

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-22-0004-AP

Appellate Case No. 2019-00898

Eastwood Construction, LLC,

Appellant,

v.

South Carolina Department
Of Employment and Workforce and
Timothy Kern

Respondents.

BRIEF OF RESPONDENT SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

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STATEMENT OF ISSUES ON APPEAL

- I. DOES THE TWO ISSUE RULE REQUIRE AFFIRMANCE IN THIS CASE BECAUSE APPELLANT FAILED TO APPEAL ALL GROUNDS UPON WHICH THE ALC'S DECISION IS BASED?
- II. ARE THE ISSUES APPELLANT PRESENTS IN ITS BRIEF PROPERLY PRESERVED FOR THIS COURT'S REVIEW IN LIGHT OF APPELLANT'S FAILURE TO PRESENT THOSE ISSUES TO OR RECEIVE A RULING FROM THE ALC?
- III. SHOULD THE COURT CONSIDER APPELLANT'S ARGUMENTS IN LIGHT OF APPELLANT'S FAILURE TO APPLY THE CORRECT STANDARD OF REVIEW?
- IV. SHOULD THIS COURT DISREGARD ISSUES WHICH ARE NOT PROPERLY RAISED BY APPELLANT IN THE STATEMENT OF ISSUES ON APPEAL AND WHICH ARE BOTH CONCLUSORY AND UNSUPPORTED BY AUTHORITY?
- V. IS THE DECISION OF THE APPELLATE PANEL HOLDING RESPONDENT TIMOTHY KERN ELIGIBLE FOR BENEFITS SUPPORTED BY SUBSTANTIAL EVIDENCE?
- VI. DOES THE DEFINITION OF "FOR CAUSE" FOUND WITHIN THE ASSET AND GOODWILL PURCHASE AGREEMENT CONTROL AS TO KERN'S ELIGIBILITY FOR UNEMPLOYMENT BENEFITS?

STATEMENT OF THE CASE

Timothy Kern filed a claim for unemployment insurance (UI) benefits with Respondent South Carolina Department of Employment and Workforce (Department) on April 9, 2018. (ALC Record pp.5-8). Kern's former employer, Eastwood Construction, LLC (Appellant), responded to the claim on April 16, 2018. (ALC Record p.15-17). A claims adjudicator issued a determination April 24, 2018, holding Kern ineligible to receive benefits. (ALC Record pp.19-21). Kern appealed to the Department's Appeal Tribunal (Tribunal) on May 3, 2018. (ALC Record p.22). Following several postponements, a hearing was held before the Tribunal on September 19, 2018. (ALC

Record pp.118-233). The Tribunal issued a decision on October 3, 2018, reversing the claims adjudicator's determination and finding Kern eligible for benefits based on a finding he was separated under non-disqualifying circumstances. (ALC Record pp.547-550).

Appellant appealed the Tribunal decision to the Department's Appellate Panel (Panel) on October 11, 2018. (ALC Record pp.554-555). At Appellant's request, oral arguments were held December 12, 2018, before the Panel. (ALC Record pp.567-589). The Panel issued a decision on December 14, 2018, affirming the Tribunal's decision and holding Kern eligible to receive benefits, based on a finding he was discharged under non-disqualifying circumstances. (ALC Record pp.1-4; pp.591-593). Appellant appealed to the Administrative Law Court (ALC) on January 9, 2019. (ALC Notice of Assignment). Following the filing of the record and briefs from both parties, the ALC issued an order on May 16, 2019, affirming the Panel's decision. (ALC Order). Appellant then appealed to this Court.

FACTS

Kern worked for Appellant from April 7, 2017, through December 11, 2017, as a Vice President of Operations. (ALC Record p.6; p.13). During the initial claims process, Kern stated his discharge was "not for cause." (ALC Record p.11). In Appellant's response to the Department's request for additional separation information, Appellant stated the final incident which led to Kern's discharge was "refusal to return stolen funds." (ALC Record p.16). At the Tribunal hearing, Kern testified on his own behalf. (ALC Record p.128, line 7-p.213, line 13). Although Appellant was represented by

counsel at the hearing and subpoenas were issued for two of Appellant's employees, Appellant chose not to provide any witnesses at the hearing. (ALC Record p.118-119).

I. Kern's Testimony

Prior to his employment with Appellant, Kern and his business partner William Sinnett operated a business called Fortress Builders, LLC (Fortress). (ALC Record p.250). Kern and Sinnett paid taxes on Fortress's earnings through their individual income taxes pursuant to Subchapter S of the Internal Revenue Code. (ALC Record p.199, lines 14-15). Kern and Sinnett entered into negotiations to sell Fortress to Appellant in 2016. (ALC Record pp.245-249). Prior to the sale, both parties observed a due diligence period, during which independent accountants examined Fortress's books and valued Fortress and its assets. *Id.* Based on that valuation, Appellant then purchased Fortress pursuant to an Asset and Goodwill Purchase Agreement (Agreement), effective April 7, 2017. (ALC Record p.250-304). At the time of the sale, the books presented by Kern to Appellant were true and correct to the best of Kern's knowledge and had been independently audited by accountants paid by both parties. (ALC Record p.189, lines 3-8). Kern did not intentionally or willfully withhold any information regarding Fortress's books or assets. (ALC Record p.189, lines 9-11). As part of the Agreement, Appellant hired Kern as a "for cause" employee. (ALC Record pp.254-255).

Shortly after the sale closed, Appellant's accountants informed Appellant they believed Fortress was worth significantly less than the purchase price due to accounting errors. (ALC Record p.137, line 6-p.138, line 3). None of Fortress's financial records were presented to the Tribunal or the Panel in this case. Kern spoke with Appellant's

representatives on multiple occasions regarding the disparity in book values. (ALC Record p.137, line 26, p.138, line 25). During these discussions, Appellant informed Kern and Sinnett they needed to file amended tax returns because Kern and Sinnett had overreported earnings from the business on their individual tax returns in the three years prior to the sales. (ALC Record p.139, lines 4-20). On August 28, 2017, Appellant presented Kern and Sinnett with a letter seeking their agreement to turn over any tax refund Kern and Sinnett may receive to Appellant as part of a plan to compensate Appellant for the disparity in pre- and post-sale book values of Fortress. (ALC Record p.310-311). Notably, that letter praises the Fortress team for their work during the post-sale transition period and projected a bright future for the business. *Id.* Neither Kern nor Sinnett agreed to or signed the letter. *Id.* Appellant presented an almost-identical letter to Kern and Sinnett on November 15, 2017. (ALC Record p.312-313). The letter again praised the Fortress team for their work and again projected a bright future for the business. *Id.*¹ Neither Kern nor Sinnett agreed to or signed that letter. *Id.*

Kern filed an amended individual tax return in September of 2017 to reclaim his overpaid taxes. (ALC Record p.141, lines pp.314-316). The Internal Revenue Service

¹ In the two letters, both of which were sent to Kern and Sinnett, Appellant stated:
“[W]e have been very encouraged with how the Fortress Homes team has engaged to transition to Eastwood Homes’ new Columbia Division to date. With as challenging as the last year has been with the acquisition and all the changes that have followed, we are all very impressed at how things are proceeding We all, we think, appreciate that there is a long and bright future ahead for Eastwood Homes in Columbia, and we want to reassure you that we are committed to working through the accounting error issues in a way that places an emphasis on the success of all involved.”
(ALC Record p.310-313).

(IRS) deposited the return, in the amount of \$152,066.00, into a Fortress operating account on November 1, 2017. (ALC Record p.318). Sinnett transferred those funds into a different account not attached to Fortress on November 7, 2017. *Id.* Later that month, Sinnett informed Appellant about the money transfer and then told Kern Appellant had responded angrily to the information. (ALC Record p.144, line 18-p.145, line 12). Kern continued to work for Appellant until Appellant terminated Kern's employment, effective December 11, 2017, stating the termination was due to a breach of the Agreement caused by "fraudulently intentional misrepresentation of the financial position of [Fortress] through fraudulent bookkeeping practices," as well as "fraud and embezzlement of [Fortress]'s assets" and fraudulent and wholly improper actions regarding the transfer of the tax refund from the Fortress account to a different account. (ALC Record p.6; p.13; p.326-327). Kern and Appellant are involved in ongoing litigation regarding the sale of the company and the ensuing disagreements over various funds. (ALC Record p.436-541). The refund moneys have been placed in an escrow account pending the outcome of the litigation. (ALC Record p.143, line 25-p.144, line 4).

II. Panel Decision

In its decision, the Panel found:

The record establishes [Kern] was discharged after [Appellant] discovered [Kern] received a tax refund. Although the parties may be in litigation about issues related to the tax refund for the three years prior to [Kern]'s employment with [Appellant] and the valuation of the LLC, those concerns are not within the purview of this Appellate Panel. For the limited purposes of determining [Kern]'s eligibility for unemployment benefits, we find insufficient evidence of wrongdoing on the part of [Kern] 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], [Kern] engaged in wrongdoing or failed to perform his job duties as expected.

In [Appellant]'s appeal to the Appellate Panel, the Employer argues [Kern] 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 [Kern]. This is further reason for finding the issues related to [Kern]'s employment separation concern the contract between the parties and not wrongdoing on the part of [Kern] which would warrant disqualification from benefits. For these reasons, we find [Kern] was discharged under non-disqualifying circumstances, and he is eligible for benefits, if he is otherwise qualified.

(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. The two issue rule requires affirmance in this case because Appellant failed to appeal all grounds upon which the ALC decision is based.

This Court should affirm the ALC’s decision because Appellant failed to appeal all grounds upon which the ALC’s decision was based. In its order affirming the Panel’s decision, the ALC stated:

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.

(ALC Order p.8). “Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.” *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). “[The South Carolina Supreme] Court has also found the two issue rule is applicable in situations not involving a jury.” *Id.* “The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.” *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 379 (Ct. App. 1998).

Here, the ALC affirmed the Panel decision based on two independent bases: substantial evidence supported the Panel's decision and Appellant failed to identify any legal basis supporting its appeal to the ALC. The ALC makes it clear its order affirming the Panel’s decision is based upon Appellant’s failure to cite to any authority. Immediately following the section addressing the Rule 37(B)(3) dismissal, the ALC states they are affirming the Panel’s decision “[b]ased on the foregoing”. (ALC Order p.

8). Further, the ALC makes it clear they were not obligated to address the merits of the appeal due to Appellant's failure to identify a legal basis supporting its appeal. (ALC Order p.7) (“While Appellant seeks reversal of the Panel’s decision, it has not identified any legal basis to support its request for relief.”).

Appellant does not mention the ALC's finding that it failed to identify a legal basis supporting its appeal to the ALC in its brief to this Court, and Appellant has specifically failed to mention the issue in its statement of the issues on appeal. (Appellant’s Initial Brief). As a result, Appellant failed to appeal that issue and this Court should not consider it. *See* Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”). Because Appellant failed to appeal this ruling by the ALC and the ALC based its decision on that ground, that unappealed ruling now becomes the law of the case, and this Court should affirm the ALC’s order pursuant to the two issue rule.

II. Neither of Appellant’s stated issues on appeal are properly preserved for review by this Court because they were not raised to or ruled upon by the ALC.

Neither of Appellant’s two issues in its statement of issues on appeal are properly preserved for review by this Court. The South Carolina Supreme Court has previously stated:

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). More specifically, “issues not raised to and ruled upon by the ALC are unpreserved for appellate review.” *Risher v. S.C. Dept. of Health & Env’tl. Control*, 393 S.C. 198, 208, 712 S.E.2d 428, 433 (2011). “An issue that was not preserved for review should not be addressed by the Court of Appeals . . .” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). “Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529, S.E.2d 543, 546 (2000) (internal quotations omitted). “[T]he ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the [lower] court.” *Id.* (internal citations omitted). “At the very least, the matter must have definitely been called to the attention of the [lower] court sufficiently to obtain a ruling thereon.” *Id.* (internal citations omitted). “Without an initial ruling by the [lower] court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” *Id.*

In its brief to the ALC, Appellant set forth a single issue on appeal: “Did the Appellate Panel err in upholding the Appeal Tribunal’s determination that the Claimant was eligible for benefits, upon finding he was separated from employment under non-disqualifying circumstances?” (Appellant’s Brief to the ALC p.1). Now, Appellant seeks to raise two different issues on appeal. Appellant’s issues on appeal to this Court are:

- I. WHETHER THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE AND THUS INELIGIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS WHEN HE ADMITTED TO UNLAWFULLY TRANSFERRING FUNDS BELONGING TO EASTWOOD TO A

SEPARATE ACCOUNT CONTROLLED BY KERN AND SINNETT.

II. WHETHER THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE BY BREACHING THE AGREEMENT BETWEEN FORTRESS AND EASTWOOD WHEN HE AND SINNETT MISREPRESENTED THE PROPER VALUE OF FORTRESS DURING THE SALE.

(Appellant's Initial Brief p. 1). From the time Kern initially filed a claim for benefits to the time of Appellant's appeal to this Court, no decision-making body, whether Tribunal, Panel, or ALC, has found Kern was discharged for cause in the context of eligibility for unemployment benefits. In the absence of any such prior finding, there has not been any need to address the issue of whether substantial evidence in the record supports such a hypothetical finding. Further, Appellant never references substantial evidence anywhere in its brief to the ALC. (Appellant's Brief to the ALC). Although the ALC ruled on whether substantial evidence existed to support the Panel's decision, that issue is entirely distinct from whether substantial evidence existed to support a finding Kern was discharged for cause. Therefore, the issues Appellant presents to this Court have neither been raised to nor ruled upon by any lower authority, including the ALC, and are not properly preserved for appeal. *See Risher* at 208, 712 S.E.2d at 433 ("issues not raised to and ruled upon by the ALC are not preserved for appellate review"). Because the issues presented to this Court by Appellant have not been properly preserved, this Court should not address them. *See Dunbar* at 142, 587 S.E.2d at 694 ("An issue that was not preserved for review should not be addressed by the Court of Appeals . . ."). There being

no properly preserved issues presented to this Court, the ALC's order affirming the Panel's decision should be affirmed.

III. This Court should not consider Appellant's arguments because Appellant applies the incorrect standard of review.

Appellant applies the incorrect standard of review to this case and, as a result, his arguments are irrelevant and should not be considered by this Court. As has been previously mentioned, Kern has never been found by any competent authority to have been discharged for cause in the context of eligibility for unemployment benefits. Both of Appellant's stated issues address whether substantial evidence exists to support a finding Kern was discharged for cause. (Appellant's Initial Brief, p.1). That inquiry is not relevant to this case. "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* at 604, 670 S.E.2d at 676. "The ALC judge's order should be affirmed if supported by substantial evidence in the record." *Id.* The ALC, among other findings, found there was substantial evidence to support the Panel's finding Kern was separated from his employment through no fault of his own. However, throughout its brief, Appellant seeks to convince the Court that substantial evidence exists to support a finding that Kern was discharged for cause. That finding was not and has never been made. Appellant seems to be arguing that if substantial evidence supports one proposition, an inconsistent proposition cannot also be supported by substantial evidence. For instance, Appellant argues:

The ALC's decision that Kern was entitled to unemployment insurance benefits is wholly unsupported by substantial evidence within the record.

Rather, there is substantial evidence in the record that Kern was terminated for cause and was ineligible for unemployment insurance benefits. Thus, the ALC's decision should be overturned as clearly erroneous.

(Appellant's Initial Brief p.7). Similarly, Appellant later argues:

It is clear from the record in this case that there was substantial evidence that Kern was terminated for cause when he breached the Agreement with Eastwood. Accordingly, the ALC's decision is clearly erroneous as it is unsupported by substantial evidence in the record.

(Appellant's Initial Brief p.8). Appellant is arguing that because its version of the facts establish substantial evidence to support a finding that Kern was discharged for cause, substantial evidence cannot exist to support a finding that Kern was separated from his employment through no fault of his own. This is a clear misunderstanding of the standard of review and the case law in this state. Substantial evidence is defined as evidence which "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." *Original Blue Ribbon Taxi Corp.* at 605, 670 S.E.2d at 676. Even assuming arguendo that Appellant's version of the facts do establish substantial evidence to support a finding that Kern was discharged for cause, that would not mean the record does not contain substantial evidence to support a finding that Kern was separated from his employment through no fault of his own. *See id.* at 605, 670 S.E.2d at 677 ("The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.")² As a result, it is entirely

² The Department notes Appellant quoted or paraphrased the entire standard of review section from *Original Blue Ribbon Taxi Corp.* in its own standard of review section yet mysteriously left off this passage which is the concluding passage from that section, is

irrelevant whether substantial evidence in the record supports a finding Kern was discharged for cause. Because Appellant's entire appeal is based on a misunderstanding of the standard of review, this Court should not consider Appellant's irrelevant arguments and should affirm the ALC's order affirming the Panel's decision.

IV. This Court should not consider arguments which are not set forth in Appellant's statement of the issues on appeal and which are both conclusory and unsupported by authority.

Appellant's statements that the ALC's decision is unsupported by substantial evidence and clearly erroneous are not set forth in Appellant's statement of issues on appeal, nor are they supported by argument or citation to authority, and they should not be considered by this Court. *See* Rule 208, SCACR(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *see also Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 684 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for review. . . . Where no authority is cited and argument in brief is conclusory, issue is deemed abandoned."). Both of the issues raised by Appellant in its statement of issues on appeal question whether substantial evidence exists in the record to support a finding that Kern was discharged for cause. (Appellant's Initial Brief p.1). Those issues are separate and distinct from the issue of whether substantial evidence exists in the record to support the ALC's order finding Kern was separated from employment through no fault of his own. Appellant states the

accompanied by multiple supporting citations, and is directly on point for the case at hand. In an effort to place this issue in its proper context, the Department has included that final sentence here.

ALC's decision is unsupported by substantial evidence at the conclusion of each of its argument sections. (Appellant's Initial Brief pp.7-8). However, Appellant does not raise that issue in its statement of the issues on appeal. Appellant also states the ALC's decision is clearly erroneous at the end of each of its argument sections. *Id.* However, similarly, Appellant does not raise that issue in its statement of the issues on appeal. Because it does not raise these issues in its statement of the issues on appeal, this Court should not consider them. *See* Rule 208(b)(1)(B), SCACR.

Further, Appellant does not argue the issue of whether the ALC's decision is supported by substantial evidence in any detail. In fact, the only direct reference Appellant makes to the ALC's decision throughout its entire argument section is a passage noting Kern bore the burden of proving his eligibility for benefits, a proposition which neither the Department nor the ALC has challenged. (Appellant's Initial Brief pp.6-7). Appellant makes no attempt to examine either the Panel's or the ALC's actual findings or conclusions. Appellant merely puts forward its version of the facts and states in a brief and conclusory fashion that the ALC's decision is unsupported by substantial evidence. Because Appellant has failed to set forth the issues of whether substantial evidence supports the ALC's decision and whether the ALC's decision is erroneous in its statement of the issues on appeal and because Appellant makes such conclusory statements without supporting authority, Appellant has abandoned those issues, they are unpreserved for this Court's review, and this Court should not consider them. *See* Rule 208(b)(1)(B), SCACR; *see also Eaddy*.

V. Substantial evidence supports the Panel's finding Appellant discharged Kern under non-disqualifying circumstances and the ALC's order affirming that decision is, therefore, correct as a matter of law.³

The Panel's decision holding Kern eligible to receive benefits is supported by substantial evidence and the ALC's decision affirming the Panel's decision is, therefore, correct as a matter of law. Unemployment funds are collected and made available for "the benefit of persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20 (Supp. 2018). Further, "[a]n unemployed insured worker is eligible to receive benefits with respect to a week only if the [D]epartment finds he...has separated, through no fault of his own, from his most recent bona fide employer..." S.C. Code Ann. § 41-35-110 (Supp. 2018). The Panel found there was insufficient evidence of wrongdoing and found that Kern was separated from his employment through no fault of his own and was thus eligible for benefits. (ALC Record p.3). The Panel's decision is supported by substantial evidence in the record and is correct as a matter of law. Therefore, the ALC's decision affirming the Panel's decision is also correct as a matter of law.

Appellant was given proper notice to appear and present testimony to the Tribunal in this matter to support its position, but chose not to do so. Moreover, two of Appellant's employees were subpoenaed to appear, giving Appellant both the opportunity and the legal obligation to present testimony to the Tribunal; however, Appellant produced no

³ As has previously been shown, Appellant has failed to properly raise this issue and the Court should not consider it. However, out of an abundance of caution, the Department has chosen to address the issue here as it was an issue actually addressed by the ALC in its order affirming the Panel's decision. The Department will not address the question of whether substantial evidence exists to support a finding that Kern was discharged for cause as that finding has never been made.

witnesses at the hearing. (ALC Record p.111-115). In fact, the Department granted a postponement requested by Appellant on the basis of Appellant needing more time to comply with the same subpoenas issued for a previously-scheduled hearing on this same matter. (ALC Record p.38; pp.56-57). At the hearing, Appellant presented no witnesses and no testimony. (ALC Record p.118-119). As a result, the Panel found the employer did not present any evidence Kern engaged in any wrongdoing or that he failed to perform his job duties as expected. (ALC Record p.3). That finding is supported by the Record.

Appellant asserts Kern was discharged as a result of misstatements in the purchase agreement, and for taking moneys which belonged to Appellant. (ALC Appellant's Brief p.2). Firstly, the record clearly establishes Appellant was aware of the discrepancy in the books as early as June 2017. (ALC Record p.137, lines 16-19). Kern continued to work for Appellant until December 11, 2017, receiving praise for the Fortress team's performance on multiple occasions in that intervening time. (ALC Record pp.310-313). The discrepancy itself clearly did not cause Kern's discharge. Additionally, the record has unambiguously established the books were true and accurate to the best of Kern's knowledge at the time of the sale and that Kern did not knowingly or intentionally misrepresent anything related to the sale. (ALC Record p.189, lines 3-13). Although Appellant had the opportunity to present testimony and evidence at the hearing, it presented no evidence of fraudulent activity related to the sale. The record does not support Appellant's contention Kern was discharged for misstatements related to the

Agreement. In fact, the record supports the Panel's finding Kern was discharged due to the contractual dispute over Kern's tax return.

Ultimately, Kern was discharged for not turning over his tax return to Appellant who demanded the money be turned over based on an accusation Kern owed Appellant money. At the time the tax refund was issued by the IRS, Kern and Appellant were involved in a dispute over the sale of Fortress to Appellant. Although both parties agree that, despite independent examinations by two accounting firms, Fortress's books were incorrect at the time of the sale, there is no indication in the record Kern and Appellant had reached any agreement on the actual size of the discrepancy or as to how to address that discrepancy. The tax refund represented moneys paid by Kern personally to the IRS based on his own personal tax liability from the three years prior to the sale of the business and, with or without the sale of Fortress to Appellant, the rights to the refund would lie with Kern and not Fortress.⁴ Those refund moneys never belonged to Fortress and could not have been acquired by Appellant under the terms of the Agreement. Appellant had no freestanding right to that money and the money's brief presence in an account that was left open to complete business related to the Agreement did not change that fact.⁵ Kern was still the proper owner of the tax refund moneys and had every right to

⁴ Fortress elected to be taxed as an S Corporation, which resulted in pass-through taxation for its owners.

⁵ The ownership of the Fortress operating account was not established in this case. Despite Appellant's blatant mischaracterization of the record without citation (Appellant's Initial Brief p.6), Kern did not admit under oath that he knew the Fortress Builders's account was subject to the Agreement. In fact, on multiple occasions, he flatly denied that assertion. (ALC Record, p.205, lines 13-28; p.208, lines 18-21; p.209, lines 1-17).

keep them for himself. Kern was discharged for not turning the moneys over in repayment of an alleged debt which is currently the subject of litigation. Kern and Sinnett's decision to keep their money in an account to which Appellant did not have access was reasonable and free of wrongdoing. For the foregoing reasons, the Record clearly contains substantial evidence to support the Panel's decision finding insufficient evidence to show wrongdoing on Kern's part in his separation, thus resulting in his eligibility for benefits. Therefore, the ALC's order affirming that decision is correct as a matter of law and this Court should affirm.

VI. The definition of "for cause" under the terms of the Agreement is not controlling as to Kern's eligibility for benefits.⁶

Appellant argues the Agreement defines the proper bases for separation and further argues a finding the separation was "for cause" under the terms of the Agreement should result in Kern's disqualification from receiving benefits. (Appellant's Brief pp.7-8). This argument is manifestly without merit. S.C. Code Ann. § 41-35-120 (Supp. 2018) defines the circumstances under which a claimant may be disqualified from receiving benefits due to the circumstances of their separation.⁷ Section 41-35-120 does not allow

⁶ As has previously been shown, Appellant was aware of the alleged discrepancy in Fortress's valuation as early as June of 2017, and did not discharge Kern until December of 2017. (ALC Record p.137, lines 16-19). In the intervening time, Appellant praised Kern's work and stated they looked forward to a long and bright future with Eastwood Homes of Columbia. (ALC Record pp.310-313). However, despite the misvaluation which allegedly occurred prior to Kern's employment with Eastwood manifestly not being the actual reason for Kern's discharge, the Department, out of an abundance of caution, here addresses Appellant's legally erroneous arguments regarding the contractual definition of "for cause" in response to Appellant's brief.

⁷ Notably, although Appellant asks this Court to disqualify Kern from benefits, they fail to mention S.C. Code Ann. § 41-35-120, the code section which deals with

parties to change the legal standards for benefit eligibility based on contractual negotiation. In fact, S.C. Code Ann. § 41-39-10 (Supp. 2018) forbids the waiver, release, or commutation of a claimant's rights to benefits by contract. Kern's rights to unemployment benefits are as they are stated in Title 41 of the South Carolina Code. The Agreement cannot supersede or displace those rights.

The definition of "cause" in the Agreement does not require wrongdoing on Kern's part. (R.p.254). In fact, one of the listed meanings of "cause" is "(iv) breach of obligations under this Agreement." (R.p.254). Appellant points to this to indicate Kern was properly terminated due to simple misstatements in the purchase agreement in violation of the Agreement's requirements for the seller to present accurate books at the time of sale. (App.Br.p.2). The Record clearly established Kern did not intentionally or willfully misrepresent the financial position of Fortress prior to the sale, and turned over the books in good faith for independent analysis during the due diligence period. (R.p.189, lines 3-14). Therefore, if Kern's actions represent "cause" under the Agreement, the Agreement sets forth a definition of "cause" which does not require fault on Kern's behalf. Section 41-27-20 requires benefits be set aside and provided to all claimants who have been separated through no fault of their own. As a result, using the Agreement's definition of "cause" to define Kern's eligibility for benefits would be in clear violation of section 41-39-10's prohibition on contractual waiver, release, or commutation of a claimant's rights to benefits. Therefore, Appellant's argument that the

"Disqualification from Benefits," anywhere in their brief or their table of authorities. (Appellant's Brief).

definition of “cause” found within the agreement should control in this case is flawed and should be discarded.

The ALC found:

Appellant and [Kern] are involved in ongoing civil litigation regarding the sale of Fortress including alleged misstatements made by [Kern] associated with the valuation of Fortress prior to its sale, and the ensuing disagreements over various funds. Appellant maintains [Kern] was terminated [by Appellant] as a result of these actions and that because the Agreement indicates that misstatements are a proper basis for separation, [Kern] is not entitled to unemployment benefits. The Panel disagrees as does the [ALC]. 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 [Kern] intentionally or willfully misrepresented or misstated Fortress’ value prior to the sale. Contrarily, the record demonstrates that prior to the sale, [Kern] turned over all Fortress’ records in good faith for an independent analysis.

(ALC Order p.7). Appellant notably does not address the ALC’s order on this issue at all.

The Panel’s decision holding the Agreement is not controlling as to Appellant’s eligibility is correct as a matter of law, as is the ALC’s order upholding that finding.

CONCLUSION

Appellant fails to appeal every issue upon which the ALC’s decision was based and, therefore, the two issue rule requires affirmation. In fact, Appellant fails to substantively address any of the issues upon which the ALC’s order was based. The

issues Appellant raises in its brief are not preserved for appellate review by this Court as they were never raised to or ruled upon by the ALC and this Court should not consider those issues pursuant to its longstanding preservation rules. Additionally, Appellant fails to apply the proper standard of review to the case and its arguments are, therefore, irrelevant to the matter at hand. Further, this Court should not consider any issues which were not put forward in Appellant's statement of the issues on appeal and which are both conclusory and unsupported by authority.

Substantial evidence supports the Panel's decision holding Kern eligible for unemployment benefits and the ALC's order affirming that decision is correct as a matter of law. Further, the ALC's findings are themselves supported by substantial evidence. Appellant's argument that the definition of cause under the Agreement controls as to Kern's eligibility for unemployment benefits is manifestly without merit and should not be considered by this Court. For the foregoing reasons, the Department respectfully requests that this Court affirm the ALC's order affirming the Panel's decision.

[Signature on Following Page]

Respectfully Submitted,



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September 30, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No: 19-ALJ-22-0004-AP

Appellate Case No. 2019-000898

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Eastwood Construction, LLC,

Appellant,

v.

South Carolina Department of Employment and
Workforce and Timothy Kern,

Respondents.

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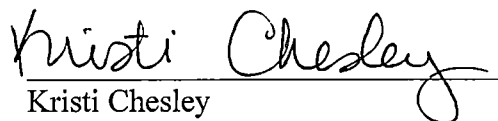
I certify that I have served the Initial Brief and Designation of Matter of the South Carolina Department of Employment and Workforce on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on September 30, 2019, addressed to the parties at their addresses of record:

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September 30, 2019

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

RE: Eastwood Construction v. South Carolina Department of
Employment and Workforce and Timothy Kern
Appellate Case No: 2019-000898

Dear Ms. Kitchings:

Enclosed are the original and one copy of the Initial Brief and Designation of Matter of Appellant South Carolina Department of Employment and Workforce. A Proof of Service is also included in this packet.

Please let me know if you have any questions.

Sincerely,

Kristi Chesley

Kristi Chesley
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