

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Eastwood Construction, LLC,

Appellant,

vs.

South Carolina Department of Employment
and Workforce and William C. Sinnett,

Respondents.

Docket No. 19-ALJ-22-0003-AP

ORDER

RECEIVED

JUN 18 2019

SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (the ALC or Court) pursuant to Eastwood Construction, LLC's (Employer) appeal from the decision of the South Carolina Department of Employment and Workforce's (Department) Appellate Panel (Panel). In its decision, the Panel affirmed the decision of the Appeals Tribunal (Tribunal) dismissing Employer's appeal for failing to timely appeal the claims adjudicator's decision granting unemployment insurance benefits to William C. Sinnett (Employee). This Court has jurisdiction to hear this matter pursuant to Sections 1-23-380 and -600(E), and Section 41-35-750 (Supp. 2018) of the South Carolina Code. 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 Employer from April 6, 2017, through December 11, 2017. On April 4, 2018, Employee filed for unemployment insurance benefits. On July 3, 2018, the Department's claims adjudicator mailed a determination to the parties finding Employee was eligible to receive benefits because there was insufficient evidence to indicate that Employee was discharged for any wrongdoing. Pursuant to Department procedure, the mailing date of July 3, 2018 was printed on the determination, and a copy was maintained by the Department.

On July 23, 2018, Employer submitted an appeal of the claims adjudicator's determination by mail to the Department's Tribunal. By letter mailed on July 31, 2018, the Tribunal dismissed the appeal as untimely finding that Employer had failed to file the appeal within ten days of the mailing date of the claim's adjudicator's determination as required by Section 41-35-660. S.C. Code Ann. § 41-35-660 (Supp. 2018).

FILED

May 6, 2019
SC ADMIN. LAW COURT



On August 7, 2018, Employer appealed the Tribunal's dismissal to the Panel. By letter dated August 16, 2018, the parties were notified that the Panel was remanding the matter to the Tribunal for a hearing and decision on the timeliness of Employer's appeal. On September 19, 2018, the Tribunal conducted an evidentiary hearing. During the hearing, Employer presented no witness testimony and only one relevant document: an affidavit from its corporate attorney stating that he received the claims adjudicator's decision on July 23, 2018. By decision dated September 28, 2018, the Tribunal found that Employer's appeal of July 23, 2018 from the claims adjudicator's decision to the Tribunal was untimely.

On October 3, 2018, Employer appealed the Tribunal's decision to the Panel. By decision mailed on December 13, 2018, the Panel affirmed the Tribunal's decision. On January 9, 2019, Employer commenced this action seeking judicial review of the Panel's decision.

ISSUE

Whether the Panel erred in affirming the Tribunal's determination that Employer's appeal from the claims adjudicator's decision was untimely.

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 (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

Employer maintains that there is insufficient evidence to establish that the claims adjudicator’s determination was mailed on July 3, 2018, the date on the decision letter. Employer argues that the document relied upon by the Panel did not evidence a postmark and “was not testified to by any person as to the process for which it was mailed or if it was mailed at all.” Contrary to Employer’s assertions, substantial evidence exists in the record to support the Panel’s decision. The claims adjudicator’s determination indicates that it was mailed on July 3, 2018. It was properly entered into evidence and considered by the Panel pursuant to law. S.C. Code Regs. 47-51(C)(1) (“The Appeal Tribunal shall include in the record and consider as evidence all Department records material to the appeal.”).

Employer presented no evidence (including the transmittal envelope) to contradict that the mailing date displayed on the determination was correct. Similarly, Employer offered no evidence indicating when it actually received the determination in the mail at its address of record. It was sent to both Employee and Employer's addresses of record on that date. Employee testified that he timely received all communications from the Department.

While Employer contends its general counsel's affidavit indicates when Employer received the determination, it does not; the affidavit evidences when Employer's general counsel personally received the decision. Even if the Panel had found Employer's hearsay affidavit persuasive, it would have been prohibited by law from basing its opinion solely on that affidavit. See S.C. Code Regs. 47-51(C)(3) ("[F]indings of fact cannot be based exclusively on hearsay evidence unless that evidence is admissible under the South Carolina Rules of Evidence."). Moreover, it was within the purview of the trier of fact to evaluate the evidence and assign it such credibility and weight to it as it deemed appropriate. Potter v. Spartanburg School Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (2011). Additional evidence supporting the Panel's decision affirming the Tribunal was set forth in its decision of December 13, 2018:

The Department's records show the Department mailed the claims adjudicator's determination to the Employer's address of record on July 3, 2018. The deadline to file an appeal was July 13, 2018. The Employer appealed on July 23, 2018, ten days after the appeal period expired. The Department has no authority to extend the appeal time limit. Regrettably, the Employer elected not to provide testimony at the hearing.¹ Although [Employer's corporate counsel] represented in his affidavit that he "received the determination" on July 23, 2018, we find this hearsay statement, which was not subject to direct or cross examination by the hearing officer, is not sufficient evidence to show that the Department's records are incorrect. For example, the affidavit does not address whether the postmark on the envelope containing the determination is different than the mailing date on the determination. The affidavit also does not specify whether July 23, 2018, is the date the Employer first received the determination or whether that is the date [its corporate counsel] personally received the document. In light of these unanswered questions resulting from the Employer's decision not to present a witness at the hearing, the Appellate Panel finds the Department's records are credible evidence of the mailing date of the determination and rejects the Employer's argument that the document was mailed at some later, unspecified date. Therefore, we find the appeal to the Appeal Tribunal was properly dismissed as untimely, and the claims adjudicator's

¹ In response to the Panel, the attorney present at the hearing on behalf of Employer stated that he was not aware of any reason why Employer's corporate counsel, the affiant, was not present at the hearing.

determination is final. [Employee] remains eligible for benefits, if he is otherwise qualified, effective April 1, 2018.

Employer also argues that the Panel erred as a matter of law as it did not properly apply Section 41-35-615. S.C. Code Ann. § 41-35-615 (Supp. 2018). Employer maintains that the statutory deadline found in Section 41-35-660 did not expire because there was no evidence introduced of a postmark on the envelope of the claims adjudicator's determination of July 3, 2018. Employer contends that this is required by Section 41-35-615. S.C. Code Ann. § 41-35-660 (Supp. 2018). The Panel addressed this argument and found it to be without merit as does this Court. Section 41-35-615 states:

All notices given to an employer concerning a request for determination of insured status, a request for initiation of a claim series in a benefit year, a notice of unemployment, a certification for waiting-week credit, a claim for benefits, and any reconsideration of a determination must be made by United States mail or electronic mail. The employer may designate with the department its preferred method of notice. If an employer does not make a designation, then notices must be made by United States mail. The employer may not be required to respond to the notice until ten calendar days, or the next business day if the tenth day falls on a Saturday, Sunday, or state holiday, after the postmark on notices sent via United States mail or ten calendar days after the date a notice is sent via electronic mail.

S.C. Code Ann. § 41-35-615 (Supp. 2018).

Section 41-36-615 is not applicable in the context of appeals from claims adjudicators' decisions but rather, addresses documents requested by the Department from an employer to determine an insured's status and other matters related to the processing and adjudication of an employee's claim. An employer's failure to respond to such notices can result in charges being removed from an employer's account in the event a claimant is later found to have received an overpayment of benefits. S.C. Code Ann. § 41-35-135(A) (Supp. 2018). The "reconsideration of a determination" set forth in Section 41-35-615 references those matters outlined in that section and not appeals of determinations from a claims adjudicator, the Tribunal or the Panel determinations which are addressed in Section 41-35-660.

Section 41-35-660 which is permissive, specifically addresses appeals from an initial determination, redetermination, or subsequent determination by claimants and other interested parties (including a claimant's employer) who may be affected by the **adjudication of the claim**. (Emphasis added). In this context, an appeal must be filed no later than ten days after the determination was mailed. See S.C. Code Ann. § 41-35-660 (Supp. 2018).

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 6, 2019
Columbia, South Carolina