THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Docket No. 11-ALJ-22-0654-AP

CHARLES E. STUBBS, Appellant,

vs.

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

BRIEF OF APPELLANT

January 2, 2013

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QUESTIONS PRESENTED

1. **Did the Administrative Law Court err by finding that Stubbs' appeal was untimely based upon its erroneous conjecture that the mailbox at his apartment complex was not a U.S. postal box when it met the definition of a mailbox found in case law and when there is no evidence that Stubbs gave the appeal to an agent or other third party to mail?**

2. **Even if it was necessary that Stubbs prove that he posted the appeal into a U.S. mailbox, did substantial, conclusive evidence establish that it was a U.S. mailbox, and was it an abuse of discretion and clearly erroneous for the Administrative Law Court to rule to the contrary?**

3. **Did the Administrative Law Court's finding that Stubbs' appeal was untimely, despite his uncontradicted testimony that he placed it in his mailbox within the ten-day timeframe required by law, violate the General Assembly's stated public policy in enacting the unemployment benefits program?**

STATEMENT OF THE CASE

1. Procedural history

This is an appeal from an Order of the Administrative Law Court finding that Appellant Charles E. Stubbs failed to timely appeal a decision of Respondent Department and Employment and Workforce denying his claim for unemployment benefits. Stubbs worked for Respondent JSE LLC, a staffing business, from October 28, 2009 to January 2, 2011 as an assembler. R. pp. 23-24. Stubbs applied for unemployment benefits and was found eligible without disqualification. R. p. 38. The Employer appealed the decision and the Department set a hearing before its Appeal Tribunal. The hearing was held on June 14, 2011, and both Stubbs and the Employer participated. Stubbs was unrepresented at the hearing. The Appeal Tribunal found that Stubbs had injured his foot in a car accident on December 18, 2010 and that he had undergone surgery and remained under a doctor's care with restrictions from prolonged standing until May 2011. The employer offered no medical leave and provided him with no other assignments that would accommodate his doctor's restrictions. The Appeal Tribunal concluded that Stubbs was completely disqualified from receiving benefits because he "voluntarily quit" his position with the Employer due to health-related reasons.[1] R. p. 28.

Representing himself, Stubbs appealed this decision to the Department's Appellate Panel. R. p. 43. Notwithstanding Stubbs' unrebutted testimony that he placed his notice of appeal in his apartment complex mailbox within ten days of the notice of

1 The Appeal Tribunal committed an error of law by failing to consider the applicability of S.C. Code Ann. § 41-35-125(d), which provides that workers who are separated from employment due to "compelling family circumstances" are eligible for benefits. "Compelling family circumstances" includes separation from employment "because of the illness or disability of the claimant and, based upon available information, the department finds that it was medically necessary for the claimant to stop working or change occupations." Stubbs was denied an opportunity to obtain a ruling from the Appellate Panel on this meritorious issue.

decision, the appeal was dismissed as untimely by letter of the Department's Higher Authority Appeals office. R. p. 45. Stubbs appealed this dismissal to the Appellate Panel. R. pp. 46-50. The Appellate Panel remanded the case to the Appeal Tribunal for a hearing on the timeliness of Stubbs' appeal, which was held on November 9, 2011. R. p. 51. In a November 29, 2011 decision, the Appellate Panel found Stubbs' appeal untimely. Stubbs appealed this final agency decision to the South Carolina Administrative Law Court. R. pp. 24-25. On March 26, 2012 Judge John D. McLeod issued an order finding the appeal untimely. R. p. 1. Stubbs moved for reconsideration based upon errors of law and moved for the court to take judicial notice of certain adjudicative facts. R. p. 6. The court denied this motion on May 15, 2012. R. p. 3. Stubbs filed a Notice of Appeal to this Court and served it upon the Respondents on June 14, 2012.

2. **The evidence presented**

The facts regarding the timeliness of Stubbs' appeal were developed at a hearing before the Appeal Tribunal on November 9, 2011. The Department asserts that the Appeal Tribunal decision at issue was mailed to Stubbs on June 17, 2011. R. p. 24. Stubbs testified that he received the June 17, 2011 decision on Monday, June 20, R. p. 29, lines 15-17, and that he mailed his appeal on June 21. R. p. 30, lines 11-12. His testimony regarding these events is clear:

> HEARING OFFICER: Okay, when did you receive that in the mail?
> CLAIMANT: I would have to say probably around the 20th, which I checked the calendar the 17th, was a Friday, so I probably got it that Monday.
> HEARING OFFICER: Okay.
> CLAIMANT: And put it back in the mail that Tuesday.
> R. p. 29, lines 14-19.

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

> HEARING OFFICER: Well, how...did you mail this?
> CLAIMANT: I mailed this at my house. I got a...they got a box where the mailman comes, and he...you got little slots where you can...outgoing mail.
> HEARING OFFICER: Right.
> CLAIMANT: And he...he takes it out. I...I don't know what happened with that, I don't. I have no idea.
> HEARING OFFICER: And when you say you put it in that slot...
> CLAIMANT: I put it in that slot on the...had to be the 21st.
> R. p. 31, lines 16-23.

Though Stubbs was initially confused about what constitutes a U.S. postal box, he concluded that the apartment complex's outgoing mailbox qualified as such:

> HEARING OFFICER: And you say you put this letter in an envelope?
> CLAIMANT: In...In my box at...at...it's not a US postal box, it's a box...I guess it is. Well, I guess it is because it's a...it's a box that's used by the apartment complex...
> HEARING OFFICER: Right.
> CLAIMANT: ...for delivering or...or...or...picking up mail. R. p. 34, lines 5-10.

Stubbs did not know why the appeal was not postmarked until June 29. R. p. 34, line 17. He testified "I don't know what happened with the letter." R. p. 35, line 4. Stubbs asked the hearing officer to take into consideration "that the mail might have made a mistake...the mail is an entity in itself and...I have no control over it in any kind of way." R. p. 36, lines 12-13.

3. **The decision of the Appellate Panel**

The Department's Appellate Panel found that the department mailed its decision to Stubbs' address of record on June 17, 2011; that Stubbs received the decision on June 20; and that the appeal period expired on June 27. The Appellate Panel acknowledged that Stubbs testified that he placed his appeal letter in the outgoing mail slot at his apartment complex on June 21, 2011 and that he assumed it was sent out timely. The Appellate Panel made no finding that Stubbs was not credible but simply concluded that

"[t]he claimant was aware he was mailing a time-sensitive document, and it was his responsibility to ensure that the appeal was timely filed. The claimant filed an untimely appeal due to his own error or neglect. Therefore the appeal is dismissed as untimely." R. p. 26. The Panel's decision was the final agency decision.

4. <u>The decision of the Administrative Law Court</u>

The Administrative Law Court recognized that the proper legal standard was whether the appeal notice had been timely placed in the mail, not the date it was delivered by the postal service. Although this issue had not been addressed below the court nonetheless went on to find that Stubbs had filed an untimely appeal because "the Petitioner merely gave his notice of appeal to a third party, rather than to the SCDEW or the United States Postal Service." The court stated that "[t]he Petitioner testified that the mail slot where he placed the envelope containing his notice of appeal was not a U.S. postal box, authorized by the United States Postmaster General for receipt and delivery of mail." R. pp. 1-2.

5. <u>Stubbs' Motion for Reconsideration</u>

Stubbs moved for the Administrative Law Court to reconsider its decision in order to correct errors of law and to take judicial notice of the fact that the apartment complex mailbox was, in fact, a U.S. postal box, authorized by the United States Postmaster General for receipt and delivery of mail. R. pp. 6-22. Stubbs submitted further sworn testimony clarifying that the court misconstrued his testimony and that the mailbox into which he placed the appeal was a U.S. postal box. R. pp. 21-22.

Moreover, to conclusively establish that the box was a U.S. postal box, Stubbs submitted additional affidavits and photographs of the mailbox in question. The affidavits were executed by the photographer and employee of South Carolina Legal Services, S.

Ashley Cole, and Stubbs. Exhibits A through F show what are indisputably United States Postal Service (USPS) mailboxes. R. pp. 14-19. The outgoing mailbox in question is shown in Exhibit C and is secured by a lock. R. p. 16. Stubbs' affidavit confirms that Exhibit C shows the outgoing mailbox into which he placed his appeal, properly addressed, to the Department, with sufficient postage, on June 21, 2011; that it is used by all the tenants of the apartment complex for their outgoing mail; and is, to his knowledge, the only outgoing mailbox for the apartment complex residents. R. pp. 20-22. A posted sticker, bearing the insignia of the USPS, admonishes that "[M]ail receptacles and contents are protected by Federal law, and this law prohibits attempts to pry boxes open or otherwise tamper with them." R. p. 17. In addition, there is a label welded to the back of the bank of mailboxes that states, "U.S. MAIL APPROVED BY POSTMASTER GENERAL." R. p. 19. Based on the incontestable nature of these sources, Stubbs further requested the court take judicial notice that the box was indeed a U.S. mailbox. The court construed Stubbs' motion as a Motion for Rehearing pursuant to Rule 40, SCALC and denied it. R. p. 3.

STANDARD OF REVIEW

S.C. Code Ann. § 41-35-750 provides that "[i]n a judicial proceeding under [Title 41, Chapter 35], the findings of the department as to the facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the court must be confined to questions of law." The Administrative Procedures Act (A.P.A.) sets forth the bases upon which a court of appellate review may act on an administrative finding, inference, conclusion or decision of an agency. S.C. Code Ann. § 1-23-310 *et. seq*. The South Carolina Department of Employment and Workforce is an "agency" within the scope of the A.P.A. S.C. Code Ann. § 1-23-310(2). An appellate court may affirm or remand an agency decision. S.C. Code Ann. § 1-23-380(A). Otherwise, it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (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. S.C. Code Ann. § 1-23-380(A)(5).

The "substantial evidence" standard governs factual findings under the A.P.A. *See e.g. Hall v. United Rentals*, 371 S.C. 69, 79, 636 SE.2d 876, 882 (Ct. App. 2006) (worker's compensation case), *McEachern v. S.C. Employment Sec. Comm'n,* 370 S.C. 553, 635 SE.2d 644 (Ct. App. 2006). An appellate court may not overturn an agency's finding of fact when it is supported by substantial evidence. Substantial evidence requires a showing of more than a "mere scintilla of evidence." *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 550, 663 SE.2d 85, 89 (Ct. App. 2008). To be substantial, evidence must be

such that reasonable minds can reach the same conclusion that the agency reached. *Merck v. S.C. Employment Sec. Comm'n*, 290 S.C. 459, 461,351 SE.2d 338 (1986).

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

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

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

A decision is considered arbitrary "if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment . . . or is governed by no fixed rules or standards." *Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (1985).

ARGUMENTS

1. **The Administrative Law Court erred by finding that Stubbs' appeal was untimely based upon its erroneous conjecture that the mailbox at his apartment complex was not a U.S. postal box when it met the definition of a mailbox found in case law and when there is no evidence that Stubbs gave the appeal to an agent or other third party to mail.**

Neither the Administrative Law Court nor the Department made any findings of fact disputing Stubbs' testimony that he placed the appeal in to his mailbox on June 21, 2011, nor did they find that Stubbs' testimony lacked credibility. Rather, the sole basis for the Administrative Law Court's decision that Stubbs' appeal was untimely was its conjecture that his apartment complex's outgoing mailbox was not a mailbox. The court's opinion is unsustainable on several grounds. First, this issue was never previously raised by the parties nor decided by the Department. Second, as is further discussed below, the affirmative and undisputed evidence in this case conclusively established that the mailbox was in fact a U.S. mailbox. Accordingly, the court's decision is not supported by substantial evidence. Finally, as a matter of law, based on the evidence at the original hearing the apartment complex's mailbox is a mail depository box under South Carolina law, and Stubbs' placing of his notice of appeal into the mailbox on June 21, 2011 constituted timely filing of his appeal. It is not disputed that Stubbs placed his appeal into the box. Based upon longstanding federal and South Carolina precedent it must be concluded that the appeal was timely.

Appeals from denials of unemployment benefits can be made by mail. An interested party may file an appeal "not later than ten days after the determination was mailed to his last known address." S.C. Code Ann. § 41-35-660. The statute does not specify the manner in which an appeal is to be made. However, the Department has promulgated a regulation providing for perfecting an appeal in either of two ways: "by

filing at the office where the claim was filed, or at the office of the Commission in Columbia, South Carolina, within ten (10) calendar days after the date of notification or mailing of the decision of the Appeal Tribunal." S.C. Code Ann. Regs. 47-52(A)(1). The Department is required to include in each appeal decision a notice specifying the appeal rights of the parties; this notice "shall state clearly the place and manner for filing an appeal from the decision and the period within which an appeal may be taken." S.C. Code Ann. Regs. 47-51(F). In an attempt to comply with this requirement, the Department's Appeal Tribunal decision includes the following notice:

> This will be the final decision of the Agency, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," Post Office Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center. R. p. 24.

Thus, the Department acknowledges both in its regulations and in its notice that an interested party can appeal an Appeal Tribunal decision by placing the appeal in the mail.

When the Notice of Appeal is served by mail, it must be deemed timely as long as it is deposited in the mail within the requisite time frame. The courts of this state have consistently held that, when service by mail is permitted, it is complete when the document is deposited with the United States Postal Service, properly addressed with sufficient postage. *Southbridge Props, Inc. v. Jones*, 292 S.C. 198, 199 (1987); see also *Town of Honea Path v. Wright*, 194 S.C. 461, 9 S.E.2d 924 (1940); *Walters v. Lauren Cotton Mills*, 53 S.C. 155, 31 S.E. 1 (1898). In the present case, Stubbs mailed the

appeal, to the correct address and with sufficient postage, by placing it into his apartment complex's outgoing mailbox on June 21, 2011, well within the ten-day requirement of S.C. Code Ann. § 41-35-660.

The Administrative Law Court found—against ample and long-standing state and federal authority—that Stubbs' depositing his appeal into his apartment mailbox was not sufficient for perfecting the appeal because it questioned whether the apartment mailbox was a U.S. postal box. Yet it is well established that service occurs at the time a party places the document in a "designated mail depository box, whether in a building or along mail route." *Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct. App.1995). "Any depository box designated as a mail depository, whether it is privately owned and controlled or placed in buildings or along a mail route, constitutes a depository authorized for the receipt and delivery of mail." 62 *Am. Jur. 2d, Post Office* § 53 (citing *Rosen v. United States*, 245 U.S. 467 (1918)).

Stubbs testified that the postal service picks up outgoing mail directly from this mailbox, which establishes that it is a designated mail depository box.

> HEARING OFFICER: Well, how...did you mail this?
> CLAIMANT: I mailed this at my house. I got a...<u>they got a box where the mailman comes</u>, and he...you got little slots where you can...outgoing mail.
> HEARING OFFICER: Right.
> CLAIMANT: And he...he takes it out. I...I don't know what happened with that, I don't. I have no idea.
> HEARING OFFICER: And when you say you put it in that slot...
> CLAIMANT: I put it in that slot on the...had to be the 21st.
> R. p. 31, lines 16-23. (emphasis added)

Moreover, Stubbs testified that "I guess it is [a U.S. postal box] because...it's a box that's used by the apartment complex for delivering...or picking up mail." R. p. 34, lines 5-10.

The Court based its decision on the mistaken and unsupported conclusion that Stubbs placed the notice of appeal in the care of a third party. Indeed, giving a notice of intent to appeal to a third party private mail service to place mail has been held not to constitute timely service. *Southbridge Properties, Inc.*, 292 S.C. 198, 355 S.E.2d 535. However, the record here establishes that Stubbs placed his notice of appeal directly into the outgoing mailbox himself. There is no substantial evidence to support the Court's conclusion that Stubbs gave the appeal to a third party to mail.

2. Even if it was necessary that Stubbs prove that he posted the appeal into a U.S. mailbox, substantial, conclusive evidence established that it was a U.S. mailbox and it was abuse of discretion and clearly erroneous for the Administrative Law Court to rule to the contrary.

Even assuming that it would be necessary to establish that the apartment mailbox in question was a U.S. mailbox in order for it to be considered a mail depository for purpose perfecting a notice of appeal, this was established through overwhelming uncontradicted evidence with no substantial evidence supporting a contrary conclusion. Indeed, based on the nature of the evidence involved, in his Motion for Reconsideration, Stubbs requested that the court take judicial notice that his mailbox, bearing the seals, insignia and federal warnings against tampering of the postal service, constitutes a postal box authorized by the United States Postal Service Postmaster General for receipt and delivery of mail. *Rosen v. United States*, 245 U.S. 467, 468 (1918). Judicial notice of an adjudicative fact may be taken at any time during the proceedings and a judicially noticed fact must be one that by either general knowledge or by a determination from a source whose accuracy cannot be reasonably questioned is a fact "not subject to reasonable dispute". Rule 201, SCRE; *see Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (finding that facts subject to judicial notice include those whose accuracy

may be ascertained by reference to readily available sources of indisputable reliability."). Appellate courts may also take original judicial notice of adjudicative facts. *State v. Squires*, 311 S.C. 11, 426 S.E.2d 738 (1992); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905 (1940).

Stubbs attached to the motion two affidavits which conclusively establish that the outgoing mailbox into which Stubbs placed the appeal is a postal box authorized by the United States Postal Service ("USPS") and United States Postmaster General for receipt and delivery of mail. The photographs clearly show that the mailbox is a conventional outgoing mailbox as is commonly found in apartment complexes; that is it secured with a lock, and that it is covered with Postal Service decals and inscriptions. One such sticker, bearing the insignia of the USPS, admonishes that "[m]ail receptacles and contents are protected by Federal law, and this law prohibits attempts to pry boxes open or otherwise tamper with them." R. p. 17. In addition, there is a label welded to the back of the bank of mailboxes that states, "U.S. MAIL APPROVED BY POSTMASTER GENERAL." R. p. 19. It is appropriate for this Court to consider the exhibits under the doctrine of judicial notice. In this case, the USPS and the Postmaster General have designated Stubbs' mailbox as one approved for use for outgoing mail. The USPS and Postmaster General are sources of indisputable reliability as to the determination of whether the apartment mailbox is an "authorized depository." It is not subject to reasonable dispute that the mailbox is, in fact, a USPS mailbox and authorized depository. Moreover, the existence and state of this mailbox is independently verifiable. As such, the Administrative Law Court abused its discretion by finding that the mailbox was not a USPS mailbox, by failing to take judicial notice of this fact, and by denying Stubbs' Motion for

Reconsideration.

3. The Administrative Law Court's finding that Stubbs' appeal was untimely, despite his uncontradicted testimony that he placed it in his mailbox within the ten-day timeframe required by law, violates the General Assembly's stated public policy in enacting the unemployment benefits program.

Finally, even if the evidence was not conclusive and it was a close legal question as to whether the placing the notice of appeal in his apartment mailbox rendered Stubbs' appeal timely, it would be inequitable and against public policy for the Department to dismiss his administrative appeal under these circumstances. The General Assembly has clearly stated its public policy in enacting unemployment benefits:

> Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family. S.C. Code Ann. § 41-27-20.

The Unemployment Compensation Law is remedial in nature and it is to be liberally construed to give effect to its beneficent purposes. *Hartsville Cotton Mill v. S.C. Employment Sec. Comm'n.*, 224 S.C. 407 (1953). The deadline to appeal, ten calendar days from the mailing date of the Appeal Tribunal decision, is one of the fastest and most unforgiving found in the law. Yet the stakes for being improperly found to have filed untimely are so high. Not only does an erroneous decision deprive a worker of due process, but it can cause a worker to lose his home to foreclosure or eviction, car to repossession, and deprive him and his family of a modest source of income to buy food or medicine.[2] The ALC's decision finding Charles Stubbs' appeal to be untimely because

2 Recognizing the particular prevalence of *pro se* litigants in administrative proceedings, the Administrative Law Court's own Rules of Procedure provide that "[i]n all cases involving *pro se* litigants or those without substantial knowledge and experience in administrative matters, the administrative law judge may make reasonable efforts to assure fairness." Note to Rule 38, SCALC.

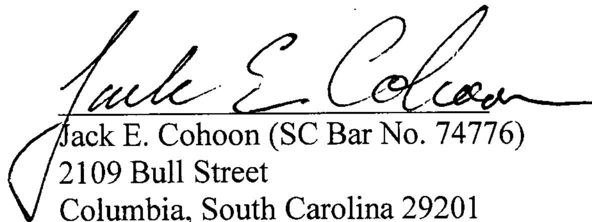
of its erroneous and unsupported view that his mailbox was not a mailbox violates both the letter and the spirit of the Unemployment Compensation Law and must be reversed.

Conclusion

For the reasons stated above, Appellant Charles E. Stubbs respectfully requests that this Court reverse the Decision of Administrative Law Court on the basis that it is unsupported by substantial evidence, affected by serious error of law, arbitrary and capricious, and characterized by abuse of discretion. Stubbs further asks that his case be remanded to the Department for a hearing before the Appellate Panel on the issue of Stubbs' separation from employment.

Respectfully submitted,

SOUTH CAROLINA LEGAL SERVICES



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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF SERVICE

I certify that I have served the Brief of Appellant on South Carolina Department of Employment and Workforce and on JSE LLC by U.S. Mail, Postage Paid on January 2, 2013 to the following addresses:

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