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SC Court of Appeals

**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. 20-ALJ-22-0216-AP

Appellate Case No. 2020-001506

Tamika E. Howard,

Appellant,

v.

**South Carolina Department
Of Employment and Workforce and
United Cerebral Palsy of South Carolina**

Respondents.

**INITIAL BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE**

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STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRM THE APPELLATE PANEL'S DECISION THAT DISMISSED APPELLANT'S APPEAL TO THE APPEAL TRIBUNAL BECAUSE IT WAS UNTIMELY FILED PURSUANT TO S.C. CODE ANN. § 41-35-660?

STATEMENT OF THE CASE

Appellant Tamika Howard (Appellant) filed a claim for unemployment insurance (UI) benefits with Respondent South Carolina Department of Employment and Workforce (the Department) on March 29, 2020. (ALC R.pp.4-11). Respondent United Cerebral Palsy of South Carolina, Appellant's employer, was notified of the claim and provided its response to the claim. (ALC R.pp.12-17). On May 5, 2020, the Department mailed the claim adjudicator's determination to Appellant, holding her ineligible to receive benefits pursuant to S.C. Code Ann § 41-35-120. (ALC R. pp.21- 22). Appellant appealed the determination to the Appeal Tribunal (Tribunal) on May 19, 2020. (ALC R.p.23).

On May 30, 2020, the Tribunal dismissed Appellant's appeal as untimely. (ALC R.p.25). Appellant appealed the dismissal to the Appellate Panel (Panel) on June 2, 2020. (R.p.26). The Panel remanded the case to the Tribunal to conduct an evidentiary hearing and render a decision on the issue of the timeliness of Appellant's appeal. (ALC R.p.27). After conducting a hearing, the Tribunal found Appellant's appeal was filed untimely and issued its decision dismissing her appeal on August 3, 2020. (ALC R. 60-62).

Appellant appealed the Tribunal's decision to the Panel. (ALC R.pp. 63-64). On August 25, 2020, the Panel issued the Department's final decision, affirming the Tribunal's decision upon finding Appellant filed her appeal to the Tribunal untimely.(ALC R.pp.1-3).

Appellant then appealed the Panel's decision to the Administrative Law Court. Following the Department's filing the record on appeal and the filing of briefs by Appellant and the Department, the ALC issued an order, dated November 5, 2020, affirming the Panel's decision. (ALC Order). Appellant now seeks judicial review from this Court.

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). Accordingly, the APA's standard of review governs appeals from final decisions of the Department's Appellate Panel. *See* S.C. Code Ann. §§ 1-23-380 & -600(E) (Supp. 2020). The appeal to this Court from the Order of the Administrative Law Court affirming the Department's final agency decision is brought pursuant to S.C. Code Ann. § 1-23-610 (Supp. 2020).

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 (B) (Supp. 2020).

This standard of review is commonly referred to as the substantial evidence rule. Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency". *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

“Substantial evidence” is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

Furthermore, “[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence.” *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353 461 S.E.2d 388, 391 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Appellant bears the burden “to prove convincingly that the agency's decision is unsupported by the evidence.” *Sea Pines Ass'n for Prot. Of Wildlife, Inc., v S.C. Dep't of Natural Res.*, 345 S.C.594, 603-04, 550 S.E.2d 287, 292 (2001).

On appeal to this Court from the ALC Order, “[t]he 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).

STATEMENT OF FACTS

Appellant filed a claim for unemployment insurance (UI) benefits with the Department on March 29, 2020. (ALC R.pp.4-11). Appellant's employer, Respondent United Cerebral Palsy of South Carolina, provided fact-finding statements to the Department regarding Appellant's employment status, stating that Appellant was "still employed – but recently requested personal leave for reasons that are personal in nature." The employer further stated Appellant was granted a medical leave of absence, starting 3/30/20 and continuing for up to 12 weeks. (ALC R.pp.4-17).

The claims adjudicator considered the statements from both parties and held Appellant was ineligible for unemployment benefits as to the issue of her separation from employment, finding in its determination:

You requested and were granted a leave of absence from your most recent bona fide employer for personal reasons. By filing for unemployment insurance benefits while on a leave of absence, you are considered to have voluntarily severed the employer/employee relationship without good cause under the South Carolina Code Section 41-35-120.

On May 5, 2020, the Department mailed this claims adjudicator's determination to Appellant at her address on record. (ALC R.p.21). The determination contained a distinctly separated outlined box in dark bolded print with appeal rights, which specifically stated:

IMPORTANT: This determination will be the final decision of the Department unless you file an appeal setting forth in detail the grounds for appeal by 05/15/2020. Your appeal may be filed via the MyBenefits Portal, by mail addressed to the "Appeal Tribunal, Post Office Box 995, Columbia, SC 29202," or by fax to 803-737-0287. For additional information on filing an appeal, contact the Appeals Department at 803-737-2520 or visit our website at www.dew.sc.gov/Individuals/manage-your-benefits/appeals.

(ALC R,p.21).

Pursuant to S.C. Code Ann. § 41-35-660, a party may file an appeal of an initial determination not later than ten (10) days after the determination was mailed to the last known address of the party. In this case, the Department mailed the determination to Appellant's last known address on May 5, 2020, and therefore, Appellant was required to file her appeal no later than May 15, 2020. Moreover, the appeal deadline date of May 15, 2020, was expressly listed on the determination. (ALC R.p.21). The determination also notified Appellant of the available methods for filing an appeal by mail, online, or by fax to the Department. Despite clear notice of the appeal deadline and the finality of the decision if not appealed by May 15, 2020, Appellant filed an untimely appeal on May 19, 2020, four (4) days after the appeal period expired. (ALC R.p.23).

At the hearing on the timeliness of the appeal, Appellant confirmed the Department had mailed the determination to her correct address and acknowledged she received the determination. (ALC R.p.44). She admitted she was aware the May 5, 2020, determination held her ineligible for benefits, and she did not timely appeal it. (ALC R.p.44).

Appellant asserted she did not realize she needed to appeal it, despite knowing the determination clearly held her ineligible for benefits and knowing it would be final if not appealed by the May 15, 2020 deadline,

Appellant also stated she was confused because she had other claim issues affecting her eligibility for benefits on other grounds. Specifically, Appellant had stated in her initial fact-finding responses on her claim application that she had a major health condition and she was not able to seek and/or accept full-time work without restrictions. (ALC R.p.11). S.C. Code Ann. § 41-35-110 requires as a specific condition for benefit eligibility that a

claimant must be able, available, and actively seeking work each week that a claim for UI benefits is filed. As to this issue, Appellant had previously received, and timely appealed, an April 14, 2020, determination holding her ineligible for benefits because she was not able and available to work under S.C. Code Ann. § 41-35-110, as is required to receive unemployment benefits. (ALC R.pp.18-20).

The subsequent May 5, 2020, determination found Appellant was disqualified from UI benefits based on her voluntary severance from employment without good cause pursuant to S.C. Code Ann. § 41-35-120. (ALC R.p.21). Appellant received the May 5, 2020, determination holding her ineligible for benefits for these reasons, and knew that it would be final unless she appealed it by May 15, 2020. Nevertheless, Appellant did not appeal it and let the appeal deadline lapse.

Appellant stated she later realized her error and filed an appeal after she contacted the Department to seek assistance, but this was after the appeal period expired. (ALC R.p.59). Appellant appealed on May 19, 2020, stating her appeal was untimely because she “did not understand [she] had to appeal each decision”. (ALC R.p.23). The Tribunal found Appellant’s appeal was untimely and dismissed it. (ALC R.pp.61-62).

Upon Appellant’s further appeal to the Panel, the Panel agreed the attempted appeal was filed untimely and affirmed dismissal of her appeal. (ALC R.pp.2-3; pp.68-69).

Specifically, the Panel found the following:

The Department properly mailed the claims adjudicator’s determination to the [Appellant’s] address of record on May 5, 2020. The deadline to file an appeal was May 15, 2020. The record established the [Appellant] filed an appeal on May 19, 2020, four days after the appeal period expired. The [Appellant] was aware of the determination, yet she waited to file an appeal

because she erroneously believed the April 15, 2020 appeal applied to the subsequent separation determination. The [Appellant] filed an untimely appeal due to her own error or neglect by failing to act in a diligent manner to preserve her appeal rights. Therefore, we find the May 19, 2020, appeal to the Appeal Tribunal was properly dismissed, and the separation determination is final.

(ALC R.p.3; p.65).

Appellant appealed the Panel's decision to the ALC, and the ALC affirmed the Panel's decision dismissing the appeal as untimely. The ALC found the Panel's decision was supported by substantial evidence and the Panel properly dismissed Appellant's appeal as untimely under S.C. Code Ann. § 41-35-660.

ARGUMENT

The Administrative Law Court correctly affirmed the Department's Appellate Panel because the Panel's decision dismissing Appellant's appeal as not timely filed pursuant to S.C. Code Ann. § 41-35-660 is supported by substantial evidence and is correct as a matter of law.

The Appellate Panel's decision dismissing Appellant's appeal because it was untimely filed is supported by substantial evidence on the whole record and is correct as a matter of law. The Panel found: (1) the Department properly mailed the claims adjudicator's determination to the Appellant's address of record on May 5, 2020; (2) the deadline to file an appeal was May 15, 2020; (3) Appellant was aware of the determination but did not file her appeal until May 19, 2020, four days after the appeal period expired; (4) Appellant's untimely appeal was due to her own error and her failure to act in a diligent manner to preserve her appeal rights. (ALC R.pp.2-3; pp.68-69).

The Panel's findings are supported by substantial evidence in the record, including Appellant's own testimony, and the Panel's decision is correct as a matter of law. It is undisputed that the Department properly mailed the adjudicator's determination to Appellant on May 5, 2020, and Appellant received it. Appellant acknowledged she read it and she was aware the determination held her ineligible for benefits under S.C. Code Ann. § 41-35-120 for the reasons described in the determination. Pursuant to statute, Appellant was required to file her appeal in this case no later than May 15, 2020, and this deadline date was expressly shown on the determination. It is undisputed that Appellant missed the appeal deadline and did not file her appeal until May 19, 2020, four days beyond the expiration date for a timely appeal. The record establishes that Appellant's untimely appeal

was due to her own neglect or error. Appellant erroneously believed that an appeal she had filed regarding a different determination on April 15, 2020, somehow meant that she did not need to appeal the May 5, 2020, determination, even though it was not in existence at the time and held Appellant ineligible for benefits on a distinctly separate basis under S.C. Code Ann. § 41-35-120. Moreover, the May 5, 2020 determination contained a clear and specific notice on its face that it would be final unless Appellant appealed it by May 15, 2020. Nevertheless, Appellant allowed this deadline to pass, and filed an untimely appeal on May 19, 2020, after ultimately contacting the Department to make an inquiry.

Therefore, the Panel's findings are clearly supported by substantial evidence in the record and accordingly, are binding on the appellate court. The Panel properly affirmed the Tribunal's decision finding the appeal untimely and dismissing it, and the ALC correctly affirmed the Panel's decision as a matter of law.

Pursuant to S.C. Code Ann. § 41-35-660, a claimant may file an appeal from a determination "not later than ten days after the determination was mailed to his last known address." The statute contains no exception permitting an untimely appeal, even for reasons of mistake, inadvertence or good cause. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and a court must apply the statute according to its literal meaning. *E.g., Sloan v. Hardee*, 371 S.C. 495, 498-99, 640 S.E.2d 457, 459 (2007). Section 41-35-660 states unambiguously that a claimant must file an appeal from a determination "not later than ten days after the determination was mailed to his last known address." Given that "[c]ompliance with statutory time periods for filing appeals is a prerequisite for any appellate entity to have jurisdiction to

hear an appeal,” the Appeal Tribunal did not have appellate jurisdiction over Appellant’s untimely appeal. *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl. Control*, 380 S.C. 349, 376, 669 S.E.2d 899, 913. (Ct. App. 2008) (internal citations omitted).

Appellant’s explanation surrounding her untimely appeal amounts to a request for leniency and that the appeal period be extended. However, the question of compliance with the statutes, regulations, and rules governing an appeal is one of appellate jurisdiction, and an appellate body may not extend the time to appeal. *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188-89, 714 S.E.2d 547, 549-50 (2011). Consequently, the timely filing of a notice of appeal is a jurisdictional requirement, and neither the Tribunal, the Panel, the ALC, nor this Court has the authority to extend the time in which the claimant must file the appeal. *See Hill v. S.C. Dep’t of Health & Env’tl. 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)). South Carolina Courts have consistently held that “untimely service of an appeal is a jurisdictional requirement that cannot be waived.” *Olson v Faculty House of Carolina, Inc.* 244 S.C. 194, 214, 544 S.E.2d 38, 48 (Ct.App.2001).

In sum, the statutes setting forth Appellant's obligation to timely file an appeal are clear and unambiguous, and cannot be waived. Substantial evidence in the record establishes that Appellant failed to file an appeal within the mandatory time limits statutorily required for an appeal. As a result, the Panel correctly found the appeal was filed untimely and properly dismissed it. Therefore, the ALC's decision affirming the Panel's decision is correct as a matter of law and this Court should affirm.

Appellant's brief contains matters that are not properly before this Court, are outside the record on appeal, exceed the scope of appellate review of this appeal, and therefore, should not be considered.

The issue in the appeal to the ALC, and now the same issue on appeal to this Court, is whether substantial evidence exists in the record to support the Department's decision dismissing Appellant's appeal as untimely filed under S.C. Code Ann. 41-35-660. As Respondent has previously explained, the ALC's order affirming the Department's finding to that effect is clearly supported by substantial evidence and is correct as a matter of law.

In her brief to this Court, Appellant raises other issues and arguments which are related to her employment status with Respondent United Cerebral Palsy of South Carolina. (Appellant's Amended Brief, Issues 3, 4, 5, 6). However, these matters are not relevant to the appeal of the ALC Order to this Court, and instead pertain to separate matters that are not properly an issue before this Court in its appellate review of this appeal. Because Appellant failed to file a timely appeal of the May 5, 2020, determination, the Tribunal, the Panel, and the ALC did not have jurisdiction and did not consider or rule on these other matters. Therefore, Appellant's other asserted issues and arguments are not properly before this Court for its consideration, are outside the record on appeal, and exceed the scope of

judicial review of this appeal, and therefore, should be disallowed. *See Timms v. Timms*, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985). (“We are confined to the record in deciding issues on appeal.”). *See also Senn v. Spartanburg Cty.*, 192 S.C. 489, 7 S.E.2d 454, 456 (1940) (“[A]s a general rule if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction on the appellate court.”)

CONCLUSION

Based on the foregoing, the Department respectfully submits this Court should affirm the Order of the ALC. Substantial evidence supports the Panel’s decision and the Panel’s decision is correct as a matter of law. 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.

Respectfully Submitted,



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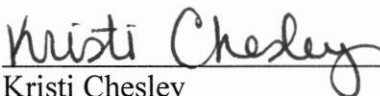
PROOF OF SERVICE

I certify that I have served the Respondent DEW's Initial Brief and Designation of Matter on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, and by email on March 25, 2021, addressed to the parties at their addresses of record:

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SC Court of Appeals

VIA EMAIL AND US MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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RE: Tamika E. Howard v. South Carolina Department of Employment and
Workforce and United Cerebral Palsy of South Carolina
Appellate Case No: 2020-001506

Dear Ms. Kitchings:

Enclosed is the original Initial Brief and Designation of Matter of the Respondent in the above referenced case. A Proof of Service is also included in this packet.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kristi Chesley".

Kristi Chesley
Administrative Legal Assistant for
Sandra Grooms
Attorney for Respondent South Carolina
Department of Employment and Workforce