

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No.: 15-ALJ-22-0497-AP

Appellate Case No. 2016-000037

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APR 27 2016

SC Court of Appeals

Billie D. Mueller,

v.

South Carolina Department of Employment
and Workforce,

Respondent.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE SCDEW APPELLATE PANEL ERR IN FINDING THE APPELLANT NEGLECTED TO FILE HER APPEAL IN A TIMELY MANNER?
- II. DID THE SCDEW APPELLATE PANEL ERR IN FINDING THAT APPELLANT RECEIVED THE DECISION IN A TIMELY MANNER?
- III. DID THE APPELLATE PANEL AND APPEAL TRIBUNAL ERR IN THE DECISION ON SEVERANCE PAYMENTS AND BONUS NOT BEING WAGES FOR WHICH THE APPELLANT PAID ALL FEDERAL, STATE AND FICA TAXES?

RESPONDENT'S RESTATEMENT OF THE ISSUES ON APPEAL

- I. DID APPELLANT FAIL TO FILE A SUFFICIENT BRIEF TO INCLUDE CITATION TO AUTHORITY ON THE ISSUE OF THE TIMELINESS OF HER APPEAL TO THE DEPARTMENT'S APPELLATE PANEL?
- II. *ARGUENDO*, DID THE DEPARTMENT CORRECTLY FIND THAT APPELLANT'S APPEAL WAS UNTIMELY FILED?
- III. SHOULD APPELLANT'S ADDITIONAL ARGUMENTS BE REJECTED AS NOT PRESERVED FOR REVIEW?

STATEMENT OF THE CASE

Appellant, Billie D. Mueller (Appellant) filed a claim with Respondent, the South Carolina Department of Employment and Workforce (DEW or Department) for unemployment insurance (UI) benefits. On April 2, 2015, the Department initially found that Appellant did not meet the eligibility requirements of the law pursuant to S.C. Code Ann. § 41-35-50¹ and therefore ineligible to receive UI benefits (ALC R. p. 5.).

Appellant appealed the initial determination to the Appeal Tribunal (Tribunal) pursuant to S.C. Code Ann. § 41-35-660. The Tribunal conducted an evidentiary hearing in which Appellant participated. The resulting decision, mailed to the Appellant's address of record on May 7, 2015, affirmed the initial determination. Id.

Thereafter, Appellant filed a letter of appeal from the Tribunal decision with the Department's Appellate Panel (Panel) received on May 29, 2015. (ALC R. p. 6.).

In a letter dated June 1, 2015, the Panel remanded the case to the Tribunal for the sole purpose of receiving testimony regarding the timeliness of Appellant's letter of appeal. (ALC R. p. 7.) The matter was then returned to the Panel to make a decision on the record developed. (ALC R. p. 7.) On June 18, 2015, the Tribunal held a telephone hearing for this purpose. (ALC R. pp. 9-14.) On July 7, 2015, the Panel issued the final agency decision that dismissed Appellant's appeal as untimely filed. (ALC R. pp. 1-2.)

On July 30, 2015, Appellant timely appealed the Panel's decision to the South Carolina Administrative Law Court. On January 4, 2016, the Honorable John D. McLeod issued an order

¹ This statute provides that no insured worker may receive benefits in a second benefit year unless, subsequent to the beginning of the first benefit year during which he received benefits, he performed work in the employ of a single employer in an amount equal to at least eight (8) times the weekly benefit amount established for the individual in the preceding benefit year.

affirming the Panel's decision. (ALC Order dated January 4, 2016). Thereafter, Appellant filed an appeal with this Court.

STATEMENT OF 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 her on May 7, 2015. The statutory time period for appealing from this decision expired on May 18, 2015, pursuant to S.C. Code Ann. § 41-35-680. The Panel did not receive a letter of appeal in this matter until May 29, 2015. (ALC R. p. 6.) The Panel remanded the case to the Tribunal for a hearing on the timeliness issue. (ALC R. p. 7.).

During the hearing, Appellant testified that she did not know when the determination actually appeared in her mail box because she did not stay at that location all the time and she usually checked her mail every two weeks. (ALC R. p. 12.) Appellant further testified that she was uncertain whether her appeal had to be ten days from the date of mailing or ten days from the date of receipt. Id.

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

The Department properly mailed the Appeal Tribunal decision to [Appellant]'s address of record. The deadline to file an appeal was May 18, 2015. [Appellant] appealed on May 29, 2015, eleven (11) days after the appeal period expired. The Department has no authority to extend the appeal time limit unless the delay was caused by Department or Postal error, and we evidence of no such error. [Appellant] filed an untimely appeal due to her own error or neglect in failing to carefully read the appeal instructions, and by failing to act in a diligent manner to preserve her appeal rights. Knowing that a time-sensitive decision from the Department would be forthcoming, [Appellant] reasonably should have taken affirmative steps to check the mail more often than every fourteen (14) days. **The greater weight of evidence indicates that if [Appellant] had checked her mail on a regular basis, she would have received the decision earlier, and likely could have filed a timely appeal.** Therefore, the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

(ALC R. p. 2) (emphasis added).

The ALC found that substantial evidence in the record supported the Panel's decision. In affirming the Panel, the ALC found:

Here, the record is clear that the Tribunal decision was mailed on May 7, 2014 and that the last day to file an appeal was May 18, 2015. However, Appellant filed her appeal on May 29, 2014, which was eleven (11) days beyond the time allowed under Section 41-35-660. As a result, Appellant's appeal to the Panel was untimely. The Court finds that the Panel decision that Appellant appealed from is supported by the substantial evidence in the record.

(ALC Order dated January 4, 2016 p. 4.)

ARGUMENTS

Standard of Review

Pursuant to S.C. Code Ann. § 1-23-610(B)

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.

Under the Administrative Procedures Act, this Court's review of an ALC decision "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." Hill v. S.C. Dep't of Health and Env'tl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010).

I. APPELLANT FAILED TO FILE A SUFFICIENT BRIEF INCLUDING CITATION TO AUTHORITY ON THE ISSUE RULED ON BY THE PANEL.

On appeal, Appellant now presents only a single potentially relevant argument that the Panel erred by “finding that Appellant received the decision in a timely manner.” However, Appellant has abandoned her appeal by failing to file a proper brief.

Rule 208(b)(1)(D), SCACR requires arguments on appeal to include citations to legal authority; see also Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.”). An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Historic Charleston Holdings, L.L.C. v. Mallon, 365 S.C. 524, 533 n. 7, 617 S.E.2d 388, 393 n. 7 (Ct. App. 2005); Bryson v. Bryson, 378 S.C. 502, 662 S.E.2d 611 (Ct. App. 2008).

Appellant’s Brief recites her view of the facts without any supporting authority and fails to isolate any issues that this Court may address within its standard of review.

II. ARGUENDO, THE DEPARTMENT CORRECTLY FOUND THAT APPELLANT’S APPEAL WAS UNTIMELY FILED.

In arguendo, S.C. Code Ann. § 41-35-680 states that the Tribunal’s decision will become the Department’s final decision “unless **within ten days after the date of mailing the decision** a further appeal is initiated pursuant to Section 41-35-710.” (Emphasis added). It is uncontested that the Tribunal decision was mailed to Appellant’s address of record on May 7, 2015. Neither does Appellant dispute that the decision was delivered to her address of record within the statutory time period for timely filing. See Lindsey v. S. Carolina Tax Comm’n, 323 S.C. 57, 60, 448 S.E.2d 577, 578 (Ct. App. 1994)(Where there was no contention that the document was not

properly addressed or contained insufficient postage, the uncontroverted evidence shows the notice was deposited in the mail on the date alleged.)

While the Department is sympathetic to Appellant's medical issues, the language of S.C. Code Ann. § 41-35-680 is explicit. A party's appeal must be within ten (10) days of the mailing of the Tribunal decision and no language allows discretion to the Panel to consider mitigating circumstances. The Panel's authority is strictly confined to the limits set by the statutory provisions that give them their existence and any actions that exceed their jurisdiction are void. S.C. Tax Comm'n v. S.C. Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983). Since no authority exists to consider mitigating circumstances, the Panel properly declined to consider the matter. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985)(A failure to satisfy the time limits of jurisdiction is fatal since an untimely appeal prohibits the Panel from deciding the matter.).

Considering the Record and the controlling statute, the Panel concluded:

[Appellant] filed an untimely appeal due to her own error or neglect in failing to carefully read the appeal instructions, and by failing to act in a diligent manner to preserve her appeal rights. Knowing that a time-sensitive decision from the Department would be forthcoming, [Appellant] reasonably should have taken affirmative steps to check the mail more often than every fourteen (14) days. The greater weight of evidence indicates that if [Appellant] had checked her mail on a regular basis, she would have received the decision earlier, and likely could have filed a timely appeal. Therefore, the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

(ALC R. p. 2.) Here, there is substantial evidence in the record to support the Panel's decision that Appellant's appeal was untimely.

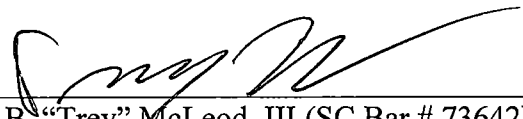
II. APPELLANT'S ADDITIONAL ARGUMENTS MUST BE REJECTED AS NOT PRESERVED FOR REVIEW

It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the lower court. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). Here Appellant's

assertions regarding the underlying UI benefits eligibility cannot be reached by this Court as it could not be and was not reached by the Panel nor the ALC. Senn v. Spartanburg Cty., 192 S.C. 489, 7 S.E.2d 454, 456 (1940)(“[A]s a general rule if an inferior court or tribunal has no jurisdiction of a cause an appeal from its decision confers no jurisdiction on the appellate court.”)

CONCLUSION

The decisions of the ALC and the Panel are supported by substantial evidence on the record as a whole and are in accord with applicable law, therefore, the findings are binding on the court and the decision should be affirmed.



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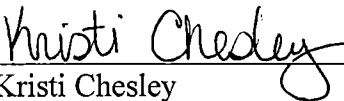
Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter of the Respondent on the Appellant in this case by depositing a copy of it in the United States Mail, postage prepaid, on April 25, 2016, addressed to the Appellant at her address of record:

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April 25, 2016



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Billie D. Mueller v. SCDEW
Appellate Case No: 2016-000037

Dear Ms. Kitchings:

Enclosed are the original unbound and one bound copy of the Initial Brief and Designation of Matter of the Respondent with a Certificate of Service in the above referenced case.

Please let me know if you have any questions.

Sincerely,

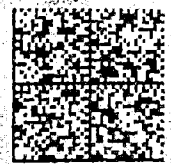
A handwritten signature in cursive script that reads "Kristi Chesley".

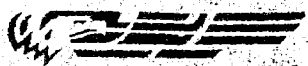
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