

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
Administrative Law Court

Deborah Brooks Durden, Administrative Law Judge

RECEIVED

AUG 05 2013

Case No. 12-ALJ-22-0439-AP

SC Court of Appeals

Marcus Wider,

Respondent,

v.

South Carolina Department of
Employment and Workforce,
and KB Enterprises, Inc.

Defendants.

Of whom South Carolina
Department of Employment
and Workforce is

Appellant.

FINAL BRIEF OF RESPONDENT

August 5, 2013

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Department fail to preserve for appeal its argument that the Administrative Law Court should have remanded the case to the Department's Appellate Panel for more definite and certain findings of fact?**
- II. Did the Administrative Law Court correctly hold that no substantial evidence exists in the record as a whole to support a dispute in material facts?**
- III. Did the Administrative Law Court correctly decline to remand the case to the Department for more definite and certain findings of fact?**

INTRODUCTION

Marcus Wider, a loader for K B Enterprises, Inc. (“the Employer”), a moving company, was completely denied unemployment benefits due to the Employer’s claim that the moving team he was assigned to damaged a customer’s property. The South Carolina Department of Employment and Workforce (“the Department”) based its denial of benefits upon a theory of collective guilt and did so without evidence that Wider caused the damage. The Administrative Law Court properly reversed the Department’s final agency decision both because there was no substantial evidence that Wider caused the damage to customer property and because the Department’s Appellate Panel found him discharged for cause without making any finding that he had caused the damage. The Department’s assertion that the Court should have remanded the case to the Department’s Appellate Panel is not preserved for appeal as the Department did not argue this issue in its brief before the Administrative Law Court. Moreover, even if this issue was preserved for appeal, it is meritless. Wider seeks a decision of this Court affirming the lower court’s decision holding him eligible for unemployment benefits without disqualification.

STATEMENT OF THE CASE

Wider applied to the Department for unemployment benefits after being discharged by the Employer. In a June 25, 2012 Determination the Department found him discharged for cause for failing to perform assigned work to the satisfaction of the employer and imposed a full twenty-week disqualification. (R. p. 12). Wider appealed to the Department's Appeal Tribunal and an evidentiary hearing was conducted on August 6, 2012 before Administrative Hearing Officer Lane K. Cook. The Employer's representative and sole witness at the hearing had no personal knowledge of the incident for which Wider was discharged, nor did she present any documentation of the incident. Wider denied the Employer's allegations. (R. p. 63, line 16). The Appeal Tribunal found Wider discharged for cause and upheld the twenty-week disqualification. (R. pp. 10-11).

Wider then appealed to the Department's Appellate Panel, which declined to hold a hearing and issued a decision on the record on September 13, 2012. The Panel upheld both the finding of discharge for cause and the twenty-week disqualification. (R. pp. 8-9). The Panel found that the Employer discharged Wider due to his team causing approximately \$8,000 in damage to a customer's home. The Panel acknowledged that Wider had testified that the customer's father caused most of the damage and that his coworkers, and not Wider, were responsible for any damage caused by the team. The Panel did not make any finding about Wider's credibility, nor did it find that Wider caused the damage in question, yet it determined that he was discharged for cause and disqualified him from receiving benefits for twenty weeks. The sole basis for the Panel's decision is that "[t]he record establishes the claimant was involved of [sic] numerous incidents involving damage to customer's property, including [sic] final incident resulting in significant damage." (R. p. 9).

Wider appealed the Appellate Panel decision to the Administrative Law Court and the case was assigned to Administrative Law Judge Deborah Brooks Durden. Wider argued that the Department erred by finding him discharged for cause when there was no substantial evidence presented that he caused damage to the customer's property. Wider also argued that the Department erred by finding he was discharged for cause when it failed to make any finding that he caused the damage. Wider sought reversal—and not remand—of this erroneous decision. In its February 27, 2013 Order the Administrative Law Court reversed the Department's decision on both of the grounds argued by Wider. (R. pp. 2-7). The Department filed a Motion for Rehearing on March 8, 2013 arguing—for the first time in the case—that reversal was improper. (R. pp. 65-67). The Administrative Law Court denied the Department's Motion for Rehearing in a March 25, 2013 Order, finding there is no evidence in the record to support a finding that Wider was discharged for cause and that the Department's motion fails to point out any such evidence that has been overlooked. (R. pp. 68-73). The Court also found that the Department's motion did not seek to correct manifest errors of law or fact to present newly discovered evidence. (R. pp. 1).

FACTS

Wider worked for the Employer from August 4, 2011 to May 24, 2012 as a loader. (R. p. 56, lines 23-25). K B Enterprises, Inc., a moving service, discharged Wider due to a “big damage claim.” (R. p. 51, lines 18-19). On May 24, 2012, the employer sent Marcus Wider as a member of a three-man team to move a customer’s furniture into a new home. The customer’s father moved items on the home’s hardwood floor, causing damage. (R. p. 57, lines 7-9). The customer and his father forced a treadmill through a doorway, also causing damage. (R. p. 57, lines 11-13). The other two employees assigned to Wider’s team damaged a wall and stair rails. (R. p. 57, lines 15-19). Wider did not cause any damage:

HEARING OFFICER: Was there any damage that you personally caused?

CLAIMANT: No, sir.

HEARING OFFICER: None at all?

CLAIMANT: None.

HEARING OFFICER: So...so you said most of the damage was caused by the customer’s father, is that right?

CLAIMANT: Yes, sir.

HEARING OFFICER: Then there was some damage caused by...

CLAIMANT: By the other two guys, they damaged the wall [UNCLEAR] they was going up the stairs. And then the rails on...when you go upstairs, the side rails that you hold on to. I knew that was scratched up. But that was by the guy Wilber and Jamie. (R. p. 57, line 20-p. 58, line 3).

Wider testified that he attempted to involve a manager when he observed the damage that his coworkers were causing but that the manager told him to complete the move:

I did the best I could to help the customers out. I even called the manager that night when we was moving to let them know what was going on with the situation with the job. He told me to continue to do the job and we'll look over tomorrow. And I felt like I should have been approached a different way about the job after the fact because I worked the next day after the job and I complained them about the worker I was working with. (R. p. 63, lines 16 to 22).

Mary Oliver, the Employer's representative and sole witness, had no personal knowledge and presented no substantiating documentation of the damage or its cause. She testified that, at the time of his discharge, Wider had denied causing the damage:

HEARING OFFICER: When he was approached about the final incident, what was his response?

EMPLOYER WITNESS: He...he was very...I mean, very calm. He just...he said that he didn't feel he did the damages, you know. (R. p. 53, lines 8-10).

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 (S.C. Ct. App. 2006) (Worker's Compensation case), *McEachern v. S.C. Emp. Sec. Comm.*, 370 S.C. 553, 635 SE.2d 644 (S.C. 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 (S.C. 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. Emp. Sec. Comm.*, 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 (S.C. Ct. App. 2005). An appellate court may "freely and absolutely" review a trial court's or agency's error of law. *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 552, 663 SE.2d 85, 90 (S.C. Ct. App. 2008) (citing *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (S.C. Ct. App. 2005)).

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

I. The Department failed to preserve for appeal its argument that the Administrative Law Court should have remanded the case to the Department's Appellate Panel for more definite and certain findings of fact.

In his appeal to the Administrative Law Court, Wider sought reversal, and not remand, of the Department's final agency decision denying him benefits based upon both the lack of substantial evidence in the record to support a finding of discharge for cause and the Department's failure to make any finding that he caused the damage. The Department never argued in its brief to the Administrative Law Court that remand, and not reversal, was the proper remedy should Wider prevail. Instead, the Department waited until the court granted the relief Wider sought to argue—for the first time—in a motion for rehearing that remand was the appropriate remedy. If a respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct. *First Union Nat. Bank v. FCVS Communications*, 321 S.C. 496 469 S.E.2d 613 (Ct. App. 1996). By failing to make its argument regarding remand in its brief to the Administrative Law Court, the Department admitted to the correctness of Wider's position and waived this issue.

Moreover, a motion for rehearing is not a vehicle to allow aggrieved parties to make new arguments and get a second bite at the apple. The Appellate Court Rules concisely explain the purpose and format of a petition or motion for rehearing, which is to "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. Because the Department did not argue in its brief that remand, and not reversal, was the proper remedy, the Department cannot now claim that the Administrative Law Court "overlooked or misapprehended" this issue. Likewise, the courts have recognized

that a party may not raise an issue for the first time in a post-trial motion which could have been raised at trial. *Mail Source, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370., 374, 588 S.E.2d 639, 641 (Ct. App. 2003). Because the Department declined to argue for remand in its brief before the Administrative Law Court, it did not preserve this issue for review in its motion for rehearing and the Department's motion was properly denied. This issue is therefore not preserved for consideration by this Court.

II. The Administrative Law Court correctly held that no substantial evidence exists in the record as a whole to support a dispute in material facts.

In order to impose a disqualification from receiving unemployment benefits, the Department must find that a claimant was discharged "for cause connected with his most recent work." S.C. Code Ann. § 41-35-120(2)(a). A finding of discharge for cause may be justified by an employee's disregard of the standard of behavior which an employer can rightfully expect from him or her employee. *Lee v. S.C. Employment Security Comm'n*, 277 S.C. 586, 291 S.E.2d 378 (1982). The Department has recognized in final agency decisions that the employer bears the burden of proving that a claimant was discharged for cause and that it must do so through competent evidence. For example, in a January 4, 2012 decision the Department's Appellate Panel held:

The employer bears the burden of proving that an employee is discharged for cause. In this case, the employer has not met this burden. The employer witness did not have firsthand knowledge of the final incident, and the employer did not present as witnesses the current employees who were involved in the incident." *Hollis v. Wade's Restaurant*, Final Decision, Department of Employment and Workforce, Decision No. 2012-P-5, Appeal No. 16490-16491 (Jan. 4, 2012).

The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. *Buist*

v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636 (2006), quoting *Brown v. South Carolina Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). This Court should defer to the Department in holding that the burden properly falls on the Employer to prove cause for discharge.

The Department's holding in *Hollis* is consistent with the generally accepted rule that an employer who alleges that a claimant is ineligible for unemployment compensation by reason of misconduct bears the burden of proof on that issue: 76 Am. Jur. 2d *Unemployment Compensation* § 71 (updated Nov. 2012). "An employer's burden of proof with regard to misconduct includes the burden to prove that the alleged misconduct was in fact the reason for the employee's discharge" and "[t]his burden is not satisfied by showing incidents of misconduct during the course of employment if the employee was not discharged because of those incidents." *Id.*

Moreover, the Department's own hearing notice informed the Employer of the requirement to present evidence. It states, in relevant part: "EVIDENCE: This hearing is your only chance to testify and present evidence. Sworn testimony is required from witnesses with first-hand knowledge." The Appeal Tribunal found that "the employer witness had limited first hand knowledge of the final incident resulting in discharge" (R. p. 11). In fact, a review of the transcript in this case reveals that the Employer witness had no firsthand knowledge of the damage or its cause. The Employer presented no evidence that Wider caused the damage at issue. As a result, the Employer abdicated all responsibility to prove its allegations. The only firsthand witness was Wider, who testified that he did not cause the damage. (R. p. 57, line 5-6). Neither the Appeal Tribunal nor the Appellate Panel made any finding regarding Wider's credibility and provided no justification for ignoring his testimony as the only

witness with personal knowledge.

The Department asserts that an unsigned agency document, written by a Department employee supposedly based upon a telephone conversation with Wider, constitutes substantial evidence to support the Department's decision finding of discharge for cause. Wider did not create this document. It was generated by a Department employee for a telephone "fact finding." The form clearly contemplates a claimant reviewing the document for accuracy and signing to indicate that "I certify that the information stated herein is true." (R. p. 75). Despite the apparent expectation that the claimant would review and sign the document, the agency never sought or obtained Wider's signature.

Moreover, Wider directly refuted any allegation that he caused the damage in his unambiguous testimony before the Appeal Tribunal:

HEARING OFFICER: Was there any damage that you personally caused?

CLAIMANT: No, sir.

HEARING OFFICER: None at all?

CLAIMANT: None.

HEARING OFFICER: So...so you said most of the damage was caused by the customer's father, is that right?

CLAIMANT: Yes, sir.

HEARING OFFICER: Then there was some damage caused by...

CLAIMANT: By the other two guys, they damaged the wall [UNCLEAR] they was going up the stairs. And then the rails on...when you go upstairs, the side rails that you hold on to. I knew that was scratched up. But that was by the guy Wilber and Jamie. (R. p. 57, line 20-p. 39, line 3).

An unsworn, uncertified, unsubstantiated statement taken by a Department employee who was not presented to testify is not substantial evidence. A reasonable person could not rely upon such flimsy “evidence” in the face of direct and unambiguous testimony by the only firsthand witness to the contrary. Even assuming, for the purposes of argument, that the statement contained in the fact finding accurately reflects Wider’s statement to a Department employee, it is a statement that members of the team caused some of the damage, not an admission that he personally caused any of the damage in question.

The Department attempts to generate inconsistencies in Wider’s testimony where there are none. Wider acknowledged in his testimony that other members of the K B Enterprises team caused some of the damage to the customer’s home but was quite clear that he had not caused the damage. (R. p. 57, line 20-p. 39, line 3). Wider’s testimony is consistent with what he had previously told Mary Oliver, the Employer’s Operations Specialist, at the time of the discharge: “He...he was very...I mean, very calm. He just...he said that he didn’t feel he did the damages, you know.” (R. p. 53, lines 8-10).

The Department also claims that the dispute is one of witness credibility and that the Court should defer to the Appellate Panel’s assessment of credibility. This is meritless, as neither the Appeal Tribunal nor the Appellate Panel made any determination of witness credibility. Nor is there any basis for a finding that Wider lacked credibility, as the Employer failed to present any evidence to contradict Wider’s testimony.

The Administrative Law Court correctly found the Department’s decision to be unsupported by substantial evidence. Due to the paucity of evidence in the record, including the Employer’s failure to present either witnesses with firsthand knowledge or any

documentation of the incident leading to Wider's discharge, reasonable minds considering the evidence before the Department could not reach the conclusion that the Department reached. Therefore, the Administrative Law Court's Order should stand.

III. The Administrative Law Court correctly declined to remand the case back to the Department for more definite and certain findings of fact.

The Panel made no finding of fact that Wider caused any of the damage at issue but rather imposed a theory of collective punishment: because Wider was present for the incident, he is guilty, regardless of whether he contributed to or attempted to mitigate the damage. The Administrative Law Court correctly found that "[T]he Department's decision makes no finding that the Appellant caused the damage." (R. p. 5). It is not necessary for this case to be remanded for the Appellate Panel to make new findings of fact, because there is no evidence in the record to support a finding that Wider was discharged for cause.

The Respondent's reliance upon *Baldwin v. James River Corp.*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991), is misplaced. In *Baldwin*, the circuit court had reinstated a workers compensation award by a single commissioner due to a conclusory and incomplete decision by the worker's compensation commission. The Court of Appeals found this to be in error because it amounted to determining the facts from conflicting evidence, which only the commission is authorized to do. Unlike *Baldwin*, in the present case there is no conflicting evidence which would necessitate the Court remanding the case to the Department to weigh and rule upon. The Employer failed to present evidence of its supposed cause for discharge, and therefore there is no conflicting evidence to weigh.

Shealy v. Algernon Blair, Inc., 250 S.C. 106, 110 (S.C. 1967), the other principal authority cited by the Department, in fact undermines the Department's argument for a

remand. In *Shealy*, the South Carolina Supreme Court held that “[o]nly the Commission is authorized to pass upon the weight of the evidence in a workmen's compensation case, and it is proper to remand a case to it for required findings where the record contains evidence from which such findings may be made.” 250 S.C. 106, 110 (S.C. 1967)(emphasis added). Applying the holding in *Shealy*, it would be improper to remand this case because the record does not contain evidence from which a finding of discharge for cause may be made. This is logical because it is contrary to judicial and administrative economy to remand a case for reconsideration when the facts in the record admit of only one logical conclusion.

Moreover, an appellant seeking reversal must show error and prejudice. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996). Even assuming, for the sake of argument, that the Administrative Law Court should have remanded the case, its failure to do so did not prejudice the Department. Because a reasonable person could not conclude that Wider was discharged for cause based upon this record, a remand would have resulted in the same outcome—a finding that the Employer had not met its burden of proof and a determination that Wider was eligible for benefits without disqualification. Because the outcome would be the same, the Department cannot show prejudice that would justify reversal of the Administrative Law Court’s Order.

Finally, needless remands violate South Carolina’s clearly stated public policy to combat the many ills of unemployment on society:

[t]he public policy of this State is declared to be as follows: 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; the achievement of social security requires protection against this greatest

hazard of our economic life; this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. S.C. Code Ann. § 41-27-20.

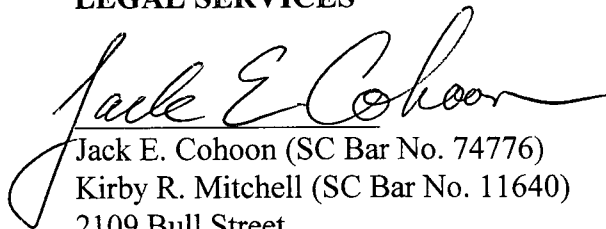
To accomplish the General Assembly's clearly-stated goals, it is essential that unemployment benefits cases be adjudicated quickly, a fact recognized in the statutory provision granting jurisdiction of appeals to the Administrative Law Court, which states that "[t]hese actions...must be heard in a summary manner and must be given precedence over other cases." S.C. Code Ann. § 41-35-750. The General Assembly's effort to combat unemployment's "crushing" burden is undermined by needless remands. An unemployed South Carolina worker should not face further hardship waiting for a remand and reconsideration when the employer has not presented evidence to support a finding of discharge for cause.

CONCLUSION

The Administrative Law Court correctly reversed the Department's decision denying unemployment benefits to Marcus Wider, a South Carolina worker, both because the Department's decision is unsupported by substantial evidence and because it is affected by error of law. The Administrative Law Court also correctly denied the Department's motion for rehearing. The Department's claim that the Administrative Law Court should have remanded the case to the Appellate Panel is not preserved for review because the Department did not make this argument in its brief below. Even if it had been preserved for review, it is without merit, because the Employer abdicated its responsibility to present evidence which would support a finding of discharge for cause. This Court should dismiss the Department's appeal, affirm the Administrative Law Court's Order and find Wider eligible for unemployment benefits without disqualification.

Respectfully submitted,

**SOUTH CAROLINA
LEGAL SERVICES**

A handwritten signature in black ink, reading "Jack E. Cohoon". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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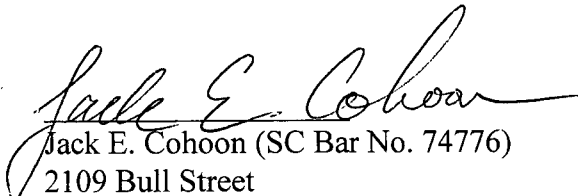
Defendants.

Of whom South Carolina
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**ATTORNEY'S CERTIFICATION THAT RESPONDENT'S FINAL BRIEF
COMPLIES WITH RULE 211(B), SCACR**

Respondent certifies, through its undersigned attorney, that Respondent's Final Brief complies with Rule 211(b), SCACR.


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