

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

Charles E. Stubbs,

Appellant,

v.

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

Respondent.

FINAL BRIEF OF RESPONDENT

Maura Dawson
Bar # 73726
Asst. General Counsel
SC Dept. of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395
Attorney for Respondent

TABLE OF CONTENTS

Table of Authorities.....	ii
Appellant’s Statement of the Issue on Appeal	1
Respondent’s Statement of the Issue on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Argument.....	8
Standard of Review.....	8
The Administrative Law Court’s decision should be affirmed as Appellant did not timely file his appeal, and, therefore, the Appellate Panel did not have jurisdiction to hear the Appellant’s case.....	9
It is not relevant whether Appellant properly placed his letter requesting an appeal in a proper U.S. Postal Service mailbox, the notice of appeal was untimely.....	11
Conclusion.....	13

TABLE OF AUTHORITIES

Cases

<u>Allison v. W.L. Gore and Associates</u> , 394 S.C. 185, 714 S.E.2d 547 (2011).....	9, 12
<u>Elam v. S.C. Dept. of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772, (2004).....	6, 9
<u>Houston v. Deloach & Deloach</u> , 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).....	9
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	8, 9, 12
<u>Palmetto Alliance, Inc. v. S.C. Public Service Com'n</u> , 282 S.C. 430, 319 S.E.2d 695 (1984).....	12
<u>Town of Mt. Pleasant v. Roberts</u> , 393 S.C. 332, 713 S.E.2d 278 (2011).....	10

Statutes

S.C. Code Ann. § 1-23- 310.....	8
S.C. Code Ann. § 1-23-380.....	8
S.C. Code Ann. § 41-35-680.....	3, 4, 8, 10, 12
S.C. Code Ann. § 41-35-710.....	3

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

- 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?**

RESPONDENT'S RESTATEMENT OF THE ISSUE ON APPEAL

- 1. Did the Administrative Law Court err in finding the Appellate Panel correctly dismissed the appeal because it lacked jurisdiction to hear the Appellant's untimely filed appeal?**

STATEMENT OF THE CASE

Appellant Charles E. Stubbs ("Appellant") filed for unemployment benefits and in April 2011, the claims adjudicator determined Appellant eligible because he was discharged from his most recent bona fide employer due to lack of work. (R. p. 38) Respondent JSE LLC ("JSE") filed an appeal with the Appeal Tribunal. (R. p. 39).

The Appeal Tribunal found Appellant voluntarily quit his employment without good cause and, therefore indefinitely disqualified him from benefits. (R. pp. 23-24). The Appeal Tribunal decision was mailed on June 17, 2011. Higher Authority Appeals received a letter from Appellant requesting an appeal that **was postmarked June 29, 2011.**

The Appellate Panel issued a letter that Appellant had not filed for an appeal on a timely basis. (R. p. 45). Appellant mailed a request to reconsider the Appellate Panel decision. (R. pp. 46-47). Appellant mailed a second letter explaining he mailed the appeals letter on June 25, 2011. (R. p. 49). The Appellate Panel remanded the case to the Appeal Tribunal for an evidentiary hearing on the timeliness of Appellant's notice of appeal. (R. p. 51). Upon reviewing the transcript and the evidence, the Appellate Panel determined that Appellant did not timely file his notice of appeal, and, therefore his case was dismissed. (R. pp. 25-26).

Appellant filed for judicial review with the Administrative Law Court ("ALC"), which affirmed the Appellate Panel's finding. Appellant filed a motion for reconsideration, which was treated as a motion for rehearing and denied. (R. p. 3).

Appellant thereafter filed this appeal.

STATEMENT OF THE FACTS

Appellant worked for JSE from October 2009 to January 2011, most recently as an assembler. (R. p. 23-24). In December 2010, Appellant had surgery, which prevented Appellant from standing for long periods of time until May 2011. (R. p. 23-24). JSE informed Appellant that he should report back when he was able to perform the work. (R. p. 23-24). Appellant did not return to JSE and instead filed for unemployment benefits. (R. p. 23-24).

Appellant was initially determined eligible for unemployment insurance benefits with an effective date of March 6, 2011. (R. p. 38). The claims adjudicator decided: “You are on lay off from your most recent bona fide employer due to lack of work and no disqualification is imposed on the separation under the South Carolina Code.” (R. p. 38). JSE appealed the claim adjudicator’s decision. (R. p. 39).

After a hearing on November 9, 2011, the Appeal Tribunal held “the claimant disqualified from receiving benefits effective March 6, 2011, until requalification upon a finding the claimant voluntarily quit employment without good cause.” (R. p. 42). The Appeal Tribunal mailed its decision on June 17, 2011. (R. p. 42).

The Appellant mailed a letter requesting an appeal, which was post-marked June 29, 2011. (R. p. 25, p. 43-44). The appeal period expired on June 27, 2011. S.C. Code Ann. §41-35-680. (The Appeal Tribunal decision is considered final, “unless within ten days after the date of the mailing the decision a further appeal is initiated pursuant to 41-35-710.”).

The Appellant testified that he placed the letter into the mail slot “probably around” June 20, 2011, because it was marked June 17, 2011. Appellant explained that he received it on a Monday, and he mailed it the next day. (R. p. 29, lines 15-19).

However, he also stated in a letter received in the Appellate Division on October 2, 2012, that he mailed the letter on June 25, 2011. (R. p. 49).

The Appellate Panel mailed a letter dated August 3, 2011 to Appellant which stated:

This will acknowledge your appeal filed June 29, 2011 from Appeal Tribunal Decision Number 2011-A-10528 issued June 17, 2011. South Carolina Code §41-35-680 provides that Appeal Tribunal Decision becomes final ten (10) days after the mailing thereof. We, therefore, have no alternative but to dismiss the appeal as being untimely.

(R. p. 45)

Appellant requested reconsideration of the Appellate Panel's decision and the overpayment owed. (R. p. 46-47).

The Higher Authority Appeals informed Appellant in a letter dated, October 27, 2011, that the case was remanded "to the Appeal Tribunal to conduct an evidentiary hearing regarding the timeliness of your appeal dated June 29, 2011 from an Appeal Tribunal Decision made June 27, 2011. Once this testimony has been received, the record will be reviewed by the Panel." (R. p. 51).

The Appellate Panel remanded the case to the Appeal Tribunal to conduct a hearing on the timeliness of the appeal letter. (R. p. 51). The Appeal Tribunal took testimony from Appellant on November 9, 2011. (R. p. 52).

The following testimony took place at the Appeal Tribunal hearing on timeliness:

Hearing Officer:	And I have in the records of the Agency a determination mailed on June 17, '11, holding the claimant indefinitely disqualified effective, March 6, '11. Did you receive that decision in the mail?
------------------	--

Claimant: Okay, this is the one that came on the 17th, you're saying?

Hearing Officer: Well, it was mailed on the 17th, [UNCLEAR].

Claimant: Okay, okay, yeah. I... **I received that and promptly put it back in the mail the next day.**

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 on the 17th, was on a Friday, so I probably got it that Monday.**

Hearing Officer: Okay.

Claimant: And put it back in the mail that Tuesday.

Hearing Officer: Okay, you can hand that to me then. We'll note that then and enter the decision of the Appeal Tribunal as Agency Exhibit Number One. Then we have what appears to be an appeal letter, and it appears to have with it a envelope in which the appeal letter was mailed with the postmark of June, 29, 2011. Is that what those two pages are? Is that your appeal letter with a copy of the envelope?

Claimant: Yes, sir, it is. I received it on July the 1st looks like.

Hearing Officer: Well, do you see the postmark of the post office?

Claimant: Yeah.

Hearing Officer: [UNCLEAR]

Claimant: ...the 29th of June.

Hearing Officer: Yes. Is that when you mailed it?

Claimant: No. I mailed it on... it would have been the... I mailed it on...**which probably would have been the 21st.**

(R. p. 29, line 6-23- p. 30, line 12) (Emphasis added).

He further testified:

Claimant: I put it in that slot on the... had to be the 21st.

Hearing Officer: On June 21st?

Claimant: Yeah, had to be because I... **I would have gotten it 17th, on the Friday, the 20th, was that Monday.** And I know I mailed it the next day. I had to look the dates back up once they gave me the dates and that's [UNCLEAR].

(R. p. 31, line 23 p. 32, line 2) (Emphasis added).

During Appellant's testimony, it appears Appellant referred to a calendar and what the mailing date of the Appeal Tribunal Decision in order to determine what date he mailed his letter. Despite testifying that he sent the notice on "that Monday" after receiving the letter and it was "probably what would have been the 21st," Appellant previously had sent a letter to the Higher Authority Appeals division stating that he had mailed the notice on June 25, 2011, which was a Saturday.

The Appellate Panel found:

The Department properly mailed the Appeal Tribunal decision to the claimant's address of record, and the claimant received it in time to file a timely appeal. Although the claimant asserts he mailed the appeal June 21, 2011, it was not postmarked until June 29, 2011, which was eight (8) days later. The 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, and the Appeal Tribunal decision is final as a matter of law."

(R. p. 26).

Appellant filed for judicial review with the ALC. The ALC held:

The requirement of timely service of a Notice of Appeal is jurisdictional. If a party misses a deadline, the court, or Appellate Panel, has no authority to extend or ignore the deadline for service. Elam v. S.C. Dept. of Transportation, 361 S.C.

9, 15, 602 S.E.2d 772, 775 (2004). The Panel lacked jurisdiction to hear, and correctly dismissed the appeal.

(R. p. 2)

Appellant filed a Motion for Reconsideration, which included affidavits from Appellant and an employee of the South Carolina Legal Services, photographs of the mail slot in question, and argued that the “existence of the mailbox is independently verifiable.” (R. pp. 6-20). The Motion did not include any affidavits from the U.S. Postmaster General or his designee.

The ALC treated the Motion for Reconsideration as a Motion for Rehearing and denied the motion on May 15, 2012. (R. p. 3).

ARGUMENT

Standard of Review

Respondent South Carolina Department of Employment and Workforce (“Agency”) is an agency and subject to the Administrative Procedures Act. South Carolina Code § 1-23-310. The administrative procedures of the agency include an appeal to the Appeal Tribunal and further appeal to the Appellate Panel. S.C. Code Ann. § 41-35-680. Once the administrative remedies available within an agency are exhausted, the aggrieved party is entitled to a judicial review. S.C. Code Ann. § 1-23-380.

During the judicial review, the administrative law court:

[M]ay not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court 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.

Unless there is a clearly erroneous application of the law, an agency’s decision will be upheld if there is substantial evidence to support the agency’s finding. Lark v. Bi-

Lo, Inc., 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981). Substantial evidence has been defined as:

[N]ot 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 that the administrative agency reached or must have reached in order to justify its action.

Lark v. Bi-Lo, Inc., 276 S.C. at 135-36, 276 S.E.2d at 306-07. In viewing the record as a whole, if reasonable minds can reach the same conclusion as the agency, the Administrative Law Court shall affirm. Houston v. Deloach & Deloach, 378 S.C. 543, 550-51, 663 S.E.2d 85, 89 (Ct. App. 2008) (internal citations omitted). The fact that reasonable minds may reach a separate and distinct conclusion does not prevent an agency's decision from being upheld by substantial evidence. Id.

The Administrative Law Court's decision should be affirmed as Appellant did not timely file his appeal, and, therefore, the Appellate Panel did not have jurisdiction to hear the Appellant's case.

There is substantial evidence for the Appellate Panel to find the appeal was not timely. Therefore, the ALC correctly affirmed the Appellate Panel's dismissal of the appeal. The timeliness of an appeal is not a matter of conveying subject matter jurisdiction to a court. Allison v. W.L. Gore and Associates, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (internal citations omitted). Rather, the timeliness of the notice of appeal is an issue of appellate jurisdiction. Id. In the Allison case, the Court specifically states that this "same principle applies to administrative agencies." Id.

In order for Appellant's matter to be heard by the Appellate Panel, appellate jurisdiction has to vest with the Appellate Panel. The Appellate Panel does not have the power to "extend or ignore the deadline for service of the notice." Elam v. S.C. Depart. of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (internal citation omitted.)

The Appellate Panel determined that Appellant's appeal was dismissed as untimely. (R. p. 25). Given the inconsistency in Appellant's testimony, there was substantial evidence to support the Appellate Panel. Appellant provided testimony that he mailed the letter requesting the appeal the day after receiving it, he mailed it on a Tuesday, and using the mailing date of the Agency's letter itself, he opined he mailed his letter on June 21, 2011. (R. p. 29-32). However, in correspondence to the Higher Authority Appeal, he stated he mailed it on June 25, 2011. (R. p. 49). Appellant did not appear certain as to the mailing, and the envelope containing the appeal was postmarked June 29, 2011.

As the letter requesting an appeal did not arrive until after the expiration of the time period to request an appeal and the letter was postmarked June 29, 2011, it was not unreasonable for the Appellate Panel to determine that the appeal was untimely. If Appellant did not timely file the appeal, the Appellate Panel does not have appellate jurisdiction to proceed with the case. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 343-44, 713 S.E.2d 278, 283-84 (2011) (internal citation omitted).

There is substantial evidence that Appellant did not meet the procedural requirement of filing the appeal in a timely matter. S.C. Code Annotated § 41-35-680. As there is substantial evidence that Appellant did not timely file his letter requesting an appeal, the Appellate Panel did not have appellate jurisdiction and the Appeal Tribunal decision is final; therefore, the Administrative Law Court's decision should be affirmed.

It is not relevant whether Appellant properly placed his letter requesting an appeal in a proper U.S. Postal Service mailbox, the notice of appeal was untimely.

Upon receiving the Administrative Law Court's order, Appellant filed a Motion for Reconsideration, citing Rule 59 of the South Carolina Rules of Civil Procedure. In the attached Appendix to the Motion, Appellant presented affidavits from an employee of the SC Legal Services and himself, which included photographs of the mailbox that Appellant used to send the letter. (R. p. 6-20).

Appellant focuses on the portion of the ALC's decision discussing the proper service and whether the mail slot used was an official mailbox for the U.S. Postal Service. Regardless of the affidavits and photographs presented, even if the U.S. Postal Service utilized this mail slot as an official mailbox, the issue here is timeliness.

Appellant argues that the Court's decision affirming the Appellate Panel's finding it was untimely was clearly erroneous, and violates public policy. However, Appellant focuses his argument on the issue of whether the mailbox was U.S. Postal Service box. Regardless of whether the mail slot used was a mailbox, the issue the Appellate Panel was addressing was timeliness.

The ALC specifically states that the Appellate Panel did not have authority "to extend or ignore the deadline for service," because the timely service is a jurisdictional requirement. (R. p. 2). The ALC found Appellant's "actions did not constitute **timely or proper service** of his Notice of Appeal." (R. p. 2). (Emphasis added). Even if the mailbox is a proper receptacle for service, there is substantial evidence that the notice was not timely filed.

Appellant argues the ALC finding the notice of appeal was untimely violates public policy in that his testimony was "uncontradicted." (Initial Brief of Appellant).

However, appellate jurisdiction does not allow an appellate court to circumvent the rules of procedure. Allison, 394 S.C. at 189, 714 S.E.2d at 550. (“This holding is consistent with the general rule that an appellate body may not extend the time to appeal.”) (internal citations omitted.).

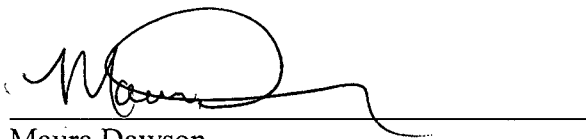
Appellant had ten days to file his notice of appeal to the Appellate Panel. S.C. Code Annotated § 41-35-680. Although Appellant’s testimony could be viewed as uncontradicted, it was far from consistent. The evidence shows at least three different dates for mailing: June 21, 2011, June 25, 2011, and June 29, 2011.

Even where reasonable minds may differ and reach two “inconsistent conclusions,” the agency decision will not be disturbed where there is substantial evidence. Palmetto Alliance, Inc. v. S.C. Public Service Com’n, 282 S.C. 430, 432, 319 S.E.2d695, 696 (1984) (citing Lark, 276 S.C. at 136, 276 S.E.2d at 307). The Appellate Panel relied on substantial evidence to find that the appeal was untimely and the Appeal Tribunal Decision was final. Therefore, the Administrative Law Court’s decision affirming the Appellate Panel’s dismissal of Appellant’s appeal as untimely should be affirmed.

CONCLUSION

The Appellate Panel's determination that Appellant's appeal was untimely and, therefore, the Appeal Tribunal's decision was final is supported by the substantial evidence in the Record. As such, the Administrative Law Court's order affirming the Appellate Panel's decision to dismiss Appellant's appeal because it was untimely filed should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Maura', is written over a horizontal line.

Maura Dawson
Assistant General Counsel
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-0233
legal@dew.sc.gov

Attorney for Respondent SCDEW

January 3, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

Charles Stubbs,

Appellant

v.

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

Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and the Certificate of Counsel on Appellant Charles Stubbs depositing a copy of it in the United States Mail, postage prepaid, on January 3, 2013, addressed to his attorney of record, Jack E. Cohoon Esq., PO Box 1445, Columbia, SC 29201, and JSE LLC at its address of record, JSE, LLC, 1410 Colonial Blvd West, Ste 230, Columbia, SC 29210.

January 3, 2013


Jessica Chesley
Administrative Legal Assistant for
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395

RECEIVED

JAN 07 2013

SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2011-ALJ-22-0654-AP

Charles Stubbs,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

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



Maura Dawson, Esquire
Bar # 73726
Asst. General Counsel
Department of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov

RECEIVED

January 3, 2013

JAN 07 2013

Attorney for Respondent SC DEW

SC Court of Appeals