

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM STATE OF SOUTH CAROLINA

Administrative Law Court

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

Appellate Case No. 2019-000894

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

RECEIVED

JUL 31 2019

SC Court of Appeals

Eastwood Construction, LLC.....Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE EASTWOOD APPEALED THE CLAIMS ADJUDICATOR'S DETERMINATION IN A TIMELY MANNER.**

STATEMENT OF THE CASE

This matter is before the Court of Appeals pursuant to Eastwood Construction, LLC's ("Eastwood") appeal from the Administrative Law Court ("ALC"). The ALC affirmed the decision of the South Carolina Department of Employment and Workforce's ("Department") Appellate Panel ("Panel") dismissing Eastwood's appeal for failing to timely appeal the claims adjudicator's decision granting unemployment benefits to William C. Sinnett ("Sinnett").

Sinnett worked for Eastwood from April 6, 2017, through December 11, 2017. He was then terminated and filed for unemployment benefits on April 4, 2018. On July 3, 2018, the Department's claims adjudicator found Sinnett was eligible to receive benefits because there was insufficient evidence to indicate that Sinnett was discharged for any wrong doing.

On July 23, 2018, Eastwood submitted an appeal of the claims adjudicator's determination by mail to the Department's Appeal Tribunal. By letter mailed on July 31, 2018, the Appeal Tribunal dismissed the appeal as untimely, finding that Eastwood had failed to file the appeal within ten days of the mailing date listed on the claim's adjudicator's determination.

On August 7, 2018, Eastwood appealed the Appeal Tribunal's dismissal to the Panel. The parties were notified that the Panel was remanding the matter to the Appeal Tribunal for a hearing and a decision on the timeliness of Eastwood's appeal. At the September 19, 2018 hearing, the Appeal Tribunal found that Eastwood's appeal was untimely.

The Panel then affirmed the Appeal Tribunal's decision that Eastwood's appeal was untimely. Eastwood then appealed to the ALC. By order of May 6, 2019, the ALC affirmed the Panel's decision, and Eastwood commenced this appeal.

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. *Olson v. S.C. Dep't of Health and Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008). Section 1-23-610(C) of the South Carolina Code provides:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because of the finding, conclusion, or decision is:

- (a). in violation of constitutional or statutory provisions;
- (b). in excess of the statutory authority of the agency;
- (c). made upon lawful 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.

The decision of the ALC should be overturned if it is unsupported by substantial evidence or controlled by some error of law. *The Original Blue Ribbon Taxi Corp. v. South Carolina Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). The reviewing court may reverse or modify the ALC's decision if the finding, conclusion, or decision reached is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Blue Ribbon Taxi*, 380 S.C. at 605, 670 S.E.2d at 676. Substantial evidence, when considering the record as a whole, allows reasonable minds to reach the same conclusion as the ALC and is more than a scintilla of evidence. *Id.*

ARGUMENT

I. EASTWOOD APPEALED THE CLAIMS ADJUDICATOR'S DETERMINATION IN A TIMELY MANNER.

The ALC erred by affirming the decision of the lower Panel and Appeal Tribunal finding that Eastwood did not timely appeal the claims adjudicator's determination. There is no evidence in the record to show that the determination was mailed to Eastwood, as evidenced by argument and testimony taken during the hearing on September 19, 2018.

South Carolina Code Section 41-35-615 states that the employer may not be required to respond to any notice sent until ten calendar days after the postmark on notices sent in the U.S. mail. This pertains to 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. S.C. Code Ann. § 41-35-615 (2011).

In his affidavit, which was submitted into evidence at the Tribunal hearing, Allen Nason stated that he was vice president and general counsel for Eastwood and Fortress. Affidavit of Allen Nason, 1, Aug. 23, 2018. He further stated that he submitted paperwork for Eastwood regarding this matter and the matter involving Sinnett's business partner, Timothy Kern. Nason Aff. 1. Sinnett and Kern were terminated from Eastwood at the same time and their cases are substantially intertwined. Nason stated that he received information from the Department regarding Kern's case, but not Sinnett's. Nason Aff. 1. He also stated that he did not receive any communication from Sinnett's attorney and was not copied on an email thread between the claims adjuster and Sinnett's attorney. Nason Aff. 1. On July 23, 2018, Nason received the determination of benefits and promptly wrote a letter to appeal the decision. Nason Aff. 1. Prior to receiving the determination, he had not received

any communication from the Department since he submitted the Employer's Statement on April 23, 2018. Nason Aff. 1.

At the Appeal Tribunal hearing, counsel for Eastwood also submitted documents he received in a Freedom of Information Act ("FOIA") request. Transcript of Hearing, 12:3-14, Sept. 19, 2018. Counsel pointed out to the hearing officer that there was information within those documents that the determination was sent to Sinnett, but no information that showed the determination was sent to Eastwood. Hr'g Tr. 12:3-14. There was no postmarked envelope in the documents that the Department provided to counsel in his FOIA request, or any other document that indicated on what day that the determination was mailed. The determination itself says it was mailed, but there is no affidavit of service, no signed statement of mailing, and no proof of a postmark.

There was no evidence presented into evidence of a postmark as required under the statute. The General Assembly has made a determination that a postmark is required, yet there is no postmark. The Department presented no evidence that it complied with the statute. Moreover, there was no testimony presented that a postmark was anywhere to be found. Eastwood cannot be held in default for untimeliness based upon a postmark that does not exist.

The ALC addressed this argument and found that S.C. Code § 41-35-615 did not apply because the appeal was not covered within the circumstances listed in the statute. Instead, the ALC found that S.C. Code Ann. § 41-35-660 was the proper statute for the appeal process. Order, Eastwood Construction, LLC v. S.C. Dept. of Employment and Workforce and William C. Sinnett, 19-ALJ-22-0003-AP (S.C. Admin. Law Court). This statute states that an appeal must be filed no later than ten days after a determination was

mailed. The ALC stated, “[T]he Department’s *records* show the Department mailed the claims adjudicator’s determination to the Employer’s address of record on July 3, 2018.” *Id.* (emphasis added). However, there is no record, statement, or affidavit stating that the determination was mailed at all or by whom.


The Department’s records do not show actual mailing. At the hearing, there was no postmark presented into evidence, there was no testimony as to mailing, no testimony to the Department’s process for mailing documents, no testimony from anyone claiming to have mailed the determination, and no affidavit of service presented. The only records that the determination was mailed on the day the Department states are a document that Eastwood never received in its FOIA request and the determination itself, which is dated July 3, 2018. Transcript of Appellate Panel Hearing 4:6-21-5:1-6, Sept. 19, 2018. But neither of these records show that the determination was mailed or by whom it was supposedly mailed. Reliance on these records does not show that the determination was *actually* mailed. Thus, even if S.C. Code § 41-35-660 does indeed apply, the ALC’s decision is still unsupported by substantial evidence in the record because no evidence was presented of actual mailing. Additionally, Eastwood received the parallel Kern determination and responded to it, but did not timely receive the Sinnett determination.

The ALC’s decision is clearly erroneous because it is unsupported by substantial evidence in the record. There is no postmark identifying a mailing date as required by the statute and there is no evidence in the record that the determination was actually mailed. Whether this Court analyzes this matter under either of the above referenced statutes, the ALC’s decision is incorrect and should be overturned because there is no evidence in the record that the determination was mailed.

CONCLUSION

For the reasons set forth above, the ALC's decision is unsupported by substantial evidence in the record and should be overturned as clearly erroneous.

Respectfully submitted,



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July 30, 2019

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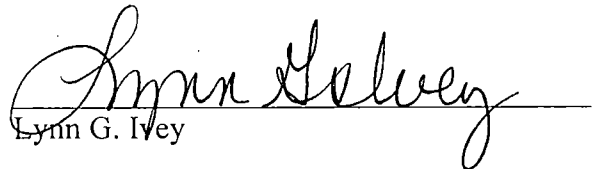
South Carolina Department of Employment and Workforce
and Timothy Sinnett,..... Respondents.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have served the Initial Brief of Appellant and Designation of Matter on Respondents by depositing a copy of same in the United States Mail, postage prepaid, on July 31, 2019, addressed as follows:

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July 31, 2019

The Honorable Jenny Abbott Kitchings
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Re: Eastwood Construction, LLC v. South Carolina Department of
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Appellate Case No. 2019-000894

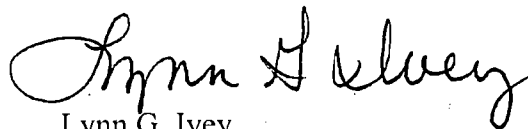
Dear Ms. Kitchings:

Enclosed for filing with your office are the original and four copies of Appellant Eastwood Construction, LLC's Initial Brief, Designation of Matter and Proof of Service in this matter. Please have the extra copies clocked in and returned to us via our courier.

By copy of this letter, I am serving Respondents' counsel with the Initial Brief and Designation of Matter.

Thank you for your assistance with this filing.

Sincerely,



Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: Jacqueline Pavlicek, Esquire (via first class mail)
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