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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2014-000246

South Carolina Department of Consumer Affairs.....Respondent,

v.

Entera Holdings, LLC, and Entera Work Compensation Solutions, LLC.....Appellants.

FINAL BRIEF OF RESPONDENT
DEPARTMENT OF CONSUMER AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	iii
STATEMENT OF THE CASE	1
ARGUMENTS	
I. THE RULES OF PROCEDURE FOR THE ADMINISTRATIVE LAW COURT DO NOT GOVERN THE DEPARTMENT'S SERVICE OF ITS FINAL AGENCY DECISION.....	2
II. THE APPELLANT FAILED TO TIMELY FILE A REQUEST FOR A CONTESTED CASE HEARING BEFORE THE ADMINISTRATIVE LAW COURT.....	4
III. THE DEPARTMENT'S DECISION DATED AUGUST 21, 2013 WAS A FINAL AGENCY DECISION.....	6
IV. THE ADMINISTRATIVE LAW COURT PROPERLY ACCEPTED THE DEPARTMENT'S REPLY TO ENTERA'S RESPONSE TO THE MOTION TO DISMISS.....	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Botany Bay Marina v. Townsend</i> , 296 S.C. 330, 372 S.E.2d 584 (1988).....	4
<i>Mears v. Mears</i> , 287 S.C. 168, 337 S.E.2d 206 (1985).....	4

Administrative Decisions

<i>The Beach Company, Inc. v. SCDHEC</i> , Docket No. 04-ALJ-07-0199-CC.....	4
<i>Charleston County Assessor v. Gladsky</i> , Docket No. 01-ALJ-17-0386-CC.....	4
<i>Clark v. SCDHEC</i> , Docket No. 98-ALJ-0498-CC.....	4
<i>Robinson v. SCDHEC</i> , Docket No. 02-ALJ-07-0034-CC.....	4
<i>Wedgfield Plantation Owners Association v. SCDHEC</i> , Docket No. 04-ALJ-07-0351-CC.....	4
<i>Young v. Charleston County Assessor</i> , Docket No. 04-ALJ-17-0305-CC.....	4

Statutes

S.C. Code Ann. § 1-23-505 (Supp. 2013)	6
S.C. Code Ann. § 37-6-414 (Supp. 2013)	7

Other Authorities

South Carolina Constitution Article I Section 22.....	7
South Carolina Administrative Law Court Rules: Rule 3, SCALC.....	2
South Carolina Administrative Law Court Rules: Rule 5, SCALC.....	2,3
South Carolina Administrative Law Court Rules: Rule 11, SCALC.....	4,5
South Carolina Administrative Law Court Rules: Rule 19, SCALC.....	7
South Carolina Rules of Civil Procedure: Rule 4, SCRPC.....	3
South Carolina Rules of Civil Procedure: Rule 5, SCRPC.....	3

STATEMENT OF ISSUES ON APPEAL

- I. Was the service of the Department's final agency decision governed by the Rules of Procedure for the South Carolina Administrative Law Court?
- II. Did the Appellant timely file a request for a contested case hearing before the Administrative Law Court?
- III. Was the Department's decision a final agency decision?
- IV. Did the Administrative Law Court err when it accepted the Department's Reply to Entera's Return to Motion to Dismiss?

STATEMENT OF THE CASE

This matter comes before the Court on the Petition for Judicial Review filed by Entera Holdings, LLC and Entera Work Comp Solutions, LLC (collectively “Entera” or “Appellant”). The appeal challenges the Order of the Administrative Law Court (ALC) dismissing Entera’s request for a contested case hearing on a final agency decision of the Department of Consumer Affairs (“Department” or “Respondent”). (R. pp. 1-3). The final agency decision cited Entera for operating as a Professional Employer Organization (PEO) without a license. (R. pp. 14-20).

As documented in Federal Express shipping labels and online tracking histories, the Department’s decision dated August 21, 2013 was received separately by both Entera and its outside counsel on Friday August 23, 2013. (R. pp. 24-27, 32). Entera mailed its request for a contested case at the ALC on September 30, 2013. (R. pp. 4-6). On October 22, 2013, the Department filed a Motion to Dismiss with the ALC. (R. pp. 21-23). Entera filed its Response to the motion on November 1, 2013. (R. pp. 28-31). The Department received a copy of the Response by U.S. Mail on November 4, 2013. On November 8, the Department filed a Reply to Entera’s Response on November 8, 2013. (R. pp. 33-37). On November 26, 2013, Judge Durden issued an Order of Dismissal. (R. pp. 1-3). On December 6, 2013, Entera filed a request for reconsideration. (R. pp. 38-39). That request was deemed denied by SCALC Rule 29(D)(4) when the court declined to issue a ruling on the request. Entera filed its Notice of Appeal with this Court on February 4, 2014.

ARGUMENT

I.

THE RULES OF PROCEDURE FOR THE ADMINISTRATIVE LAW COURT DO NOT GOVERN THE DEPARTMENT'S SERVICE OF ITS FINAL AGENCY DECISION.

In its Brief, Entera argues that the service of Department's decision in this matter was not proper, claiming that Administrative Law Court Rule 3 specifically provides for service by mail or service by personal delivery only. Initially, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of the Administrative Law Court govern the service of an order by an agency upon a person found by the agency to be in violation of its regulatory statutes and/or regulations. The Department was serving its decision, not initiating a proceeding at the Administrative Law Court. Therefore, the Rule does not apply. Beyond that, even if Rule 3 did apply to an agency's service of its order, Rule 3 governs the computation of time, not the method for service. Therefore, contrary to Entera's argument in its Brief, Rule 3 does not specifically provide for service by mail or service by personal delivery only.

Entera also argues that the provisions of SCALC Rule 5 would render the Department's service of its order incomplete. As before, and most importantly, Entera has cited no authority for the proposition that the service of process provisions of the ALC Rules govern the service of an order by an agency upon a person found by the

agency to be in violation of its regulatory statutes and/or regulations. Rule 5 provides that any document, pleading, motion, brief or memorandum or other paper filed with the Court shall be served upon all parties to the proceeding. When the Department issued its order, there was no proceeding before the ALC, and there was no requirement to file it with the ALC. Therefore, the Rule does not apply.

Beyond that, even if Rule 5 did apply to an agency's service of its order, the rule also provides that service that complies with Rule 5(b)(1), SCRCF, also shall satisfy this Rule. Rule 5(b)(1), SCRCF provides that service may be made by:

.....delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein.

The Department's order was delivered to both Entera and its outside counsel by Federal Express, and as the attachments to the Department's Motion to Dismiss show, was accepted and signed for at both locations. (R. pp. 24-27). Further support for this method of delivery is found in Rule 4 (d)(9), SCRCF which provides for service by a commercial delivery service.

II.

THE APPELLANT FAILED TO TIMELY FILE A REQUEST FOR A CONTESTED CASE HEARING BEFORE THE ADMINISTRATIVE LAW COURT.

Administrative Law Court Rule 11 (C) provides that unless otherwise provided by statute, a request for a contested case must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination. Failure to file the request within that time frame divests the ALC of jurisdiction to hear a contested case. *Wedgfield Plantation Owners Association v. SCDHEC*, Docket No. 04-ALJ-07-0351-CC, citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985); and *Botany Bay Marina v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988). Furthermore, appeal deadlines are absolute and the ALC has no authority to expand the time in which the request for a contested case hearing must be filed. *Id.* citing *Mears v. Mears*, and *Clark v. SCDHEC*, Docket No. 98-ALJ-0498-CC; *Robinson v. SCDHEC*, Docket No. 02-ALJ-07-0034-CC; *Young v. Charleston County Assessor*, Docket No. 04-ALJ-17-0305-CC; *Charleston County Assessor v. Gladsky*, Docket No. 01-ALJ-17-0386-CC; and *The Beach Company, Inc. v. SCDHEC*, Docket No. 04-ALJ-07-0199-CC.

In the instant case, as documented in Federal Express shipping labels and online tracking histories, the Department's order was received separately by both Entera and its outside counsel on Friday August 23, 2013, and not on August 29, 2013, as alleged by Entera. (R. pp. 24-27). Therefore, Entera received actual notice of the order on August 23, 2013 and was required to file with the ALC by Monday September 23, 2013. Entera did not mail its request for a contested case until September 30, 2013, after the deadline.

(R. pp. 4-6).

Entera argues that it did not receive actual notice of the Department's order until August 29, 2013, six days after the Federal Express tracking receipt showed delivery to both Entera and its outside counsel. (R. pp. 24-27). The Department served the order on both Entera's office in Atlanta and to Mr. Keller's office in Greenville, because although Mr. Keller had represented Entera in prior discussions with the agency, we did not know for a fact that Mr. Keller would handle a request for a contested case. In its Brief, Entera admits that the Federal Express tracking receipt shows delivery on Friday August 23, but argues that the receipt does not indicate where it was delivered or to whom it was delivered. However, the tracking receipt for Mr. Keller, attached to the Department's Motion to Dismiss, clearly shows that the package was delivered to **Receptionist/Front Desk** and was signed for by **C. Winstead**. (R. p. 25). The tracking receipt for Mr. Fain at Entera shows that the package was delivered on August 23 to **Receptionist/Front Desk** and signed for by **M. Brown**. (R. p. 27). Both Entera and its outside counsel had constructive and actual notice of the Department's order on August 23, 2013. The fact that Mr. Keller did not look at it until August 29 does not extend Entera's time to request a contested case pursuant to Rule 11 (C).

III.

THE DEPARTMENT'S DECISION DATED AUGUST 21, 2013 WAS A FINAL AGENCY DECISION.

In its Brief, Entera further argues that the Department's order of August 21, 2013 is not a final agency decision, despite the fact that the words "**FINAL AGENCY DECISION**" are noted at the top of the first page. (R. p. 14). The basis of this claim is a single instance on page 6 of the decision which uses the phrase "final staff decision." (R. p. 19). However, there is nothing in the order, or in South Carolina law, to indicate that there is any further process before the agency for an aggrieved party after a staff finding; the staff finding is the agency finding. There are no contested hearings before the Department. The order clearly states that if Entera disagreed with the findings, its remedy was to request a contested case before the ALC. The order further cites the relevant provisions of the ALC rules that apply, with instructions how to request a contested case hearing. Furthermore, contrary to Entera's argument, the final paragraph of the decision did not, in any way, alter the process set forth in the order. Informing a party that the Department will directly give notice of the decision to its client companies is nothing more than an incentive not to ignore the order by failing to ask for a contested case or to make some other attempt to settle the matter through filing a license application and paying a negotiated administrative penalty. It does not change the other terms of the order.

Entera also argues in its Brief that the Department's determination is not a "contested case" under the Administrative Procedures Act citing S.C. Code Ann. § 1-23-505 (Supp. 2013). Section 1-23-505 (3) defines a contested case as a proceeding

including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing. Any contested case hearing concerning a matter before the Department is held before the Administrative Law Court, not the agency. See, S.C. Code Ann. 37-6-414 (supp. 2013). There are no contested hearings before the Department. Entera's argument that a contested hearing before the agency was required before there could be a contested hearing before the ALC is confusing at best, and completely without merit.

IV.

THE ADMINISTRATIVE LAW COURT PROPERLY ACCEPTED THE DEPARTMENT'S REPLY TO ENTERA'S RESPONSE TO THE MOTION TO DISMISS.

In its Brief, Entera argues that the Administrative Law Court erred by allowing the Department to supplement its initial filing citing SCALC Rule 19. As noted, by Entera, Rule 19 clearly allows a reply to be filed by a party which has made a motion. The Department filed a reply as allowed for in the rule. It did not "supplement" its original filing. Entera also argues that Rule 19 "does not allow for the inclusion of additional evidence or matters" in a reply. Entera does not specify what evidence or additional matters it is referring to. A cursory examination of the Department's reply will show that it is entirely legal arguments addressing Entera's response to the motion

to dismiss. There are no attachments or anything that could remotely be considered evidence.

CONCLUSION

For the foregoing reasons, the Department asks this Court to affirm the order of the Administrative Law Court.

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