THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Deborah Durden, Administrative Law Judge

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Case No.: 18-ALJ-22-0409-AP

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Appellate Case No. 2019-001033

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Cortez M. Jiles,

Respondent,

v.

South Carolina Department of Employment
and Workforce and House of Raeford Farms

Of Which South Carolina Department of Employment
And Workforce is the ,

Appellant.



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# FINAL REPLY BRIEF OF APPELLANT

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## I. Appellant's issues are properly preserved because the Administrative Law Court (ALC) ruled on the sufficiency of the proof of service to show Appellant's proper service.

"Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). Here, the ALC ruled on the sufficiency of the proof of service by denying the Department's motion based solely upon that document. (Order Denying Motion to Dismiss, p.1). The ruling that the proof of service was legally sufficient was implied by necessity. *See Church v. McGee*, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011) (holding that the grounds presented on appeal were preserved for review because the trial court's ruling was implied by necessity). Requiring Appellant to file a motion for rehearing to ask a question which has already been answered would serve only to require the harassment of judges for rulings that have already been given. The ALC unambiguously, albeit incorrectly, determined that the proof of service filed by Jiles with the ALC was legally sufficient and that it provided sufficient factual support to show Jiles served his notice of appeal on the Department. No further ruling from the ALC is necessary for the parties to know the ALC's stance on this issue. Therefore, the issue is preserved and properly before this Court.

Further, independent of whether the issue of the ALC's error of law was properly preserved, the sufficiency of the proof of service as evidence to support the ALC's factual determination is clearly still properly before this Court as the proof of service is the only evidence cited by the ALC to support its factual determination that Jiles served his notice of appeal on the Department. *See* S.C. Code Ann. § 1-23-610(B) ("The court of appeals . .

. may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . .").

## II. Respondent's interpretation of what Jiles meant by the writing on his proof of service is entirely speculative and not based on any support derived from the actual document.

In arguing that Respondent's proof of service is sufficient evidence that he complied with the service requirements of S.C. Code Ann. § 41-35-750, he states that "[h]ow Jiles referred to the Notice of Appeal in the Proof of Service is immaterial." (Res. Br. 11). His reasoning is that, although the proof of service does not identify the document he purports to have served on DEW, this Court should assume it was his Notice of Appeal and that this Notice of Appeal was served appropriately on DEW. *Id.*

These assumptions, however, are not evidence that the Notice of Appeal was properly served and the ALC erred in relying on them to excuse Respondent's failure to comply with his statutory appeal deadline. After all, Jiles had already once failed to properly serve DEW, prompting a letter from the ALC. (R.p.9). Reasonable minds could not conclude that this incomplete form document, which fails to identify the document served, which does not have the designated address for DEW's Office of General Counsel, and which DEW never received, constitutes proper service. To the extent there is any evidentiary value whatsoever, it surely cannot be more than a "mere scintilla." *See Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles*, 380 S.C. 600, 605, 670 S.E.2d 674, 676 (Ct. App. 2008) ("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.").

## III. Respondent, while proceeding pro se, assumed full responsibility for complying with substantive and procedural requirements.

Respondent argues that public policy considerations should prevent courts from dismissing an unemployment appeal due to a deficiency in a proof of service, which Respondent terms a "mere technicality." (Res. Br. p.12). In support of that argument, Respondent cites broad statements from the General Assembly and our Supreme Court regarding the public policy goals of unemployment laws. *Id.* These statements are inapplicable to the current situation. The validity and sufficiency of a proof of service are considerations that are unrelated to the identified public policy goals of unemployment legislation. Further, the requirement to properly serve all parties involved in the appeal is a statutory procedural requirement under Section 41-35-750 and holding a *pro se* litigant to a different standard than other petitioners before the courts would run counter to precedent. *See State v. Burton*, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003); *State v. Policao*, 402 S.C. 547, 558, 741 S.E.2d 774, 779-80 (Ct. App. 2013) (holding a *pro se* litigant is responsible "for complying with substantive and procedural requirements of the law.").

## IV. Respondent improperly includes material which does not appear in the Record and the Court should disregard that material.

Respondent improperly includes evidence related to the Department's mailing address which is not present in the Record and should not be considered by this Court. The proper address for service on the Department is P.O. Box 8597, Columbia, SC 29202, as was communicated to Jiles when he received the Panel's decision:

**NOTICE OF MAILING OF APPELLATE PANEL DECISION**

Attached is a copy of the final decision of SCDEW in this case. Any further appeal is to the South Carolina Administrative Law Court. To obtain judicial review of this decision, you must comply with the requirements of S.C. Code Ann. § 41-35-750 and the Rules of Procedure of the Administrative Law Court. The Court may require a filing fee.

The law requires that a Petition for Judicial Review must be filed with the Court and served on all parties and SCDEW within thirty (30) days from the mailing date of SCDEW's final decision **(see the mailing date above)**.

The address of the Administrative Law Court is:

**S.C. Administrative Law Court**
**Edgar A. Brown Building**
**1205 Pendleton St., Ste. 224**
**Columbia SC 29201**

Service of the Petition on SCDEW must be addressed and mailed to:

**Office of General Counsel**
**S.C. Department of Employment and Workforce**
**Post Office Box 8597**
**Columbia SC 29202**

SCDEW cannot advise a party on any legal matter. For legal advice or assistance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice law in South Carolina.

(R.p.28). Nowhere in the Record is any other address identified for the Director or for a person designated by the Department to receive service of process in legal matters. *See* Section 41-35-750 ("In [an action seeking judicial review of a Department decision,] a petition . . . must be served on the executive director or on a person designated by the department within [thirty days from the date of mailing the department's decision.]"). Respondent never argued to the ALC that DEW's website led him to an incorrect mailing address for DEW's Office of General Counsel or that he was trying to serve the Executive Director, as an alternative. Respondent seeks to now offer new evidence and a new explanation, as post hoc rationale for failing to comply with applicable rules of procedure and statutory deadlines. While Appellant does not believe that evidence offers sufficient

support for Respondent's argument, it is outside the Record, offered improperly for consideration by this Court, and should be disregarded in its entirety. *See* S.C. Code Ann. § 1-23-610(B) ("The review of the administrative law judge's order must be confined to the record.").

## V. The Panel appropriately considered Respondent's testimony about his dental appointment on the day of his hearing.

When asked why he missed the hearing, Jiles said it was because he had a dental appointment for his son:

> Hearing Officer: What you told me before, that you had missed the call and that you had called back, is there any other reason as to why you missed it other than that?
>
> Cortez Jiles: I think I had a dentist appointment as well at that date as well because I was doing a lot of dental work for my son . . .

(R.p.66, lines 19-23). Respondent characterizes this testimony as "simply recount[ing] to the hearing officer his other obligation for the day." But it is plain to see Jiles felt the dental appointment was, at least part of the reason, he missed the hearing. Reviewing this evidence, the Panel correctly noted that Jiles **indicated** he had a scheduling conflict. *Id.* That finding is clearly supported by substantial evidence as shown above, as the Panel appropriately relied on Respondent's own sworn testimony instead of parsing through Respondent's daily schedule to guess at what he meant, but did not say.

## VI. The Panel's reference to the hearing notice Jiles received is not reliance on an "unpromulgated guideline".

Respondent claims the Panel relied on an "unpromulgated 'guideline'" requiring Jiles to call in within ten minutes of the hearing time to find Jiles lacked good cause for his

absence from the Tribunal hearing and thus committed an error of law. (Res. Br. pp.7-8). The hearing notice Jiles received did not, however, instruct him to call within 10 minutes of the hearing time, instead it reads:

> If you have not been called within 10 minutes after the scheduled time of the hearing, you must call 803-737-2520. Either another hearing is still in progress, or we are unable to contact you. Failure to call or participate in the hearing may result in your interests being considered abandoned.

(R.p.56). In other words, the instruction was to contact the Department if, after ten minutes have passed, you have not received a call from the hearing officer. There is no specific time limit on when a party must contact the Department after that point. The passage does note a party's interests, namely their appeal, may be considered abandoned if they don't contact the Department or participate in the hearing; however, that statement is perfectly in accord with state law. *See* S.C. Code Ann. § 41-35-680 (providing the Department must afford the parties "reasonable opportunity for a fair hearing"); S.C. Code Ann. Regs. 47-51(D)(2) (2018) (permitting the Tribunal to "dismiss the appeal or issue a decision on the basis of the Department records" when an "appealing party fails to appear at the hearing").

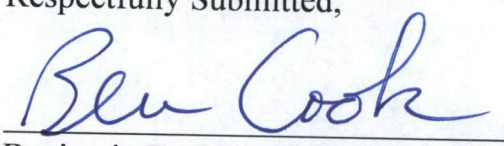
Further, the Panel did not condition its decision on Jiles's failure to contact the Department within ten minutes of the scheduled hearing time, which makes sense given that, as explained above, no such requirement to call that quickly exists. The Panel's decision twice references the instructions on the hearing notice directing Jiles to contact the Department in two scenarios: (1) he did not receive a call from the hearing officer within ten minutes or (2) if there was a schedule conflict. (R.p.30). The Panel's references to the directions in the hearing notice show Jiles had the opportunity and the information

necessary to take timely action in the event he was not reached at the call of the hearing. However, as has been previously shown, Respondent's objections to the instructions on the hearing notice don't warrant a judicial reversal of the Panel's factual finding as to whether Respondent had good cause to miss his appeal hearing. As stated previously, Jiles testified he was not available at the call of the hearing because he forgot about the hearing (R.p.65, lines 15-17), slept through it (R.p.64, lines 4-5), and did not contact the Department until after he woke up and realized he missed it (R.p.64, lines 5-7). Even taking Respondent at his word that he called twenty minutes after the hearing, there is evidence to support the Panel's decision that this scenario is not good cause for missing the Tribunal hearing.[1]

[Signature on Following Page]

[1] Although the Department maintains the Panel's finding that Jiles called in approximately one hour and ten minutes after the hearing time is supported by substantial evidence, the specific call time is not material to the outcome of the case and thus any mistake in the specific listed time does not prejudice Jiles in any way.

Respectfully Submitted,



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February 10, 2020