detection standard utilized by Nucor. Regardless, it is undisputed that Nucor has not, and does not accept independent tests because it has no control over their administration and no assurances of their reliability. (ROA 25, 27, 58; Claimant's ALC Response Brief, ROA__.)

## II. PROCEDURAL HISTORY

Based upon this third, uncontrolled independent test, Claimant sought unemployment benefits asserting that she had been wrongfully terminated and that Nucor improperly collected her hair sample. (Discharge for Cause Fact Finding, dated 05/03/2010, ROA 11-12.) On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. (Claims Adjudicator's Determination, ROA 13, 85.) The determination also noted that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2). (*Id.*] Finally, the determination confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory using gas chromatography/mass spectrometry (GC/MS) or a scientifically equivalent method. (*Id.*)

Upon receipt of the Claims Adjudicator's Determination, Legette filed a Notice of Appeal to the Appeal Tribunal on June 2, 2010, asserting that the Adjudicator's decision was issued in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. (Notice of Appeal to Appeal Tribunal, ROA 14.) A Hearing was scheduled for July 7, 2010 before Joan Marshall, Administrative Officer. (Notice of Hearing Before Appeal Tribunal, ROA 15.) On July 12, 2010, both Nucor and Claimant presented testimony and evidence to the Administrative Officer at the hearing

in Charleston, South Carolina.[1] (ROA 19 - 84.) On July 19, 2010, the Appeal Tribunal mailed a copy of its decision to Nucor and Claimant. (Decision of Appeal Tribunal, ROA 275-276.) The Appeal Tribunal found that Claimant was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana. (*Id.*) As a result, the Appeal Tribunal held that Claimant was disqualified from receiving benefits upon a finding that Claimant was discharged for illegal drug use under S.C. Code Ann. § 41-35-120(3). (Decision of Appeal Tribunal, ROA 274-275.)

On July 22, 2010, Claimant appealed the Decision of the Appeal Tribunal to the Appellate Panel on the alternative bases that she does not smoke marijuana and that there were contradictory test results. (Application for Leave To Appeal To Commission, ROA 276.) The Appellate Panel held a hearing on November 17, 2010 in Columbia, South Carolina. (Notice of Hearing Before Appellate Panel, ROA 278.) After the Hearing, the Appellate Panel issued its Decision, which was mailed on November 19, 2010. (Appellate Panel Decision, ROA 2.) The Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." As a result, the Appellate Panel held that Claimant was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4), and reversed the Appeal Tribunal's Decision. (Appellate Panel Decision, ROA 1-2.)

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[1] The recitation of facts herein is based on the Transcript of Testimony before Joan Marshall, Administrative Hearing Officer. (ROA 19-84.)

On December 14, 2010, Nucor submitted a Petition for Judicial Review to the South Carolina Administrative Law Court ("ALC") pursuant to S.C. Code Ann. § 41-35-750 and Rule 33 of the Rules of Procedure for the Administrative Law Court. (Petition for Judicial Review.) Nucor argued that (1) the Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site independent drug test not performed on behalf of the employer, (2) that Claimant herself had admitted to failing two drug tests administered on behalf of the employer in compliance with South Carolina law and with Nucor's drug policy, and (3) that Claimant's test was administered under a different detection standard, and thus, could not be the basis of a "contradictory results" finding. *Id.* On January 4, 2011, the Honorable Deborah Brooks Durden was assigned to preside over the Appeal. (Notice of Assignment.) On February 17, 2011, Nucor filed its Initial Brief, asserting *inter alia*, that in determining eligibility for unemployment benefits, the Agency had no authority to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120; that the plain language of the Statute does not permit the Agency to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer; that an employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random workplace drug tests, and permits every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether; that an employee's utilization of independent, uncontrolled drug tests likely jeopardizes the safety of other employees; and that termination was also warranted pursuant to Sections (2) and (4) of the Statute.

On May 24, 2011, Judge Durden issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. (May 24, 2011 order, at p. 4.) In so holding, Judge Durden found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, *including the negative test results cited by the Appellate Panel* in its order." *Id.* at p. 4. (Emphasis added). The order then remanded the case to the Department on the single and narrow issue of whether Claimant was disqualified to receive benefits pursuant to S.C. Code Ann. §41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests. *Id.* However, the order does not address the other issues raised by Nucor, including whether the Appellate Panel had authority to rely on Legette's outside independent test, which was performed under different detection standards.

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" (ROA __.) In response to this correspondence, Nucor filed the first Notice of Appeal in this Court, asserting that Judge Durden's had failed to review the legal questions raised with regard to the proper interpretation and application of the Statute. Thereafter, this Court issued its October 13, 2011 Order dismissing the appeal as one that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). (*See*, Ct. App. October 13, 2011 Order, ROA __.)

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order. At that Hearing, Nucor again presented testimony that it has a drug policy that was communicated to the Legette and that Nucor does not consider outside independent tests performed at an employee's request. (ROA] Nucor objected to Legette's testimony regarding the outside test or any reference thereto throughout the hearing. (ROA__.) The Appeal Tribunal issued a new decision on August 18, 2011, finding that the Claimant was indefinitely disqualified from benefits pursuant to S.C. Code Ann. § 41-35-120(3) and that the laboratory was certified as required under the Statute. (ROA __.)

Legette thereafter appealed to the Appellate Panel, asserting that the Appeal Tribunal erred as a matter of law in finding that the laboratory was certified as required under the Statute. (*See*, Claimant's Appeal to Appellate Tribunal, ROA ___.) On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties "come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services." (See, Appellate Panel correspondence, ROA __.)

On November 30, 2011, the parties briefed and argued the sole issue of whether the laboratory met the certification specifications set forth in the statute. (Parties Briefs –

ROA __.) On December 9, 2011, the Appellate Panel issued its decision regarding the narrow issue of whether the laboratory was certified as contemplated pursuant to S.C. Code Ann. § 41-350120(3), which provides that a testing laboratory must be certified by the NIDA, CAP or SLED. The Appellate Panel held that the laboratory was not certified at the time of the subject test as required. [2] (ROA __.) Neither party appealed this decision, which is a final order pursuant to S.C. Code Ann. § 1-23-380 and became the law of the case.

Nucor filed a Notice of Appeal in this Court asserting that Judge Durden's Order is now final since the only issue on remand had been disposed of by the Appellate Panel. Nucor also explained that the Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct and that the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B) had now been ruled on. ROA __. By Order dated June 6, 2012, the Court advised the parties that the appeal had been reinstated. ROA __.

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[2] Section 3(a)(iii)(B) of the Statute requires that: "(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; ..."
Based on the record, multiple reassurances from the laboratory regarding the lack of a hair specimen certification program by the College of American Pathologists ("CAP") and literature available online, Nucor had previously argued that the laboratory met the certification requirements of the Statute. However, the Agency's Appellate Panel *sua sponte* contacted CAP directly, and determined, based on correspondence from CAP, that the laboratory was *not* properly certified. Nucor subsequently received correspondence directly from CAP confirming that its hair certification program was available at the time of the subject test, and that the laboratory could have obtained such certification (assuming it met the relevant criteria). As a result, Nucor did not appeal the Agency's decision regarding certification of the laboratory under Section 3(a)(iii)(B).

## STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-610(A)(1) (Supp. 2009) provides that judicial review may only be sought from a ***final*** decision of the ALC. *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control,* 387 S.C. 265, 692 S.E.2d 894 (2010). (Emphasis in original). A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.,* 201 S.C. 32, 21 S.E.2d 209 (1942). In this case, there is nothing left to be done except execute judgment, or appeal to this Court. *See, Hooper v. Rockwell,* 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.,* 310 S.C. 330, 426 S.E.2d 777 (1993). The Agency issued its final decision with regard to the certification issue on December 9, 2011, which finally resolved the only outstanding issue that had been remanded by the ALC. The ALC likewise, has repeatedly informed the parties that its May 24, 2011 order is final as to the issues decided therein, except the certification issue, which was resolved with finality on December 9, 2011. (ROA _.) Thus, this appeal is proper and ripe.

The Court's scope of review is set forth in Section 1–23–610(B) of the South Carolina Code (Supp. 2009). *See also, ESA Services, LLC v. South Carolina Dept. of Revenue,* 392 S.C. 11, 707 S.E.2d 431, (Ct. App., 2011). That section provides:

> "The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; 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. quoting* S.C. Code Ann. § 1-23-610(B) (Supp. 2009).

Pursuant to S.C. Code Ann. § 1-23-380(A)(6), an Agency's decision may be reversed or modified if it exceeds the Agency's authority, is affected by other error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. For purposes of the substantial evidence test, "substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Bass v. Kenco Group*, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. South Carolina Public Serv. Comm'n*, 290 S.C. 409, 351 S.E.2d 151 (1986).

## ARGUMENT

### I. SUMMARY OF ARGUMENT

The question presented in this appeal requires construction and application of S.C. Ann. § 41-35-120 with regard to termination of an employee for illegal drug use. Throughout these proceedings, Nucor has consistently argued that the Appellate Panel's acceptance of an independent drug test as controlling, with no evidence that it comported with the Statute, is in contravention of the Statute's mandate and outside the scope of the Agency's authority, and therefore, constitutes an improper basis for reinstating Legette's benefits under Section (4). Nucor also argued that the Appellate Panel has no authority to apply additional or different criteria or exceptions to the plain mandates of the Statute, and these issues were presented as questions of law for the ALC to resolve. The ALC simply affirmed the Agency's reinstatement of benefits under Section (4) without addressing the substantive issues raised on appeal to that body, and chose instead to remand for additional fact finding, the single narrow issue of whether the laboratory was certified as required under the Statute. However, whether or not the laboratory is properly certified is not the dispositive question in this case. Neither does certification moot the issues raised on appeal, including interpretation and application of Sections (2), (3)(c), and (4) to this dispute and whether the Agency was authorized to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer. These issues were timely raised to the ALC, and have been timely raised on appeal to this Court. The Statute in question provides in relevant part as follows:

> An insured worker is ineligible for benefits for:

* * * * *

(2) Discharge for cause connected with the employment. . . ."Cause connected with the employment" as used in this item requires more than a failure in good performance of the employee as the result of inability or incapacity.

(3)(a) Discharge for illegal drug use, and is ineligible for benefits . . . if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.
....

(c) Information, interviews, reports, and drug-test results, written or otherwise, received by an employer through a drug-testing program may be used or received in evidence in proceedings conducted pursuant to the provisions of this title for the purposes of determining eligibility for unemployment compensation, including administrative or judicial appeal.

(4) Discharge for gross misconduct, . . . if he is discharged due to:

(i) wilful or reckless employee damage to employer property that results in damage of more than fifty dollars;

(ii) employee consumption of alcohol or being under the influence of alcohol on employer property in violation of a written company policy restricting or prohibiting consumption of alcohol;

(iii) employee theft of items valued at more than fifty dollars;

* * * * *

S.C. Code Ann., § 41-35-120.

The material facts are not disputed, and Legette admits that she "was very aware of the drug policy that the Appellant Nucor Corporation has in place;" that "violation of the Appellant's policy would constitute fault and gross misconduct under law"; that "off site testing is not usually permitted;" and that the second test administered at Legette's request on behalf of Nucor on April 15, 2010, was performed pursuant to a "level of detection" criterion. (ROA 24, 28-29, 42; Exhibit 1, ROA 85-88; Exhibit 3, ROA 97; Claimant's Response Brief, first and second pages, ROA __.] Moreover, Legette does not dispute that the April 6, 2010 and April 15, 2010, samples were collected by Appellant's Certified Nurse Practitioner or that the proper chain of custody was followed, including the fact that she personally executed the chain of custody forms confirming that the collection process was as reflected therein. (Claimant's ALC Response Brief, ROA __.]

Similarly, Respondent South Carolina Department of Employment Workforce ("SCDEW" or "the Agency") does not challenge the propriety of the hair collection process by Nucor's Nurse Practitioner or that the chain of custody was followed. In fact, the Agency does not even address the statutory requirement that the drug test be administered *on behalf of the Employer*; or the fact that the April 15, 2010 test was

administered pursuant to a specific level of detection cut-off, which is designed to detect the presence of marijuana at levels lower than a standard test. (Agency's ALC Response Brief.) Thus, the ALC's order is not supported by the evidence and fails to properly interpret and apply the Statute to the facts of this case, and must, therefore, be reversed.

## II. LEGAL ANALYSIS

### A. The ALC judge was required to determine whether S.C. Code Ann. § 41-35-120 permits reliance on an off-site test not performed on behalf of the employer, which is administered under less stringent detection standards.

On appeal to the ALC, Nucor presented legal issues for review by the ALC Judge. Nucor also requested that the ALC Judge interpret and apply the plain language of the statute. Nucor further raised the issue that in actuality, while purporting to rely on Section 41-35-120(4) as basis for overturning the Appeal Tribunal, the Appellate Panel in effect crafted an unauthorized exception to Section 41-35-120(3) by relying on off-site drug test results not administered on behalf of the employer. The legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains a non-statutorily compliant drug test after failing a statutorily-compliant company drug test. Thus, the Appellate Panel acted outside the scope of its authority as a matter of law.

Judge Durden held that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order", and thus Nucor's arguments as to subsections 41-35-120(2) and (4) "are without merit." (ALC Order, at p. 4, ROA ___.) In so holding, the Judge Durden improperly relied on the Appellate Panel's unauthorized

creation of an exception to the statute, including the Appellate Panel's erroneous ruling that there were "contradictory test results."

In the first instance, Judge Durden's characterization of the issues on appeal to that body is not an accurate paraphrasing of the four issues that Nucor asserted as bases for appealing to the ALC. (*See*, ALC Order at p. 2 -ROA __, and *c.f.* Nucor's ALC Initial Brief - Statement of Issues on Appeal, ROA __. .)[3] In addition, the ALC's characterization of Nucor's appeal to that court as "an invitation to re-weigh the facts is likewise, inaccurate. *Id.* Rather, on appeal to the ALC, Nucor asserted legal issues that required interpretation and application of the Statute, including a determination of whether the Agency had acted outside the scope of its authority. These issues are questions of law, and not an invitation to "engage in a re-weighing of the facts." ROA __.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Smith v. Regional Medical Center of Orangeburg and Calhoun Counties,* 2011 WL 2535556, 1 (Ct. App. 2011), quoting *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 662 S.E.2d 40, (2008). *See also, Hopper v. Terry Hunt Constr.,* 373 S.C. 475, 646 S.E.2d 162, (Ct. App. 2007). Both the ALC and the Court of Appeals are free to decide matters of law with no particular deference to the fact finder. S.C. Code Ann. § 1-23-610(B)(a) and (d) (Supp. 2009). *See also, Pressley v. REA Constr. Co.,* 374 S.C. 283, 648 S.E.2d 301, (Ct. App. 2007); *Murphy v. Owens Corning*, 2011 WL 873152, 2 (Ct. App. 2011).

[3] The ALC Order provides as follows regarding the issues on appeal: "Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?" This statement is not the equivalent of the three issues presented on appeal by Nucor.

In *Town of Summerville, supra,* the issue on appeal was whether the Town had complied with a statute that required publication of notice not less than thirty days prior to acting on a petition to annex real property. 378 S.C. at 108-9. The trial court held that the Town had failed to comply with the statutorily mandated 30-day notice, and the South Carolina Supreme Court affirmed. 378 S.C. 111. Similarly, in *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007), the court stated:

> "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."

*Catawba Indian Tribe*, 372 S.C. 525-526. (internal citations omitted). The *Catawba* Court held that the language of the statute was not ambiguous and the issue was resolved by looking at the plain language of the statute. *Id.* at 526. The court also rejected respondent's proposed construction of that statute "because such construction would create an absurd result, which the legislature clearly did not intend." *Id.* at 527. In this case, the Statute is clear, and mandates that the test be administered *on behalf of the employer.*[4] The Agency was not authorized under the Statute to rely on an offsite independent test that was not administered on behalf of the employer, and which was administered under a different detection standard. Thus, Judge Durden's reliance on the fact-findings of the Appellate Panel, which findings were in contravention of the language of the Statute, was erroneous as a matter of law.

In reviewing whether the Appellate Panel's reliance on the outside independent test not conducted on behalf of the employer was proper and authorized under the statute,

[4] Emphasis added.

the ALC Judge was required to review and apply the plain language of the statute. The ALC's reliance on the Appellate Panel's finding regarding "contradictory" test results has no legal support, is contrary to South Carolina law and Nucor's policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at Nucor's facility.

Further, it is undisputed that Appellant does not accept off-site testing. (ROA 25, 27, 58; Claimant's Response Brief, second page – ROA __][5] Appellant's non-acceptance/non-recognition of outside independent testing is supported by the mandate of Section 41-35-120(3). The requirements of Section 41-35-120(3) are designed to promote uniformity and reliability in drug testing standards, and provide specific guidelines for employers to follow. Similarly, the record also shows clearly that while Nucor's second drug test performed at the request of Legette was administered as a "level of detection" test (ROA 30, Exhibit 5; ROA 105; Exhibit 7, ROA 136], Legette's independent "negative" test was administered under a different, less stringent standard (ROA 30, 63-64.) The reason for using "level of detection" cut-offs for second tests is to detect trace amounts of illegal drugs that may otherwise escape detection because of the passage of time between tests, and also takes into account that an employee is now on notice that she will be tested for illegal drugs. Legette's alleged test would not detect trace amounts and thus is not comparable, nor "contradictory", to Nucor's second test. Had Legette's independent test been performed using the same criteria as Nucor's second test, there would not have been a different or "contradictory" result - it would have shown

[5] Respondent SCDEW's brief similarly does not challenge this fact.

the presence of marijuana found in Nucor's second and admittedly valid test, administered at Legette's request after failing the first test.

Moreover, both Legette and her expert concede that the second drug test, performed by Nucor at the request of Legette, was administered as a "level of detection" test (ROA 30, 30; Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Legette's independent and allegedly "negative" test was administered under a different criterion. (ROA 30, 63-64.) Even assuming *arguendo* that this independent test somehow meets the requirement that it be administered on behalf of the employer, there is no evidence suggesting it was administered under the same "level of detection" criterion as Nucor's test, and thus, *it cannot be* a "contradictory test result" as a matter of law. Comparing the two tests is quite simply, the equivalent of comparing apples to oranges.

Thus, there is no evidence of "contradictory results," and the ALC judge's failure to determine whether S.C. Code § 41-35-120 permits the Agency to rely on off-site tests not performed on behalf of the employer, which are administered under a different detection standard, was clear error of law. In essence, Judge Durden's order unjustifiably eviscerates Nucor's drug policies, of which Legette was apprised and to which she consented, and imposes an obligation on Nucor and potentially all employers to accept off-site drug testing results without justification or legal authority. Left unchallenged, the ALC Order (and the underlying Appellate Panel Order) will require virtually every South Carolina employer to accept outside drug test results proffered by terminated employees seeking unemployment benefits in spite of their violation of known drug and alcohol policies.

### B. The ALC Judge Incorrectly Determined that an Employer in South Carolina Can Terminate an Employee for Illegal Drug Use Only if the Employer Strictly Complies with Section 41-35-120(3)(a)(iii)(B) of the Statute.

In framing the only outstanding issue as determination of the laboratory's compliance with certification as set forth in Section (3)(a)(iii)(B) of the Statute, the practical implications of Judge Durden's order are that Sections (2), (3) and (4) of the Statute are mutually exclusive, and thus, failure to prove technical compliance with the laboratory certification requirement as set forth in Section (3)(a)(iii)(B), precludes an employer, *as a matter of law*, from proving that violation of the employer's drug policies constitutes "cause" or "gross misconduct" under Sections (2) and (4) of the Statute.[6]

Under South Carolina law, "[a] statute shall not be construed by concentrating on an isolated phrase. The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 3714, 718 S.E. 2d 432, 435 (2011). (internal citations omitted). In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent. *Id.* Statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Id.* Further, "[a] statute should be so construed that no word, clause, sentence, provision or part shall be

[6] In this brief, when Nucor refers to "noncertified laboratories", the reference is only intended to differentiate those laboratories that do not hold the certification requirements of Section 41-35-120(3)(a)(iii)(B) of the Statute. However, this is not intended to imply or concede that these "noncertified laboratories" do not hold any other relevant certifications, including national and international certifications pertinent to workplace hair sample testing for drugs.

rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (internal citation omitted). Further, "where possible, *all* provisions of a statute must be given full force and effect." *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). (Emphasis added).

In this case, the Statute sets forth eight disqualifications to an employee's right to receive unemployment benefits including Sections (2) - discharge for cause, (3) discharge for drug use, and (4) discharge for gross misconduct. Each of these bases is self-contained and independent of the other sections. Under proper facts, the same conduct can disqualify a worker from benefits under more than one statutory condition. *See*, *Beaufort County v. S.C. State Election Comm'n,* and *Nucor Steel v. S.C. Pub. Serv. Comm'n*, *supra.* In fact, this case provides such an instance, and hence, the Agency's reliance on all three Sections of the Statute at each stage of the administrative appeal process.[7]

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[7] The Claims Adjudicator determined that Legette was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy, and that this failure to comply with company policies constituted *discharge for cause* in connection with the work under S.C. Code Ann. § 41-35-120(2). (R. 13, 85.) (Emphasis added).

The Appeal Tribunal found that Legette was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, *she tested positive for the substance* and admitted being in the presence of individuals who used marijuana and held that Legette was disqualified from receiving benefits under S.C. Code Ann. § 41-35-120 (3). (R. 274-275.) (Emphasis added).

The Appellate Panel held: "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free" and that "*Claimant was separated under non-disqualifying circumstances* pursuant to S.C. Code Ann. § 41-35-120 (4). (R. 1-2.) (Emphasis added).

When faced with two or more applicable sections of a statute, other courts have analyzed and applied each applicable section of the relevant statute. In *Trapeni v. Department of Employment Sec.*, 142 Vt. 317, 320 (Vt. 1982), the Supreme Court of Vermont considered whether either of *two* disqualification provisions applied to a worker who was out of work due to a strike that stopped the project, either of which would have disqualified the employee from benefits: (1) labor dispute disqualification (disqualifies striker if labor dispute stops employer's operations); and (2) voluntary leave disqualification. The court ultimately found neither disqualification was applicable, but both bases were properly considered and applied to the facts of the case.

Similarly, *Administrator v. Sides*, 2000 Conn. Super. LEXIS 2720 (Conn. Super. Ct. Oct. 10, 2000), illustrates another instance where two disqualification grounds were considered: whether substance abuse constituted good cause (thereby rebutting a "for cause" disqualification) and termination based on violation of the absenteeism policy. There, the employee was terminated for violation of the employer's absenteeism policy after missing three days without calling in as required. One of her absences was due to substance abuse issues. The Employment Security Board tried to read into the statute a requirement that absences due to substance abuse were like sick leave for which good cause was established, thereby invoking the "for cause" clause of the statute. However, although the court ultimately disagreed with the "good cause" argument, that section of the statute was fully considered in addition to the absenteeism policy and the court held that the employee was disqualified from receiving unemployment benefits.

Thus, an employer is not restricted to a single disqualification category. Conduct that disqualifies an employee from benefits under one section of a statute can be also

considered under other applicable sections of that statute, if appropriate. To further illustrate the absurd outcome that would result from the position urged by Respondents, consider scenario A, where an employee confesses to using, and being under the influence of illegal drugs while present at work. As a result of this confession, the employer uses a non-certified laboratory to confirm the presence of drugs in the employee's system, and the results come back positive for illegal drugs. Under these circumstances, based upon Respondents' argument, that employer would then be precluded from discharging the employee "for cause" or "gross misconduct" under Sections 41-35-120(2) or (4) simply because the employer did not test that employee for drugs as required under Section 41-35-120(3)(a)(iii)(B).

Similarly, under scenario B, an employee is caught smoking marijuana on the employer's premises during scheduled work hours. The employer terminates the employee without performing any form of drug test. Likewise, based on Respondents' construction of the Statute, that employer would also be precluded from terminating the employee for "cause" or "gross misconduct," because the employer did not test the employee as set forth under Section (3)(a)(iii)(B), even though the employer has other evidence of the employee's violation of its drug policies.

Both scenarios A and B, above clearly involve termination based on use of illegal drugs in violation of the employer's drug policies. However, pursuant to Respondents' theory, the employer would be *precluded as a matter of law* from proving that the employee was terminated for "cause" or "gross misconduct" based on her violation of the employer's drug polices because of Section (3)(a)(iii)(B). Not only would this result run afoul of the intent of the Statute – *i.e.* disqualify an employee from receiving

unemployment benefits based on her violation of workplace drug policies, such an interpretation would severely circumscribe an employer's ability to provide a safe and drug free workplace for the rest of its employees, and would significantly jeopardize the safety of South Carolina employees as a whole.

In addition, reading the Statute as permitting termination based upon drug use that is provable *only* through use of a laboratory certified as set forth under Section 41-35-120(3)(a)(iii)(B) would render Section (3)(c) a nullity. Section (3)(c) permits an employer to legitimately discharge based on for example, police arrest records, drug tests performed by a treating physician, or believable reports from other employees that they saw the employee using illegal drugs. Here, Respondents' argument rests entirely on the faulty and unsupported assumption that "disqualification for drug use" is the equivalent of "proof of drug use by a laboratory certified" as set forth in Section (3)(a)(iii)(B) of the Statute. When read as a whole, it is clear that whether a laboratory is certified or not as mandated under Section (3)(a)(iii)(B) is a matter that goes to weight, not admissibility, of the test results.

Nucor's interpretation (and the interpretation adopted by the Agency and its lower tribunals in applying Sections (2), (3), and (4) to this dispute), properly recognizes that all three Sections of the Statute apply to the facts of this case, and that these Sections are not mutually exclusive. There is nothing complicated or innovative about such an interpretation. It simply recognizes the common rules of statutory interpretation. In other words, just because a laboratory does not meet the certification requirements of Section (3)(a)(iii)(B) does not mean, nor should it mean that an employer cannot utilize one or more sections of the same statute, which would otherwise be just as applicable to

reach the same result. In addition, there is nothing in Section (3)(a) which addresses violations of a drug policy that are discovered by the employer other than testing as set forth in Section (3)(a)(iii)(B), and these are precisely the violations that would fall under Sections (2), (3)(c) and (4) of the Statute.

Furthermore, this is not a case where Nucor has failed to prove drug use: indeed, other than the Appellate Panel's unauthorized reliance on the outside independent test which was administered under different detection standards, all the fact finding bodies found that Legette had been discharged from her employment *because* of her use of illegal drugs in violation of Nucor's Drug and Alcohol Policies. (R. 13, 275.) When an employee, of their own accord, seeks and obtains an independent test, which is administered under different detection standards, it is clear that she is attempting to circumvent an otherwise valid termination and disqualification using unauthorized and incomparable standards in an effort to thwart South Carolina law and the public policy behind a drug free and safe workplace for all employees.

Moreover, Legette's own use of, and reliance upon an independent unauthorized test is by itself, an admission that the test does not have to be form a "certified laboratory" in order to be valid. Legette is attempting to have it both ways: she is asking the Court to disregard Nucor's drug test results by asserting that the testing laboratory utilized by Nucor is not certified as required by Section (3)(a)(iii)(B). However, she is also simultaneously seeking to have her benefits reinstated on the basis of an independent "negative result" obtained under a less stringent detection standard, and processed by the very same laboratory that processed the samples collected by Nucor. This argument is disingenuous at best.

Judge Durden never analyzed which Section of the statute was applicable or whether the Sections were mutually exclusive. Rather, her Order specifically relies on, and incorporates the independent test that was the basis of the Agency's "contradictory test results" finding as basis for upholding the Appellate Panel's reinstatement of Legette's benefits under Section (4). Thus, Judge Durden's Order *affirms* the Appellate Panel's application of Section (4) to the facts of this case, while dismissing Nucor's arguments that violation of an employer's drug policies constitutes termination for cause as provided under Section (2) of the Statute. In that regard, Judge Durden's Order, likewise, bolsters Nucor's position that each of the Sections at issue is independent and stand-alone, and that Nucor can terminate in reliance upon any one or all three Sections.

Moreover, if the issue of whether Sections (2), (3) and (4) of the Statute must be applied independent of each other or whether these Sections are mutually exclusive is a novel question of law, then this Court is free to decide the question with no particular deference to the ALC or the Appellate Panel and its lower tribunals. *L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000). In such situations, the appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and the court's sense of justice. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005). In that regard, this Court has *de novo* review of the issue, thereby rendering Respondents' argument regarding mootness a non-issue.

Finally, it is incorrect to conclude that by not appealing the issue of whether the laboratory was properly certified, Nucor has conceded that Legette is entitled to unemployment benefits by operation of Section (3) of the Statute. Nucor *does not,* and

has never conceded that Legette is entitled to benefits under Section (3). Disqualification from benefits under Section (3) is not conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B); rather under Section 3(c), results from a certified laboratory are given primacy, while noncertified laboratory results are given whatever weight the fact finder deems appropriate. Thus, the Appellate Panel's determination that the testing laboratory was not certified as required under Section (3)(a)(iii)(B) is not conclusive of the issues raised on appeal to the ALC and to this Court.

### C. Claimant Was Properly Denied Benefits Pursuant to S.C. Code Ann. § 41-35-120(2), and The ALC's Failure to Analyze This as an Independent Basis for Denying Benefits Is Erroneous As A Matter Of Law.

On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. (Claims Adjudicator's Determination, ROA 13, 85.) The Adjudicator found that Nucor's drug testing policies were not unreasonable and that Claimant had the opportunity to have knowledge of the company's policies. *Id.* The Adjudicator further held that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2). (*Id.*) Finally, the Adjudicator confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory using gas chromatography/mass spectrometry (GC/MS) or a scientifically equivalent method. (*Id.*)

South Carolina courts have consistently held that an employee's "disregard of the standard behavior which an employer can rightfully expect from an employee" and "intentional and substantial negligent disregard for the employer's interests, duties, and

obligations" constitute "misconduct" sufficient to warrant a "for cause" termination and denial of benefits. *Lee v. S.C. Employment Security Comm'n*, 277 S.C. 586, 291 S.E.2d 378, (1982); *DeGroot v. Employment Security Comm'n,* 285 S.C. 209, 328 S.E.2d 668, (Ct. App. 1985). Although the statute no longer uses the word "misconduct," the supreme court has retained this interpretation of the meaning and application of S.C. Code Ann. § 41-35-120 (2) and has explained "disregard of the standard of behavior which an employer can rightfully expect from an employee" this way: "the general rule is that, where the employer's request is *reasonable*, a refusal to comply will constitute misconduct, justifying a discharge for cause." *Mickens v. Southland Exchange-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991).

It is undisputed that Claimant violated the Appellant's reasonable policy regarding drug and substance abuse and admits to failing two drug tests administered on behalf on the employer. (ROA 11, 23; Exhibit 4, ROA 101; Exhibit 6, ROA 121; ROA 38; Exhibit 5, ROA 105; Exhibit 7, ROA 136.) This failure of two drug tests demonstrates disregard of Nucor's express policies and procedures regarding drug and substance abuse, and the Claims Adjudicator's disqualification for cause finding was appropriate. Binding law in South Carolina supports the Claims Adjudicator's finding. For example, in *Lee v. S.C. Employment Security Comm'n*, the claimant-employee appealed from the order of the Court of Common Pleas in Charleston County affirming the Commission's order denying unemployment benefits to the employee. 277 S.C. at 587, 291 S.E.2d 378. The claimant-employee argued that to be denied benefits, the employer had to prove that he committed some willful or deliberate act. *Id.* The South Carolina Supreme Court disagreed. *Id.* After reviewing a number of cases interpreting

"misconduct," the court found that the record showed the direct consequences of the claimant-employee's acts or omissions were "causing losses to the employer in having to re-do appellant's work." 277 S.C. at 588, 291 S.E.2d at 379. Thus, the court held that there was no error in the Commission's order denying benefits. *Id.*

In *DeGroot*, v. *S.C. Employment Security Comm'n*, the claimant-employee was discharged for her refusal to follow instructions and carelessness. 285 S.C. at 211, 328 S.E. 2d at 669. The vice president and office manager further testified that claimant-employee made "too many mistakes in typing specifications and some of her work had to be redone by a part-time secretary." *Id.* The claimant-employee testified that she had not been informed of the firm's heavy typing load and asserted that she was really fired for failing to keep up with the work. *Id.* The South Carolina Court of Appeals, citing *Lee*, held that the record contained substantial evidence to support the Commission's finding that the claimant-employee was discharged for misconduct because she "had the ability to avoid numerous typographical mistakes and work at the standard her employer could rightfully expect." 285 S.C. at 212, 328 S.E. 2d at 670.

Just as the employee-claimant in *DeGroot*, here, Claimant was, at the very least, in violation of Nucor's Drug and Alcohol Policy. Indeed, Claimant admits that she was very aware of Nucor's Drug and Alcohol Policy; that she was aware that violation of the policy would lead to termination; and that Nucor did not consider outside independent tests not performed on its behalf. (Claimant's ALC Response Brief.) More pertinently, Claimant admits that the two drug tests administered on behalf of the employer both tested positive for marijuana. (ROA 11.) If the employee-claimants' comparatively minor misconduct in *Lee* and *DeGroot* satisfied the employer's burden under S.C. Code

§41-35-120(2), there can be no reasonable dispute that Claimant's conduct here easily rises to a level sufficient to constitute cause for her termination. Indeed, Claimant's drug positive status posed a much greater risk to Appellant than merely exposing it to typographical errors or the need to redo work. Working under the influence of illegal drugs while on duty at a steel manufacturing plant could have potentially exposed Claimant and other Nucor employees to an unsafe work environment, which could have resulted in injury or liability. For this reason alone, the Claims Adjudicator's decision should be upheld. The Appellate Panel's reliance on an off-site independent test contravenes the plain language of the statute, and cannot, as a matter of law, serve as basis for exonerating Claimant from conduct she herself admits was in violation of Nucor's drug policy. Thus, Judge Durden's failure to construe and apply the statute, and her reliance on the unauthorized findings of the Appellate Panel are reversible error.

### D. The ALC Judge's Order Upholding the Appellate Panel's Purported Reliance On S.C. Ann. § 41-35-120(4) Which Is in Fact Based on an Unauthorized Exception to S.C. Ann. § 41-35-120(3) Constitutes Error of Law.

The ALC judge held that there was record evidence to support the Appellate Panel's finding that Claimant was separated under non disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4). However, in concluding that there were "disparate results" which were of concern, the Appellate Panel relied on Claimant's off-site independent test, which was not performed on behalf of the employer as required under Section (3) of the Statute. Indeed, the Appellate Panel noted in its Order that "an employer may not accept an off-site test." ROA ___. Therefore, its reliance on the same off-site test not only circumvents the mandate of the applicable statute, but also has no legal or factual support.

In any event, it is also clear that an employee's violation of the employer's drug policies comprises yet another independent basis for termination under S.C. Code Ann. § 41-35-120(4). First, the Appellate Panel itself observed in its order that "Gross Misconduct" includes failure to comply with drug use regulations. (Appellate Panel Decision, ROA 2.) In determining the meaning of the term "misconduct" courts in South Carolina look to the general purpose of the act. *Lee v. South Carolina Employment Sec. Commission, supra*, citing *Stone Mfg. Company v. S.C. Employment Security Commission, et al.*, 219 S.C. 239, 64 S.E.2d 644 (1951). It is doubtful that the legislature envisioned that the statute could be circumvented by an outside, independent drug test administered at different detection standards at the whim of a disgruntled terminated employee.

In addition, the majority of states define illegal drug use as willful misconduct in the area of unemployment benefits. *See generally,* 78 ALR4th 180 § 5-7, *"Drugs-Unemployment Compensation."* (Citing cases). The prevailing case law establishes that where an individual is terminated due to her failure to comply with company substance abuse policies, she is precluded from receiving state unemployment benefits. *Id.*

As a result, Judge Durden's failure to determine: (1) whether the Appellate Panel had authority to craft an unauthorized exception to Section (3) of the Statute; and (2) whether the Appellate Panel could in fact, hold that on the basis of that newly crafted exception to Section (3), "(Legette] was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120 (4)",[8] is erroneous as a matter of law.

[8] Emphasis added.

## CONCLUSION

Based on the foregoing, a finding that the laboratory was not certified as required under Section (3)(a)(iii)(B) is neither dispositive of this case, nor does it comprise a factual finding that Legette *did not* use illegal drugs in violation of Nucor's Drug and Alcohol Policies. In addition, neither the ALC nor the Agency was unauthorized to rely on off-site drug test administered under different, less sensitive detection levels, to trump Nucor's tests that Legette admits she failed. It is therefore clear that the issues raised in this appeal are far from resolved, and a decision of this Court will not only grant meaningful relief to Nucor, it will also clarify application of Section 41-35-120, including whether an employee is permitted to rebut an employer's drug test results with her own unauthorized tests, and whether an employer can rely on any applicable Section of the Statute in establishing violation of its policies.

Respectfully submitted,

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