

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Eastwood Construction, LLC,

Appellant,

vs.

South Carolina Department of Employment  
and Workforce and Timothy Kern,

Respondents.

Docket No. 19-ALJ-22-0004-AP

**ORDER**

**RECEIVED**  
JUN 18 2019  
SC Court of Appeals

**STATEMENT OF THE CASE**

This matter is before the Administrative Law Court (ALC or Court) pursuant to Eastwood Construction, LLC's (Appellant) appeal from the decision of the South Carolina Department of Employment and Workforce's (Department) Appellate Panel (Panel) affirming the decision of the Appeals Tribunal (Tribunal) and holding that Timothy Kern (Employee) is eligible to receive unemployment insurance benefits. This Court has jurisdiction to hear this matter pursuant to Sections 1-23-380 and -600(E), and Section 41-35-750 of the South Carolina Code. S.C. Code Ann. §§ 1-23-380 and -600 (Supp. 2018); S.C. Code Ann. § 41-35-750 (Supp. 2018). Upon consideration of arguments raised in the parties' briefs, and a review of the record on appeal and the law, the decision of the Department's Panel is affirmed.

**BACKGROUND**

Employee worked for Appellant from April 6, 2017, through December 11, 2017 as vice president of operations. Prior to Employee's employment with Appellant, he and his business partner operated a business called Fortress Builders, LLC (Fortress). Employee and his partner paid taxes on Fortress' earnings through their individual income taxes pursuant to Subchapter S of the Internal Revenue Code. Employee and his partner entered into negotiations to sell Fortress to Appellant in 2016. Prior to the sale, independent accountants examined Fortress' books and valued Fortress and its assets. Based on the valuation, Appellant purchased Fortress pursuant to an Asset and Goodwill Purchase Agreement (Agreement) effective April 7, 2017. As part of the Agreement, Appellant hired Employee.

Shortly after the sale closed, Appellant's accountants informed it that as a result of an accounting error, they believed Fortress was worth significantly less than the purchase price.

**FILED**  
May 16, 2019

SC ADMIN. LAW COURT



Appellant's representatives advised Employee and his former business partner that they needed to file amended tax returns as they had overreported earnings from the business on their individual tax returns in the three years prior to the sale. On August 28, 2018, Appellant presented Employee and his former business partner with a letter seeking their agreement that Employee and his former business partner would turn over any tax refund they may receive to Appellant as part of a plan to compensate Appellant for the disparity in the pre- and post-sale book valuations of Fortress.<sup>1</sup> Neither Employee nor his former business partner signed the letter. On November 17, 2017, Employee and his former business partner were presented with a similar letter that neither one of them signed.

In September 2017, Employee filed an amended individual tax return to reclaim his overpaid taxes. On November 1, 2017, the Internal Revenue Service (IRS) deposited a refund in the amount of \$152,066 into Fortress' operating account. On November 7, 2017, Employee's former business partner transferred the funds into a different account that was not affiliated with Fortress with Employee's knowledge. Employee's former business partner advised Employee that Appellant was upset. Employee continued to work for Appellant until Appellant terminated his employment effective December 11, 2018. Appellant stated that the termination was due to a breach of the Agreement by "[fraudulent] intentional misrepresentation of the financial position of Fortress Builders through fraudulent bookkeeping practices," as well as "fraud and embezzlement of [Fortress'] assets." It also said that Employee had engaged in fraudulent and wholly improper actions regarding the transfer of the tax refund from the Fortress account. Appellant and Employee are involved in ongoing civil litigation regarding the sale of Fortress and the ensuing disagreements over various funds. The tax refund monies were placed in an escrow account pending the outcome of the litigation.

On April 9, 2018, Employee filed for unemployment insurance benefits stating that Appellant had discharged him without cause. In Appellant's response to the Department's request for additional information regarding the separation, Appellant stated that the final incident which led to Employee's discharge was his "refusal to return stolen funds." On April 24, 2018, the claims adjudicator issued a determination concluding that Employee was ineligible to receive benefits

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<sup>1</sup> Notably, the letter praised the Fortress team for their work during the post-sale transaction period and projected a bright future for the business.

because he had been discharged for theft which constituted gross misconduct under Section 41-35-120(4) of the Code. S.C. Code Ann. § 41-35-120 (Supp. 2018).

On May 4, 2018, Employee submitted an appeal of the claims adjudicator's determination to the Department's Tribunal. On September 19, 2018, a hearing was held. On October 3, 2018, the Tribunal issued a decision reversing the claims adjudicator's determination and finding Employee eligible for benefits on the basis that Employee's separation occurred under non-disqualifying circumstances. On October 11, 2018, Appellant appealed the decision to the Panel. At Appellant's request, oral arguments were held on December 12, 2018. On December 14, 2018, the Panel issued a decision affirming the Tribunal's decision. In its decision, the Panel stated in part:

The record establishes [Employee] was discharged after [Appellant] discovered [Employee] received a tax refund. Although the parties may be in litigation about issues related to the tax refund for the three years prior to [Employee]'s employment with [Appellant] and the valuation of [Fortress], those concerns are not within the purview of this Appellate Panel. For the limited purposes of determining [Employee]'s eligibility for unemployment benefits, we find insufficient evidence of wrongdoing on the part of [Employee] which would warrant a disqualification from benefits. [Appellant] did not present any witnesses at the Appeal Tribunal hearing and did not present any other evidence that, as an employee of [Appellant], [Employee] engaged in wrongdoing or failed to perform his job duties as expected.

In [Appellant]'s appeal to the Appellate Panel, the Employer argues [Employee] removed \$152,066 that "belonged" to [Appellant]. If true, this would be a crime, yet the Appellate Panel has been presented with no evidence that criminal charges were brought against [Employee]. This is further reason for finding the issues related to [Employee]'s employment separation concern the contract between the parties and not wrongdoing on the part of [Employee] which would warrant disqualification from benefits. For these reasons, we find [Employee] was discharged under non-disqualifying circumstances, and he is eligible for benefits, if he is otherwise qualified.

Lastly, [Appellant] asserts the Department is bound by a finding of a circuit court judge in the civil litigation between the parties. Upon careful review, we disagree. The court's finding is specifically limited to the purposes of the motion requesting a preliminary injunction to enforce a noncompetition agreement. The definition of cause in the agreement, as well as the legal standard for granting injunctive relief on a preliminary basis, involve different considerations than [Employee]'s eligibility for unemployment benefits.

On January 9, 2019, Appellant filed a Notice of Appeal seeking judicial review of the Panel's decision.

### ISSUES

Whether the Panel's decision is supported by substantial evidence or is otherwise affected by error of law.

### STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). This court reviews decisions of the Department in an appellate capacity and is "restricted to reviewing the decision[s] below." Al-Shabazz v. State, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000). According to Section 1-23-600(E) of the South Carolina Code, when acting in an appellate capacity, the court must apply the criteria of Section 1-23-380(5) which states:

- (5) The court may 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(5) (Supp. 2018).

This section requires the ALC to apply the "substantial evidence" rule. See e.g., Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d

63 (Ct. App. 1984). The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency's conclusion was unsupported by substantial evidence. *Id.*

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Co., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citing Kearse v. State Health and Human Serv. Fin. Comm'n., 318 S.C. 198, 456 S.E.2d 892 (1995)). Thus, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994)). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant, 319 S.C. at 353, 461 S.E.2d at 391 (citing Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)).

## DISCUSSION

### Substantial Evidence Supports the Panel's Decision

Unemployment benefits are collected and made available for "the benefit of persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20 (1986). "[A]n unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he ... has separated, through no fault of his own, from his most recent bona fide employer ..." S.C. Code Ann. § 41-35-110(5) (Supp. 2018). Here, the Panel found that there was insufficient evidence of Employee's wrongdoing and that Employee was separated from his employment through no fault of his own. The Court agrees.

Appellant was given more than sufficient notice to appear and present testimony to the Tribunal in support of its position but did not do so. Interestingly, the hearing was continued upon Appellant's representation that it needed additional time to comply with the subpoenas previously issued to two of Appellant's employees to appear and present records for a previously scheduled hearing on this same matter. Not only did these witnesses not appear, but also, Appellant presented no witnesses or other testimony at the hearing. Consequently, the Panel found Appellant failed to present evidence that Employee engaged in any wrongdoing or that he failed to perform his job duties as expected.

Appellant asserts Employee was discharged as a result of misstatements in the purchase agreement, and for taking money that belonged to Appellant. The record clearly establishes that

Appellant was aware of the discrepancy in the valuation as of June 2017, yet, did not terminate Employee until December 11, 2017. During this period, Appellant praised Fortress' team's performance (which included Employee) on multiple occasions. Clearly, the discrepancy as to Fortress' value did not result in Employee's discharge. The record establishes that at the time of Fortress' sale, Employee did not knowingly or intentionally misrepresent anything related to the sale. No evidence was presented that would indicate any fraudulent activity by Employee related to the sale of Fortress.

It appears from the record that Employee was discharged for not giving his tax refund to Appellant who claimed that Employee owed him money as a result of undervaluation of Fortress during its sale from Employee to Appellant. There is nothing in the record to evidence that Appellant and Employee had reached any agreement on the amount of the discrepancy or how it should be addressed. Also, the tax refund paid to Employee represented money that Employee had paid to the IRS based on Employee's personal tax liability from the three years prior to the sale of Fortress. Irrespective of Fortress' sale, the refunded money belonged to Employee. Fortress elected to be taxed as an S Corporation which resulted in pass-through taxation for its owners. There is nothing in the record that contradicts the Panel's finding that there was insufficient evidence demonstrating any wrongdoing by Employee that contributed to his separation, and Appellant has failed to convincingly demonstrate otherwise.

**The Panel Committed No Error of Law in Concluding that the Agreement Between Appellant and Employee was Not Controlling for Purposes of Employee's Eligibility for Benefits**

Appellant and Employee are involved in ongoing civil litigation regarding the sale of Fortress including alleged misstatements made by Employee associated with the valuation of Fortress prior to its sale, and the ensuing disagreements over various funds. Appellant maintains that Employee was terminated from Employer as a result of these actions and that because the Agreement indicates that misstatements are a proper basis for separation, Employee is not entitled to unemployment benefits. The Panel disagreed as does the Court. As stated by the Department in its brief, Section 41-35-120 of the Code outlines those circumstances under which a claimant may be disqualified from receiving benefits. Nothing in Section 41-35-120 provides for the parties to modify by contractual agreement, the statutory and legal standard for purposes of eligibility. Section 41-39-10 of the Code expressly forbids this. S.C. Code Ann. 41-39-10 (1986) ("No agreement by an individual to waive, release or commute his rights to benefits or any other rights

under Chapters 27 through 41 of this Title shall be valid.”). See also, Richland Horizontal Property Regime Homeowners Ass’n, Inc. v. Sky Green Holdings, Inc., 392 S.C. 194, 198, 700 S.E.2d 225, 227 (Ct. App. 2011) (“Parties to a contract may not circumvent the requirements of a statute ...”). Also, there is nothing in the record to indicate that Employee intentionally or willfully misrepresented or misstated Fortress’ value prior to the sale. Contrarily, the record demonstrates that prior to the sale, Employee turned over all Fortress’ records in good faith for an independent analysis.

**Appellant’s Argument that an Order from Common Pleas is Binding in this Matter is Without Merit**

When Employee and his former business partner sold Fortress to Employer, they agreed not to compete with Employer in the residential construction business. Upon Employee’s termination, Employee and his former business partner formed a new residential construction company. Appellant sought and secured a preliminary order from the circuit court enforcing the Agreement’s non-compete clause. Appellant argues that a portion of the circuit judge’s order granting injunctive relief stating that said Employee had been terminated for cause makes Employee ineligible for benefits, and that the Panel erred in finding otherwise. This argument is without merit.

The purpose of granting a preliminary injunction is solely to preserve the status quo to avoid potential irreparable injury to the aggrieved party until a trial can be had. Levin v. Spartanburg Reg’l Services Dist., Inc., 367 S.C. 458, 464, 626 S.E.2d 38, 42 (Ct. App. 2005). For this reason, the party seeking the injunction need only make a prima facie showing that he is entitled to protection. Id. As such, factual findings made as a result of the granting of a preliminary injunction are not binding at trial. See G-H Ins. Agency, Inc. v. Travelers Ins. Companies, 270 S.C. 147, 174, 241 S.E.2d 534, 546 (1978) (“[I]t can hardly be contended that a ruling on the facts at the temporary injunction stage is binding at the merits stage.”). Moreover, the circuit court judge’s order specifically states that the findings of fact therein are “[f]or purposes of this motion only.” Neither the Panel nor this Court are bound by the findings in the order granting Appellant a preliminary injunction.

**Appellant’s Appeal is Subject to Dismissal for Failing to Cite to Any Authority**

While the Court has elected to address the merits of Appellant’s appeal, it notes that the appeal is also subject to dismissal. SCALC Rule 37(B)(3) states “The brief shall be divided into as many parts as there are issues to be argued, and each such part shall bear an appropriate caption, followed by a discussion and **citation to authority.**” (Emphasis added). “An issue is deemed

abandoned if the argument in the brief is not supported by authority or is only conclusory.” Bluffton Towne Center, LLC v. Gilleland-Prince, 412 S.C. 554, 570, 772 S.E.2d 882, 892 (Ct. App. 2015) (citing Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011)). “Upon motion of the party or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure ...” SCALC Rule 38. Here, Appellant did not cite to any authority, made no citation to the Record, and made only conclusory statements regarding the issues raised in its brief. While Appellant seeks reversal of the Panel’s decision, it has not identified any legal basis to support its request for relief.

**ORDER**

Based on the foregoing,

**IT IS HEREBY ORDERED** that the decision of the South Carolina Department of Employment and Workforce’s Appellate Panel is **AFFIRMED**.

**AND IT IS SO ORDERED.**



Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

May 16, 2019  
Columbia, South Carolina