THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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

Appellate Case No. 2019-00894

Eastwood Construction, LLC, Appellant,

v.

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

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SC Court of Appeals

BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE

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STATEMENT OF ISSUES ON APPEAL

I. IS THE DECISION OF THE ADMINISTRATIVE LAW COURT AFFIRMING THE APPELLATE PANEL'S FINDING THAT APPELLANT'S APPEAL TO THE APPEAL TRIBUNAL WAS UNTIMELY CORRECT AS A MATTER OF LAW?

II. IS S.C. CODE ANN. § 41-35-615 APPLICABLE TO APPEALS FROM CLAIMS ADJUDICATORS' DETERMINATIONS?

STATEMENT OF THE CASE

Respondent William Sinnett worked for Appellant Eastwood Construction LLC, from April 6, 2017, through December 11, 2017. (ALC Record p.6). Appellant filed for unemployment insurance (UI) benefits with Respondent the South Carolina Department of Employment and Workforce (Department) on April 4, 2018. (ALC Record p.2). The Department's claims adjudicator mailed a determination to the parties on July 3, 2018, finding Sinnett eligible to receive benefits based on a finding there was insufficient evidence to show any wrongdoing on Sinnett's part in his discharge. (ALC Record p.9). On July 23, 2018, Appellant submitted an appeal of the claims adjudicator's determination by mail to the Department's Appeal Tribunal (Tribunal). (ALC Record p.12). The Tribunal dismissed Appellant's appeal, finding Appellant had failed to file the appeal within ten days of the mailing date of the claims adjudicator's determination, as required by statute. (ALC Record p.16).

Appellant appealed the Tribunal's decision to the Department's Appellate Panel (the Panel), and the Panel remanded the case to the Tribunal for a hearing on the timeliness of Appellant's appeal to the Tribunal. (ALC Record p.19). The Tribunal held a hearing on September 19, 2018, and, in a decision dated September 28, 2018, found Appellant's July

23, 2018, appeal to the Tribunal was untimely. (ALC Record pp.99-100). On October 3, 2018, Appellant appealed the Tribunal decision to the Panel. (ALC Record pp.102-103). Following Oral Arguments on December 12, 2018, the Panel affirmed the Tribunal decision on December 13, 2018. (ALC Record pp.136-138). Appellant then appealed the Panel's decision to the Administrative Law Court (ALC) on January 9, 2019. (ALC Appeal). Following the Department's filing of the record on appeal and the filing of briefs by both Appellant and Respondent, the ALC issued an order, dated May 6, 2019, affirming the Panel's decision. (ALC Order). Appellant has now appealed to this Court.

FACTS

Sinnett filed a claim for benefits on April 4, 2018. (ALC Record p.2). He was held eligible for benefits by a determination the Department mailed to the parties on July 3, 2018. (ALC Record p.9). Pursuant to standard agency procedure, the mailing date is printed on the determination, a copy of which is kept as a business record of the Department, pursuant to state law. *Id.* Appellant admitted receiving a copy of the determination. (ALC Record p.12). Appellant's appeal period expired on July 13, 2018. (ALC Record p.9). Appellant filed an appeal on July 23, 2018. (ALC Record p.12). The mailing address for Appellant listed on the appeal matches the mailing address on the determination. (ALC Record p.9; p.12). Following a dismissal by the Tribunal and remand from the Panel, a hearing was scheduled to provide Appellant an opportunity to provide testimony and evidence as to the appeal's timeliness. (ALC Record pp.40-41). During the hearing, Appellant presented no sworn testimony and presented only one document directly related to the timeliness of Appellant's appeal, an affidavit from an Allen Nason, Appellant's Vice

President. (ALC Record p.12; p.88). The affidavit merely states Nason personally received the determination on July 23, 2018. (ALC Record p.88). The affidavit makes no mention of when the determination was mailed, when the determination actually arrived at the address of record, or when the determination was postmarked, and also makes no mention of Appellant's mail-handling procedures. (ALC Record p.12). Nason did not appear at the hearing to provide testimony or answer questions and Appellant gave no reason for his absence. (ALC Record p.43; p.50, lines 1-6). Sinnett appeared at the hearing and testified that he received all mail from the Department in a timely manner. (ALC Record p.65, lines 2-12).

In its decision, the Panel found:

> The Department's records show the Department mailed the claims adjudicator's determination to [Appellant]'s address of record on July 3, 2018. The deadline to file an appeal was July 13, 2018. The [Appellant] 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 [Appellant] elected not to provide testimony at the hearing. Although Mr. Nason 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 [Appellant] first received the determination or whether that is the date Mr. Nason personally received the document. In light of these unanswered questions resulting from the [Appellant]'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 [Appellant]'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 determination is final. [Sinnett] remains eligible for benefits, if he is otherwise qualified, effective April 1, 2018.

(ALC Record p.3).

STANDARD OF REVIEW

The Department is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding the Department's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgement for the judgement of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals 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 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 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. § 1-23-610(C) (Supp. 2018).

"The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "The ALC judge's order should be affirmed if supported by substantial evidence in the record." *Id.* "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law

Court and is more than a scintilla of evidence." *Id.* at 605, 670 S.E.2d at 676. "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Id.* at 605, 670 S.E.2d at 677.

ARGUMENTS

I. Substantial evidence supports the Panel's decision finding Appellant's appeal to the Tribunal was properly dismissed as untimely and the ALC's decision affirming the Panel's decision is, therefore, correct as a matter of law.

Substantial evidence supports the Panel's finding that the claims adjudicator's determination was mailed July 3, 2018, and Appellant has repeatedly acknowledged their appeal was filed July 23, 2018. (ALC Record p.9; Appellant's Initial Brief p.2). Per South Carolina law, an interested party, either claimant or employer, may file an appeal from the claims adjudicator's decision "not later than ten days after the determination was mailed to [that party's] last known address." S.C. Code Ann. § 41-35-660 (Supp. 2018).

"The question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). Consequently, the timely filing of a notice of appeal is a jurisdictional requirement, and the Court lacks the authority to extend the time in which the claimant must file the appeal. *See Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion

to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004))).

In this case, the Panel found: (1) the Department mailed a claims adjudicator's determination to Appellant on July 3, 2018, indicating Sinnett was eligible to receive benefits, (2) the deadline to file an appeal was July 13, 2018, (3) Appellant filed an appeal on July 23, 2018, ten days after the appeal period expired, (4) Nason's affidavit was unpersuasive hearsay, and (5) Appellant's appeal was properly dismissed by the Tribunal as untimely. The Panel's findings are supported by substantial evidence and their decision is correct as a matter of law. As a result, the ALC's decision affirming the Panel's decision is also supported by substantial evidence and is correct as a matter of law.

The record contains substantial evidence that the Department mailed the claims adjudicator's determination to Appellant's address of record on July 3, 2018, indicating Sinnett was eligible to receive benefits. (ALC Record p.69). The determination, entered into evidence without objection at the Tribunal hearing, listed both the date it was mailed, July 3, 2018, as well as the appeal deadline of July 13, 2018. *Id.* The claims adjudicator's determination was properly entered into evidence and properly considered by both the Tribunal and the Panel pursuant to law. *See* S.C. Code Ann. Regs. 47-51(C)(1) (Supp. 2018) ("The Appeal Tribunal shall include in the record and consider as evidence all Department records material to the appeal."). Appellant's argument that no evidence exists in the record to support a finding the determination was mailed, which argument Appellant makes despite having acknowledged receiving the determination prior to filing an appeal,

essentially boils down to the idea that the Department is not justified in relying on its own records as evidence. This argument is plainly preposterous on its face given the aforementioned regulatory requirement for the Department to both enter into evidence and consider all Department records material to the appeal. *See id.*

Appellant repeatedly refers to statements made in Nason's affidavit. (Appellant's Initial Brief pp.4-5). The statements contained in the affidavit are entirely irrelevant to this case. The affidavit focuses entirely on when Nason personally received the determination and his personal interactions with the Department. (ALC Record pp.88-89). Nowhere in the document does Nason state when Appellant actually received the determination. *Id.* Also, Nason fails to state the postmark date on the determination he admits to receiving. *Id.* Further, the Panel explicitly found Nason's affidavit to be unreliable hearsay insufficient to overcome the Department's own records.[1] (ALC Record p.3).

Appellant, despite its protestations regarding Nason's personal receipt of the determination, has offered neither evidence, nor testimony, nor even argument or theory to contradict the mailing date displayed on the determination. Appellant also offered no evidence indicating when it actually received the determination in the mail. Appellant

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[1] As appellant correctly notes, the affidavit was entered into evidence at the Tribunal hearing pursuant to S.C. Code Ann. Regs. 47-51(C)(3); however, even if the Panel had not found Nason's affidavit less persuasive than the Department's records, the Panel would have been forbidden from basing a decision exclusively on the affidavit because it was hearsay which was inadmissible under the S.C. Rules of Evidence. *See* S.C. Code Ann. Regs. 47-51(C)(3) (Supp. 2018) ("Evidence will not be excluded solely because it may be hearsay. Hearsay, including information provided to the Department through telephone conversations and written statements, may be considered. However, findings of fact cannot be based exclusively on hearsay evidence unless that evidence is admissible under the South Carolina Rules of Evidence.").

chose not to present any witnesses on its behalf at the Tribunal hearing to answer questions regarding the timeliness of Appellant's appeal. Moreover, Appellant notably failed to submit the envelope containing the determination Appellant admits receiving to support its contention the mailing date shown on the determination was incorrect.

In the absence of any competent evidence to the contrary, the Panel properly relied on the Department's records, which supported its finding the determination was mailed on July 3, 2018. As such, the Panel's finding that the deadline to file an appeal was July 13, 2018, was supported by substantial evidence and is correct as a matter of law. *See* § 41-35-660 ("The claimant or any other interested party may file an appeal from an initial determination . . . not later than ten days after the determination was mailed to his last known address."). Further, the record plainly supports the finding Appellant filed its appeal on July 23, 2018, and Appellant does not dispute that fact. As a result, the Panel correctly found the appeal was filed untimely and properly dismissed. Therefore, the ALC's decision affirming the Panel's decision is correct as a matter of law and this Court should affirm.

II. S.C. Code Ann. § 41-35-615 (Supp. 2018) is not applicable to appeals from claims adjudicators' determinations.

Appellant argues the Panel's decision, and thus the ALC's decision, is incorrect as a matter of law because the Panel failed to properly apply § 41-35-615. Both the ALC and the Panel found that argument to be without merit and they are both correct as a matter of law. That section states:

> SECTION 41-35-615. Notice to employer by United States mail or electronic mail; designation of preferred method of notice; default; time for **required response.**

> 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.

§ 41-36-615 (emphasis added). This code section is completely irrelevant in the context of appeals from claims adjudicators' determinations because it deals exclusively with certain documents, sent only to employers, seeking additional information necessary to adjudicate a claim. Employers are required to respond to these notices by providing information as directed by instructions on the notices. *See* S.C. Code Ann. Regs. 47-15 (2011) ("Each employing unit shall make such reports as are prescribed by the Department on forms issued by and required to be returned to the Department or its authorized representative."). Failure to respond to such notices can result in charges not being removed from an employer's account in the event a claimant is later found to have been overpaid benefits.[2] *See* S.C. Code Ann. § 41-35-135(A) (Supp. 2018) (stating the Department shall not relieve the charges from an employer's account due to overpayment of benefits if the overpayment occurred because the employer was at fault for failing to respond to requests for

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[2] Benefits are charged to most employer accounts as they are paid out to claimants. Each year, benefits charged to an employer over the previous year are compared to that employer's overall payroll to set that employer's tax rate for unemployment taxes. As such, more charged benefits generally result in a higher tax rate.

information and they have exhibited a pattern of failing to reply timely to the Department's requests for information).

In sharp contrast, no response is required from a claims adjudicator's determination. Although a party may have the right to appeal such a determination, they are not required to respond in any way. Accordingly, as a matter of law, the postmark requirement in § 41-35-615 does not apply when determining a party's timeline to appeal from a claims adjudicator's decision. Further, even if Appellant's argument based on section 41-35-615 was correct, a postmark is only placed on a Department document after it leaves the Department's possession. The person in possession of the postmark at the time of a hearing would be the party to whom it was mailed. Notably, Appellant failed to produce this very evidence at the appeal hearing, despite it having been available to Appellant and in its exclusive possession. The Department could not be held responsible for failing to produce the postmark when Appellant had exclusive possession of the postmark.

The code section governing appeals from claims adjudicators' determinations states:

> **SECTION 41-35-660.** Appeals.
>
> The claimant or any other interested party **may file** an appeal from an initial determination, redetermination, or subsequent determination not later than ten days after the determination was mailed to his last known address. The term "any other interested party" means the claimant's last or separating employer and any employer whose account may be affected by the adjudication of the claim.

§ 41-35-660 (emphasis added). This statute is clear and unambiguous and provides further evidence the legislature did not intend appeals from claims adjudicator's determinations to

be handled under § 41-35-615. Further, the statute makes no mention of a postmark. Under § 41-35-660, the mailing date recorded on the face of the determination, in the absence of contrary evidence, is substantial evidence to establish the determination was mailed to Appellant on July 3, 2018. As such, the appeal filed by Appellant on July 23, 2018, is clearly untimely and the ALC's order affirming the Panel's finding to that effect is clearly supported by substantial evidence and correct as a matter of law.

CONCLUSION

Based on the foregoing, the Department respectfully submits this Court should affirm the ALC's decision. Substantial evidence supports the Panel's decision and the Panel's decision is correct as a matter of law. Therefore, the ALC's decision affirming the Panel's decision is correct as a matter of law. Department records, which represent the only reliable, probative, and substantial evidence in the record as to the mailing date, show the claims adjudicator's determination was mailed on July 3, 2018, and Appellant has offered no evidence to dispute that fact. Additionally, Appellant admits it did not file its appeal until July 23, 2018, clearly past the appeal deadline of July 13, 2018. Further, Appellant bases its appeal on § 41-35-615, a statute which does not apply to an appeal from a claims adjudicator's determination. Based on § 41-35-660, the statute actually applicable to this case, Appellant failed to file their appeal in a timely manner. As a result, the ALC's order affirming the Panel's decision is supported by substantial evidence and is correct as a matter of law and this Court should affirm.

[Signature on Following Page]

Respectfully Submitted,

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August 30, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

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

Respondents.

PROOF OF SERVICE

I certify that I have served the Designation of Matter To Be Included In The Record On Appeal and the Brief of Respondent of the South Carolina Department of Employment and Workforce on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2019, addressed to the parties at their addresses of record:

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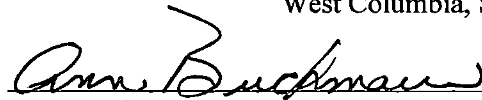
August 30, 2019



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The Honorable Jenny Abbott Kitchings
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RE: Eastwood Construction, LLC v. South Carolina Department of Employment and Workforce and William C. Sinnett
Appellate Case No: 2019-000894

Dear Ms. Kitchings:

Enclosed are the original and one copy of the Respondent South Carolina Department of Employment and Workforce Designation of Matter To Be Included In The Record On Appeal and Brief of Respondent. A Proof of Service is also included in this packet.

Please let me know if you have any questions.

Sincerely,

Ann Buchmaier
Administrative Legal Assistant for
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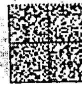

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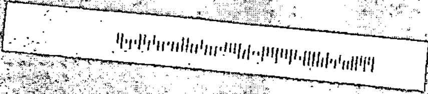

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