

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

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APR 04 2013

The Honorable Deborah Brooks Durden

SC Court of Appeals

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

RECORD ON APPEAL, VOLUME 1

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INDEX

Orders / Judgments / Decrees/ Decisions

1.	Court of Appeals Order Reinstating Appeal dated June 6, 2012	1
2.	Court of Appeals Order Dismissing Appeal dated March 23, 2012	2
3.	SCDEW Appellate Panel Decision No. 2011-P-2740 dated December 9, 2011	4
4.	Court of Appeals Order Dismissing Appeal dated October 13, 2011	8
5.	Appeal Tribunal Decision No. 2011-A-15157 dated August 18, 2011	11
6.	Order of Administrative Law Court dated May 24, 2011	13
7.	SCDEW Appellate Panel Decision No. 2010-C-2253 dated November 19, 2010	20

Pleadings / Motions / Briefs / Notices of Appeal

8.	Nucor Reply to Opposition for Rehearing dated April 23, 2012	24
9.	Legette Opposition to Nucor's Petition dated April 17, 2012	35
10.	SCDEW Opposition to Nucor's Petition dated April 16, 2012	38
11.	Nucor Petition for Rehearing and Rehearing <i>En Banc</i> dated April 9, 2012	41
12.	Nucor's Reply Brief on Appealability dated February 24, 2012	76
13.	Legette Memorandum on Appealability dated February 13, 2012	91
14.	SCDEW Memorandum on Appealability dated February 13, 2012	102
15.	Nucor Memorandum on Appealability dated February 13, 2012	113
16.	Nucor's Notice of Appeal to Court of Appeals dated January 9, 2012	181
17.	Nucor Brief to SCDEW Appellate Panel dated November 30, 2011	190
18.	Legette Brief to SCDEW Appellate Panel dated November 30, 2011	202

19.	Legette Reply to Return to Motion to Dismiss dated September 10, 2011	235
20.	SCDEW Response to Motion to Dismiss dated September 6, 2011	241
21.	Nucor Return to Motion to Dismiss dated September 2, 2011	243
22.	Legette Motion to Dismiss appeal to Court of Appeals dated August 23, 2011	259
23.	Legette appeal to Appellate Panel dated August 22, 2011	276
24.	Amended Notice of Appeal to Court of Appeals dated July 5, 2011	278
25.	Notice of Appeal to Court of Appeals dated June 22, 2011	287
26.	SCDEW Return to Motion for Hearing/Oral Argument dated June 10, 2011	296
27.	Nucor Motion for Hearing / Oral Argument dated June 2, 2011	300
28.	Respondent Legette <i>pro se</i> Reply	303
29.	Appellant Nucor Reply Brief to ALC dated April 4, 2011	307
30.	Respondent Legette <i>pro se</i> Brief to ALC dated March 21, 2011	320
31.	Respondent SCDEW Brief to ALC dated March 21, 2011	326
32.	Appellant Nucor Brief to ALC dated February 17, 2011	336
33.	Nucor Petition for Judicial Review to ALC dated December 14, 2010	366

Transcripts / Record on Appeal from Prior Appeal / Exhibits

34.	Transcript of Appeal Tribunal Hearing No. 10129-15740 dated August 15, 2011	371
35.	Supplement to ALC Record on Appeal labeled Supplement 1-26 dated March 21, 2011	541
36.	SCDEW Record on Appeal to ALC dated January 24, 2011	569

Other Materials

37.	ALC letter dated April 4, 2012	852
38.	Ralephata letter dated March 28, 2012 (without duplicative attachments)	853

39.	Court of Appeals letter dated February 2, 2012.....	857
40.	ALC Email dated June 14, 2011	858
41.	SCDEW letter to Nucor Counsel dated June 7, 2011	859

The South Carolina Court of Appeals

Nucor Corporation, Appellant,

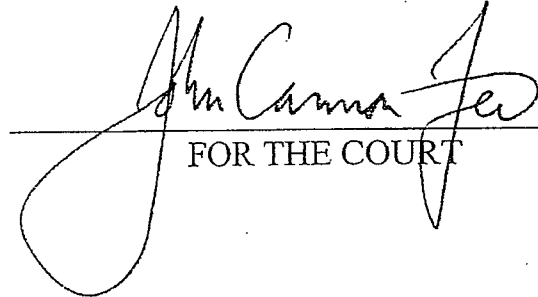
v.

South Carolina Department of Employment and
Workforce and Kim A. Leggette, Respondents.

Appellate Case No. 2012-206406

ORDER

After careful consideration of Appellant's petition for rehearing and Respondents' returns, I find my prior order was erroneous; therefore, this appeal is reinstated. Nothing in this order prevents the parties from raising the issue of appealability in their briefs.

 C.J.
FOR THE COURT

Columbia, South Carolina

cc:

Anne E. Mjaatvedt

Nosizi Ralephata

John S. Wilkerson, III

Romi Yolanda Robinson

FILED

Harter 6/6/12

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Leggette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 2010-AL-22-00938

ORDER

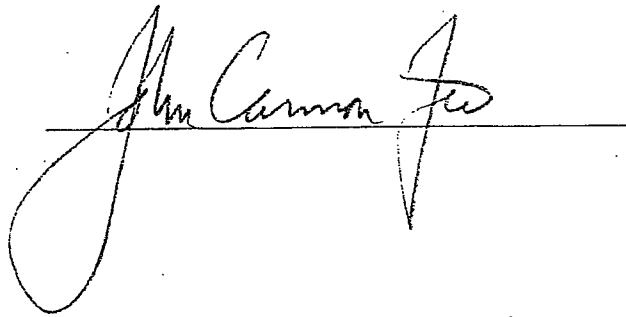
Appellant has filed a notice of appeal from the Administrative Law Court's order remanding this case to the South Carolina Department of Employment and Workforce for a new hearing to determine whether Respondent Kim A. Legette was disqualified to receive unemployment benefits pursuant to section 41-35-750 of the South Carolina Code (Supp. 2011). After preliminary review, this Court requested that the parties submit appealability memoranda.

The parties have now submitted their memoranda and, after careful consideration, this appeal is dismissed because the order on appeal is not a final order. See S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental

Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

IT IS SO ORDERED.

Columbia, South Carolina

A handwritten signature in black ink, appearing to read "John S. Wilkerson, III", is written over a horizontal line.

cc: John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy

FILED

RC 3/23/12

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
 517 Laurel Ridge Road)
 North Charleston, SC 29418)
 Claimant SSN: 235-11-8079)
 _____)
 Nucor, Corp.)
 c/o Human Resources)
 Post Office Box 2259)
 Mt. Pleasant, SC 29465)
 Liable Employer)
 _____)

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

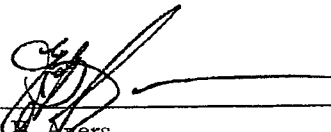
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

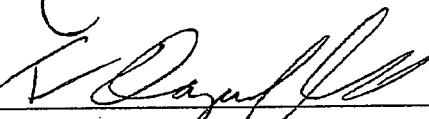
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

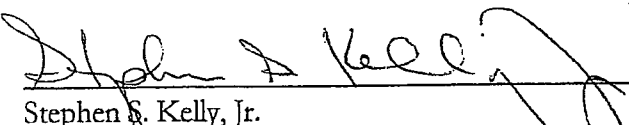
**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Myers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 11/30/11

Date Mailed: 12/9/11

Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Legette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 10-ALJ-22-0938-AP

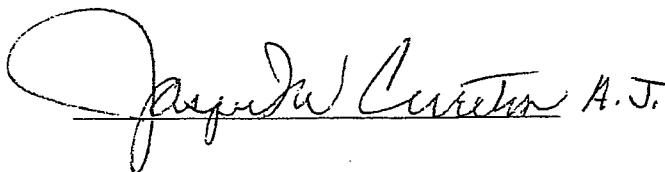
ORDER

Kim A. Legette (Legette) filed a claim for unemployment benefits on April 23, 2010, with the Department of Employment and Workforce (Department) after being discharged from her employment with Nucor Corporation (Nucor). The claims adjudicator found Nucor discharged Legette for cause connected with the employment and that accordingly, subsection 41-35-120(2) of the South Carolina Code (Supp. 2010) disqualified Legette from receiving benefits. The Appeal Tribunal affirmed the claims adjudicator's decision to deny Legette benefits, but found subsection 41-35-120(3), which addresses discharge for illegal drug use, disqualified her from receiving benefits. Legette appealed, and the Appellate Panel reversed the Appeal Tribunal's decision, finding Nucor failed to prove it discharged Legette for cause pursuant to subsection 41-35-120(2) or for gross misconduct pursuant to subsection 41-35-120(4). Nucor appealed the Appellate Panel's decision, and the Administrative Law Court

(ALC) affirmed the Appellate Panel's holding that Legette was not disqualified from receiving unemployment benefits pursuant to subsections 41-35-120(2) or (4). However, the ALC found the Appellate Panel failed to address whether subsection 41-35-120(3), regarding illegal drug use, disqualified Legette from receiving unemployment benefits. Accordingly, the ALC remanded the matter to the Department for a determination of whether Legette's discharge disqualified her from receiving benefits pursuant to subsection 41-35-120(3). Nucor appealed the order to this Court, and Legette filed a motion to dismiss, arguing the order was not immediately appealable.

After a careful consideration of the parties' memoranda and other filings, this Court dismisses this appeal as not immediately appealable because the underlying order was not a final decision. See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (holding section 1-23-610 of the South Carolina Code (Supp. 2010) governs the appealability of appeals from the ALC and limits review to final decisions); id. at 267, 692 S.E.2d at 894-95 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. . . . A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined (internal citations omitted)).

IT IS SO ORDERED.

A.J.

FILED
10/18/11

Columbia, South Carolina

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson, Esquire
Nosizi Ralephata, Esquire

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

DECISION OF APPEAL TRIBUNAL

Hearing Date: August 15, 2011

KIM A. LEGETTE
517 LAUREL RIDGE RD
NORTH CHARLESTON, SC 29418

CLAIMANT

NUCOR CORPORATION
C/O HUMAN RESOURCES
PO BOX 2259
MOUNT PLEASANT, SC 29465

EMPLOYER

APPELLANT: Employer

SS NO: 235-11-8079

APPEARANCES

FOR THE CLAIMANT: Present One Attorney

FOR THE EMPLOYER: Four Witnesses One Attorney

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for illegal drug use pursuant to South Carolina Code §41-35-120(3).

The claimant appealed the initial claims adjudicator's determination mailed May 27, 2010, which held the claimant disqualified from receiving benefits for twenty-six weeks effective April 18, 2010, through October 16, 2010, upon a finding the claimant was discharged for illegal drug use. The claimant appealed that determination to the Appeal Tribunal, which affirmed the disqualification in Appeal Tribunal Decision Number 2010-A-11555, mailed on July 19, 2010. The claimant subsequently appealed that decision to the Appellate Panel and the Panel, in their decision mailed November 19, 2010, reversed the Appeal Tribunal decision and held the claimant eligible for benefits.

The employer appealed the Appellate Panel Decision No. 2010-C-2253 mailed November 19, 2010, which held the claimant eligible for benefits without disqualification effective April 18, 2010, upon a finding the employer failed to establish that it discharged the claimant for illegal drug use. The Administrative Law Court in Case Number 10-ALJ-22-0938-AP, dated May 24, 2011, remanded the issue to the Appeal Tribunal to determine whether the claimant was discharged for illegal drug use under S.C. Code §41-35-120(3).

The claimant worked from August 24, 1998, to April 22, 2010, with the subject employer, most recently as a cold mill scheduler. The subject employer discharged the claimant after she failed to pass a drug screen.

The subject employer maintains a policy, of which the claimant was aware, prohibiting employees from using illegal drugs. The claimant was selected for a random drug test and provided a hair specimen, which was collected and labeled by a licensed health-care professional. The specimen was sealed in the claimant's presence and she signed a document indicating the specimen was hers. The test was performed by a laboratory certified by the United States Department of Health and Human Services and subsequently confirmed using the gas chromatography/mass spectrometry method.

The claimant asserts the laboratory was not properly certified by an entity proscribed in §41-35-120(3), which states in relevant part, that the test must be "performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division." The laboratory utilized by the subject employer is not certified by either the College of American Pathologists or the State Law Enforcement Division.

The employer submitted evidence indicating the laboratory in question is certified to accept human specimens for the purposes of performing laboratory examinations or procedures, effective July 1, 2009, by the Clinical Laboratory Improvement Amendments (CLIA.) The evidence, a certificate issued by the Centers for Medicare and Medicaid Services, contains a clear watermark of the

Department of Health and Human Services. The employer presented further evidence that the Centers for Medicare and Medicaid Services are a part of the United States Department of Health and Human Services.

The National Institute for Drug Abuse (NIDA), as proscribed in the relevant statute, no longer exists and thus NIDA certifications no longer exist. The Department of Health and Human Services (HHS) was reorganized and laboratories that were once "NIDA-certified" are now considered either "HHS-certified" or "SAMHSA-certified."

The claimant maintains she does not use drugs and she initiated her own drug test on March 5, 2010, and again on April 15, 2011, both of which came back negative for drugs. The claimant adamantly asserts that her own test should negate those given by the subject employer. However, there is no provision in the statute allowing for one's own drug test to negate the employer's test if the test meets the statutory requirements.

REASONS

South Carolina Code provides in §41-35-120(3) for an indefinite disqualification of benefits if a claimant is found to have been discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment.

An illegal or unlawful drug related violation must meet the provisions outlined in Section 41-35-120(3) (a) through (c). "Unlawful" means without a prescription. Those provisions, in summary are: the company must have communicated a drug policy; show the worker failed or refused to provide a specimen; or otherwise cooperate in providing an unadulterated specimen; show the worker provided a specimen which tested positive; the sample was collected and labeled by a licensed health care professional; the test was performed by a certified laboratory; the initial test was confirmed using the gas chromatography/mass spectrometry; and provide documentation of such; or show the worker failed to follow the employer's policy for admitted drug use and provide documentation of such. Documentation may be used and received into evidence for the purposes of determining eligibility for unemployment compensation.

In this case, an employer has the right to expect its employees to adhere to a reasonable standard of behavior. The best evidence available to the Tribunal establishes that the claimant submitted to a drug test which came back positive for an illegal drug. The Tribunal further finds the test itself and the lab that administered the test meet all of the statutory requirements of the above law. Although the claimant maintains no wrongdoing, the Tribunal finds the greater weight of the evidence and testimony in this case favors the employer. The claimant's conduct represents a failure to adhere to the employer's reasonable expectations and disregard of the employer's reasonable interests. Therefore, the Tribunal finds the employer discharged the claimant for illegal drug use pursuant to South Carolina Code §41-35-120(3) and an indefinite disqualification is required.

DECISION

Appeal Tribunal Decision No. 2010-A-11555 and Appellate Panel Decision No. 2010-C-2253 are hereby vacated.

The Tribunal finds the claimant disqualified indefinitely effective April 10, 2010, until requalification, upon a finding claimant was discharged for illegal drug use. This decision modifies the claims adjudicator's determination mailed May 27, 2010, and may result in an overpayment in benefits to the claimant.

This will be the final decision of the agency unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date. If the tenth day falls on a Saturday, Sunday, or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," PO Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center.



Matthew S. Brown
Administrative Hearing Officer

MSB: KLT

Decision Mailed: 08/18/11

Mailed on the above Date By: KLT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Docket No. 10-ALJ-22-0938-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

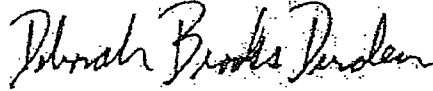
The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

November 19, 2010

**SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina**

LETTER OF TRANSMITTAL OF APPELLATE PANEL DECISION

Attached is a copy of the Appellate Panel Decision in your case. If you have questions about the effect of the decision, you may consult an agency representative at the local SCDEW office in your area or at the Benefits Division at the central office in Columbia, S.C.

If you wish to obtain judicial review of the decision, you must comply with the requirements of S.C. Code Ann. §41-35-750 and the Rules of Procedure for the Administrative Law Court.

The law requires that a Petition for Judicial Review must be filed and served within thirty (30) days after the agency's final decision (**see the mailing date above**). The Court may require a filing fee.

The Petition must be filed in the S.C. Administrative Law Court in Columbia, South Carolina:

**Jana E. Shealy, Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
803.734.0550 (phone)**

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NOV 22 2010

You must name the SCDEW and any other party in the case as defendants in the action and you must serve a copy of the Petition for Judicial Review at the following address:

**Legal Department
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202**

For assistance or guidance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

Form App-115
Rev. 6/25/10

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Legette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)

APPELLATE PANEL
DECISION

Nucor Corporation)
c/o Human Resources)
PO Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

Appellant: Claimant

NUCOR STEEL BERKELEY

LEV 22 2010

MELAN REYNOLDS

The claimant appealed Appeal Tribunal Decision 2010-A-11555 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified for having been discharged for cause connected with the work. This decision modified the claims adjudicator's determination.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2010-A-11555 is reversed. The claimant is eligible for benefits effective April 18, 2010, for having been separated under nondisqualifying circumstances.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, as a cold mill scheduler. The claimant was discharged after testing positive for an illegal drug in a random drug screen. The claimant asserted the drug testing was faulty. The claimant had previously tested positive for 6.25 picograms per milligram of marijuana on February 13, 2010, only to test negative ten days later. On April 6, 2010, she tested 1.25 picograms and then retested a trace amount of .78 on April 15, 2010. The claimant underwent testing at a different facility that used the same laboratory as the employer and tested negative for any drugs on three occasions, including April 15, 2010. The claimant was adamant that she did not use drugs, and

although the employer stated they do not accept off-site drug testing results, the claimant's drug expert made a point of using the same laboratory so they could be assured the testing was not undermined. The process of collecting the samples was different and may have made a difference in the results, according to the claimant's drug testing expert.

S.C. Code Ann. § 41-35-120 (4) requires that an indefinite benefit disqualification be imposed when the Department finds that a claimant has been discharged for gross misconduct connected with the employment. "Gross Misconduct" includes failure to comply with drug use regulations.

The burden of proving that a claimant has been discharged for cause rests with the employer and after a thorough review of the evidence in this case we have concluded that the employer has not met that burden. The disparate testing results concern us and while the employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free. Therefore, we find the claimant was separated under nondisqualifying circumstances and the Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**

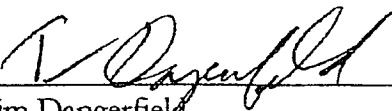


E. B. Ayers

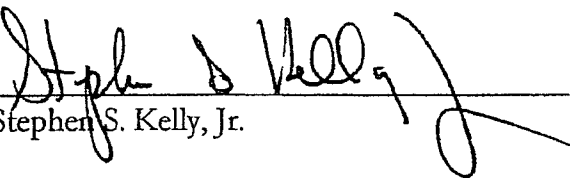
Hearing Date: 11/17/10

Date Mailed: 11/19/10

Mailed By: _____



Tim Dangerfield



Stephen S. Kelly, Jr.

In the Matter of Kim A. Legette v. Nucor Corporation
Decision No. 2010-C-2253
Appeal No. 10377-11778

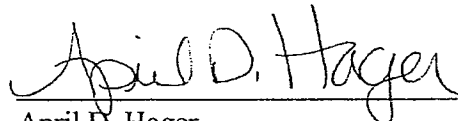
CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2010, a copy of the *Petition for Judicial Review and Hearing Transcript Request* has been served upon the following by placing same in the United States Mail, postage prepaid, to:

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Legal Department
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

Ms. Kimberly A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418


April D. Hager

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

RECEIVED
APR 23 2012

The Honorable Deborah Brooks Durdan
Docket No.: 10-ALJ-22-0938-AP

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S REPLY TO RETURN IN OPPOSITION
TO PETITION FOR REHEARING AND REHEARING *EN BANC*

It is unassailable law in South Carolina that an order is final when there is nothing left to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). Neither this Court, the ALC, nor Respondents have articulated or pointed to any "open questions of fact" or outstanding issues that must be resolved for the orders to become "final." *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). The reason is because there is nothing else left to be done except execute judgment, or appeal to this Court. The fact

that Nucor did not appeal the Appellate Panel's decision of December 9, 2011 to the ALC does not make the issues decided by the ALC any less final, including application of S.C. Code Ann., § 41-35-120¹(2) and (4) – which were clearly fully resolved in the May 24, 2011 Order. Nucor has done everything to preserve its appeal rights in this case, including a timely appeal in June 2011 after the ALC Judge had notified the parties in writing that her Order was final as to Sections (2) and (4) of the Statute; and a timely appeal on January 9, 2012, after the Agency had issued its final decision with regard to the certification issue. Respondents candidly admit that the Agency's decision of December 9, 2011, finally resolved the only outstanding issue that had been remanded back by the ALC.² The ALC likewise, has repeatedly informed the parties that its May 24, 2011 order is final as to the issues decided therein, except the certification issue, which was resolved with finality on December 9, 2011. It is patently clear that Respondents' basis for supporting dismissal of the appeal arises out of Respondents' unwillingness to address the legal issues that were timely raised by Nucor both to the ALC and to this Court. However, reluctance to address meritorious legal questions, after all factual issues have been resolved, is not a basis for denying a party an appeal as of right.

¹ S.C. Code Ann., § 41-35-120, including the applicable sections is referred to herein as "the Statute".

² See, p. 2 of Agency's Return in Opposition to Petition: "The remanded proceedings included a de novo evidentiary hearing before the Department, and oral/written arguments before the Appellate Panel, and a *final agency decision in the matter was issued on December 9, 2011.*" (Emphasis added). See also, p. 1 of Legette's Return in Opposition to Petition: "The final order in this entire matter is the Appellate Panel's December 9, 2011 Decision (Appellant's Ex. D.)" (Emphasis in original).

In the alternative, if the Court is still of the opinion that there is no final decision, Nucor respectfully requests that the Court issue an instruction requiring the ALC to issue an order that this Court will consider "final" so that Nucor is not unfairly prejudiced and deprived of its right to appeal.

Nucor has consistently argued that the Appellate Panel's acceptance of an independent drug test as controlling, with no evidence that it comported with the statute, is in contravention of the statute's mandate and outside the scope of the Agency's authority, and therefore, improper basis for reinstating Claimant's benefits under Section (4). Nucor also argued that the Appellate Panel has no authority to apply additional or different criteria or exceptions to the plain mandates of the statute, and these issues were presented as questions of law for the ALC to resolve. The ALC simply affirmed the Agency's reinstatement of benefits under Section (4) without addressing the substantive issues raised on appeal to that body, and chose instead, to remand for additional fact finding, the single narrow issue of whether the laboratory was certified as required under the Statute. However, whether or not the laboratory is properly certified is not the dispositive question in this case. Neither does certification moot the issues raised on appeal, including interpretation and application of Sections (2), (3)(c), and (4) to this dispute, and whether the Agency was authorized to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer. These issues were timely raised to the ALC, and have been timely raised on appeal to this Court.

None of the Respondents have argued, nor can they argue that these issues were remanded for further proceedings at the Agency level. Indeed, Respondents cannot assert

any such arguments as a matter of law because these are legal issues that cannot be resolved by the trier of fact. Similarly, none of the Respondents have argued, nor can they argue, that the May 24, 2011 Order is not final as to application of Section (2) and (4) to this dispute. Judge Durden makes it clear that her order applies with finality as to those Sections. Thus, the only option available to Nucor is to appeal that order to this Court. Respondents' entire basis for supporting an unjust dismissal of Nucor's fundamental right to appeal a final order stems from the unprecedented view that by not appealing the certification issue only, Nucor has waived, as a matter of law, *all* other issues that were timely raised to both the ALC and to this Court, twice. There is no legal support for such a position, neither have Respondents cited to any.

Likewise, Respondents' assertion that the May 24, 2011 Order remanded the entire case to the lower tribunals not only is incorrect, but also stands in direct contradiction to their previous arguments to this Court in response to its request for briefing on appealability of the orders. There, Respondents argued that the appeal should be dismissed because the issue of certification was still pending in the lower tribunals. In fact, when Nucor attempted to appeal the ALC's Order regarding interpretation and applicability of Sections (2) and (4) in June 2011, both Respondents argued that the appeal was not ripe because the issue of certification had been remanded back to the Agency, asserting that:

“However, the same [ALC] Order also remanded the matter to SCDEW based on its holding that the Appellate Panel did not make a finding regarding disqualification on the basis of §41-35-120(3), *and ordered the SCDEW to consider the issue of whether the drug test laboratory was properly certified under §41-35-120(3).*

“.... [H]owever, *this appeal is prematurely filed because the issue of disqualification under Section (3) is under consideration* through the Department’s administrative tribunals.”

See, Respondent Legette’s Brief of August 23, 2011 to this Court at p. 2 (Emphasis added). The Agency filed a Response concurring in, and joining in Legette’s Motion to Dismiss of August 23, 2011. As set forth in the Agency’s own written correspondence, the sole issue that the Agency requested that the parties brief and argue was whether the CLIA/HHS certificate was sufficient and/or equivalent to the NIDA certification required under the Statute.³ For the Agency to now argue that the entire case was remanded for a full hearing on all the issues, which in turn required Nucor to appeal back to the ALC *all* the issues, including issues that had already been fully resolved is a thinly veiled attempt to deprive Nucor of its right to appeal a final order.

The April 4, 2012 letter from the ALC is likewise, specific and reiterates that the ALC’s May 24, 2011 order is final: “With this Order, this Court closes its docket in this matter. Should Appellant desire to review the Department’s decision on remand, she will be required to file a separate notice of appeal from the determination.”⁴ That same order that the Agency is now incorrectly mischaracterizing as remanding *all* issues provides:

“Upon consideration of the record and briefs, this case must be *remanded back* to the Department *to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code §41-35-120(3)* which deals with discharge based upon positive drug tests.”

May 24, 2011 order at p. 1. (Emphasis Added).

It is also noteworthy that when this case was initially argued before the Appeal Tribunal in July 2010, none of the parties were represented by counsel, and at that

³ See, Exhibit 1, attached hereto.

⁴ See, April 4, 2012 correspondence from ALC, attached to Petition as Exhibit A.

hearing that the adjudicator found that the laboratory *was* certified as required under South Carolina law.⁵ Thus, when Nucor appealed to the ALC, all the arguments were based on a Record and documents that had been accepted and made part of the proceedings by the Agency and its tribunals. The propriety of the laboratory's certification was only raised as an issue by the Agency in response to Nucor's appeal to the ALC (after it had initially accepted and held that the laboratory was properly certified under South Carolina law). It was on this basis that the certification issue was remanded. On remand, the parties were specifically instructed by the Appellate Panel to come prepared to address the certification issue.⁶ Based on multiple reassurances from the laboratory regarding the lack of a hair specimen certification program by the College of American Pathologists ("CAP") and literature available online,⁷ Nucor argued that the laboratory met the certification requirements. However, the Agency's Appellate Panel *sua sponte* contacted CAP directly, and determined, based on correspondence from CAP, that the laboratory was *not* properly certified. Nucor subsequently received correspondence directly from CAP confirming that its hair certification program was available at the time of the subject test, and that the laboratory could have obtained such certification (assuming it met the relevant criteria). As a result, Nucor did not appeal the Agency's decision regarding certification. Thus, to now argue that Nucor has waived its

⁵ See, May 3, 2010 order, July 12, 2010 Transcript, and July 19, 2010 order, previously attached as part of the Record on July 22, 2011. To avoid duplication and an unnecessarily voluminous brief, these documents are not attached hereto; however, Nucor will be happy to resubmit these documents at the Court's request.

⁶ See, Exhibit 1 to Petition.

⁷ The undersigned as well as other attorneys and support staff in the law firm corresponded with, and researched the availability of a hair sample certification program at the time of the subject test, and concluded based on the information reviewed and received, that it was impossible to comply with the Statute as written.

appeal rights on *all* the issues in this matter based on the failure to appeal the certification issue is incorrect and contrary to South Carolina law. *See, Atl. Coast Builders & Contrs., LLC v. Lewis*, 722 S.E.2d 213, 215 (2011), quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). The issues that are the subject of this appeal were all raised to the ALC, and are therefore preserved for appeal to this Court.

Furthermore, the constant back and forth with regard to whether the applicable orders are final not only imposes an unjustified burden on Nucor and delays justice, but it also encourages unsupported and irrelevant arguments designed to avoid a merits resolution of the substantive issues raised in this appeal. Respondents cannot have it both ways. First, they admit that the May 24 Order is final but assert, incorrectly, that Nucor should not be allowed to appeal as of right because the issues are moot.⁸ Second, after the ALC judge issued a letter stating that her order is final, Respondents alternatively argued that the May 24 Order is *not* final because Nucor did not appeal the December 9, 2011 order to the ALC. The fact that the Appellate Panel determined the single issue regarding certification of the laboratory does not deprive or foreclose Nucor from appealing those issues that had already been deemed finally decided, and which were not subject to remand. There is no South Carolina case law in support of such a position, and

⁸ *See*, p. 2 of Legette's August 23, 2011 Brief, in which the Agency concurred and joined. *See also* p. 2 of Legette's Brief on appealability ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."); and p. 2 of the Agency's Brief on appealability ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

it is telling that the Respondents cite none. *See, Atl. Coast Builders & Contrs., LLC v. Lewis*, and *Elam v. S.C. Dep't of Transp.*, *supra*.

In the event this Court dismisses Nucor's appeal again, it must seek *certiorari* or the case is over. Such a result is fundamentally unjust because Nucor has a right (and, indeed, an obligation) to appeal final orders, such as the order at issue, to this Court for a determination of the merits. Thus, if the Court is of the opinion that the orders on appeal are not final, then an instruction to the ALC to issue a final order is warranted to enable Nucor to appeal the issues raised back in December 2010, which have yet to be addressed.

CONCLUSION

For all the foregoing reasons, and the arguments contained in Nucor's Petition, Nucor respectfully asks that the Court grant its Petition for Rehearing and Rehearing en banc.

TURNER, PADGET, GRAHAM & LANEY, P.A.

A handwritten signature in dark ink, appearing to read "Nosizi Ralephata" followed by a stylized flourish or initials.

Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Fax: (843) 576-1655
Email: NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 23, 2012
Charleston, SC

PO Box 995
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Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Phone: (803) 737-0239

Fax: (803) 737-0124

November 15, 2011

Nosizi Ralephata
Turner Padgett Graham & Laney, P.A.
Post Office Box 22129
Charleston, SC 29403

Re: Leggette v. Nucor, Appeal 10129-15740

Dear Ms. Ralephata,

The Appellate Panel has scheduled the above appeal for oral argument on November 30, 2011, at 3:00 p.m. The Panel asks that you come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory certification programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services.

Sincerely,

Paul R. Famolari
Manager, Higher Authority Appeals

Cc:

Claimant
Claimant Attorney
Employer
Imaging
File



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden
Docket No.: 10-ALJ-22-0938-AP

RECEIVED
APR 23 2012
SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 23rd day of April 2012 that I served copies of the **Appellant's Reply to Return in Opposition to Petition for Rehearing and Rehearing *En Banc*** by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

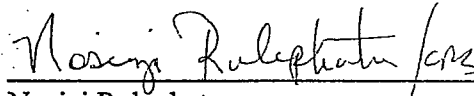
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that a copy of the **Appellant's Reply to Return in Opposition to Petition for Rehearing and Rehearing *En Banc*** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TURNER PADGET GRAHAM & LANEY, P.A.

A handwritten signature in cursive script, reading "Nosizi Ralephata /crs", written over a horizontal line.

Nosizi Ralephata
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2807
Facsimile: (843) 577-1655
Email: nralephata@turnerpadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 23, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Matter No.: 2012206406
Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

RESPONDENT LEGETTE'S RETURN IN OPPOSITION TO APPELLANT'S
PETITION FOR REHEARING AND REHEARING EN BANC

Respondent Kim A. Legette respectfully files this Return in opposition to Appellant's most recent petition of April 9, 2012. While SCACR Rule 240(e) states that a return to a SCACR Rule 221 motion need not be filed without a request from the Court, Respondent Legette wishes to very briefly respond to Appellant's newest filings in the hope of avoiding any further waste of this Court's time.

The matter is really quite simple. This Court made the correct decision in its March 23, 2012 Order that the ALC order on appeal was not the final order, hence not appealable. The final order in this entire matter is the Appellate Panel's December 9, 2011 Decision (Appellant's Exh. D).¹ Appellant did not pursue an appeal of that decision to the ALC required under S.C. Ann. § 41-35-740, and as clearly stated in ALJ Durden's letter of April 4, 2012 (Appellant's

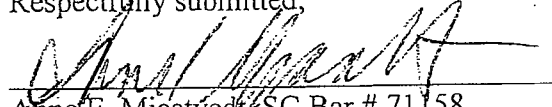
¹ Respondent Legette refers here to Exhibits filed by Appellant with their most recent submission to avoid confusion with the myriad other briefings.

Exh. A). As there was no request for judicial review within the statutory time limits, there is no further avenue for appeal or judicial review.

The confusion seems to arise based on Appellant's misunderstanding of the ALC's Order of May 24, 2011, where that court remanded the entire matter back down to the Appellate Tribunal "for a new hearing". (Appellant's Exh. B, pg. 5-6). The Appellate Tribunal on remand made a finding of fact based on the appropriate paragraph of the statute dealing with workplace drug testing, § 41-35-120(3) on August 8, 2011. Respondent Legette appealed the Tribunal's decision to the Appellate Panel pursuant to S.C. Code Ann. § 41-35-710, and the Appellate Panel issued the final decision on the entire matter on December 9, 2011, as discussed above. Appellant admits it did not appeal that Order.

Respondent Legette requests the opportunity for further briefing on the substantive matters only if this Court finds it necessary, pursuant to Rule 240 on the issue of petitions for rehearing. However, Respondent Legette requests that this Court deny Appellant's request for rehearing and rehearing en banc based on the above argument.

Respectfully submitted,



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Attorney for Respondent Kim A. Legette

April 17, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Matter No.: 2012206406
Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

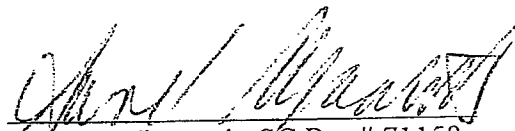
South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served Respondent Legette's Return In Opposition To Appellant's Petition For Rehearing And Rehearing En Banc in the above referenced matter by depositing a copy of the same in the United States Mail, postage prepaid on April 17, 2012 to the attorneys of record:

John S. Wilkerson, III, Esq.
Nosizi Ralephata, Esq.
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
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Attorneys For Appellant

Sandra Grooms, Esq.
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*Attorney For Respondent South Carolina
Department Of Employment Workforce*



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Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

P. O. Box 8597
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803-737-2666

April 16, 2012

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Kim A. Legette v SCDEW and Nucor Corp.
Docket # 10-ALJ-22-0938-AP

Dear Ms. Kitchings:

Please construe this letter as the return in opposition of the S.C. Department of Employment and Workforce (SCDEW) to the Appellant's Petition for Rehearing and Rehearing En Banc in the above-referenced matter. Six copies are enclosed for the Court, along with Proof of Service upon all parties.

The Court properly dismissed this appeal by its Order filed March 23, 2012, because the order on appeal was not a final order. See S.C. Code. Ann. § 1-23-610 (A) (1) Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); *Charlotte Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

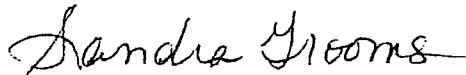
Petitioner completely misrepresents the April 4, 2012, letter from Judge Durden and erroneously characterizes the May 2011 Order as final, when it clearly ordered that the case was **REMANDED** to SCDEW for a new hearing and decision. Further, the Order clearly specified that a separate notice of appeal from the Department's decision on remand was required if Appellant desired review of the Department's decision following remand.

"Putting South Carolinians Back to Work"

The remanded proceedings before the Department included a de novo evidentiary hearing, and oral/written arguments before the Appellate Panel, and a final agency decision in the matter was issued by the Appellate Panel on December 9, 2011. Nucor chose not to file an appeal to the Administrative Law Court, and the appeal period to obtain judicial review has long since expired.

Thus, there has been no final Order from the Administrative Law Court. The May 2011 Order remanding the matter to SCDEW for further proceedings was not a final order and not appealable to the Court of Appeals. The Petition for Rehearing should be denied.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Grooms".

Sandra Grooms, Assistant General Counsel
S.C. Department of Employment & Workforce
legal@dew.sc.gov

cc: Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

The Honorable Deborah Durden, Administrative Law Judge

Case No.: 2010-ALJ-22-0938-AP

Nucor Corporation,

Appellant,

v.

South Carolina Department of Employment
And Workforce and Kim A. Legette,

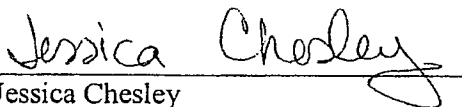
Respondent(s).

PROOF OF SERVICE

I certify that I have served the return in opposition of SCDEW to Appellant's petition for rehearing and rehearing en banc, by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2012, addressed to:

Nosizi Ralephata, Esquire
Turner Padget Graham & Laney, PA
P.O. Box 22129
Charleston, South Carolina 29413
(Attorney for Nucor)

Anne E. Mjaatvedt, Esquire
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401
(Attorney for Kim A. Legette)


Jessica Chesley

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED
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SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Appellant Nucor Corporation ("Nucor") hereby petitions this Court for rehearing of its Order filed March 23, 2012 pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. The Order dismissed Nucor's appeal stating: "the order on appeal is not a final order." Citing S.C. Code Ann. §1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC) and *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept of Health and Environmental Control*, 387 S.C. 265, 266, 692, S.E. 2d 894 (2010) (holding that an

order of the Administrative Law Court remanding the case to the Department of Health and Environmental Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order, and therefore, not immediately appealable under §1-23-610). Although Nucor agrees that *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept of Health and Environmental Control* determines when an order issued by the Administrative Law Court ("ALC") is "final" for purposes of appeal, Nucor asserts that a rehearing is warranted in this case because the Court's Order (1) misapplies the controlling law; (2) the Order's characterization of the order on appeal as "not final" is incorrect and not supported by the record, and is inconsistent with the ALC's characterization of its own order. In essence, the Court has denied Nucor the right to appeal a *final order* of the ALC (See, correspondence dated April 4, 2012 from the ALC attached hereto as Exhibit A, reiterating that the order appealed by Nucor is final in this matter).

There is no dispute by and among the ALC judge, the South Carolina Department of Employment Workforce ("the Agency" or "Department"), and *all* the parties that the May 24, 2011 order is now final and there is nothing left to be done except to enforce by execution what has been determined. There are no outstanding issues on remand, no outstanding issues (legal or factual) pending before the ALC, or any of the Agency's tribunals, and no outstanding motions. In addition, the ALC has, once again, categorically informed the parties that its May 24, 2011 order is final and disposes of *all* the issues raised by Nucor. See, Exhibit A. Thus, the order appealed is as final as it gets under South Carolina law. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). "A final judgment disposes of the whole subject matter of the action

or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” If this Court denies Nucor the right to appeal, then the case is effectively terminated. By virtue of the Court’s dismissal of Nucor’s appeal, Nucor is now caught in a catch-22 whereby this Court asserts that the order appealed is *not* final, while the ALC *insists* that its order is *final*, that it has closed its docket and no longer has jurisdiction over the matter, thereby leaving Nucor with no access to the justice system. *See*, Exhibit A. Not only is the dismissal contrary to Nucor’s substantial rights, but it is also contrary to the holding in *Charlotte-Mecklenburg* order with regard to what constitutes a final order for purposes of appealing as of right.

As set forth in detail below, the ALC’s order is based on clear legal errors which have an impact on virtually all private sector employers in South Carolina who administer on-site random drug tests on their employees in an effort to maintain a drug-free workplace. Accordingly, Nucor respectfully submits this Petition for Rehearing. Pursuant to Rule 219, Nucor also asserts that the issues raised in its Notice of Appeal are of sufficient importance to warrant a rehearing by the Court *en banc*.

PROCEDURAL HISTORY

Claimant, Kimberly Legette (“Legette” or “Claimant”), was terminated from her employment at Nucor’s steel manufacturing plant in Berkeley County on April 22, 2010, after testing positive for marijuana pursuant to two tests administered on behalf of Nucor: (1) a random drug test administered on April 6, 2010 which tested positive for 1.25 picograms per milligram of marijuana; and (2) a more stringent “level of detection”/“limit of detection” administered on April 15, 2010 on behalf of Nucor at Claimant’s request. Prior to her termination on April 15, 2010, and after twice testing

positive for marijuana through a process that she herself verified, Legette sought an additional off-site “independent” drug test, which was administered under different testing standards, that allegedly yielded a negative result. Legette subsequently sought unemployment benefits on the basis of this off-site independent test.

The Claims Adjudicator and the Appeal Tribunal denied Legette’s claim for benefits on the basis that she had been discharged for cause pursuant to S.C. Code Ann. § 41-35-120(2),¹ and that she was disqualified to receive benefits based on illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3), respectively. However, relying on the off-site independent test administered under different testing criterion, the Appellate Panel reversed on November 17, 2010, and reinstated Legette’s benefits on the basis that she was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4).

As a result of the Appellate Panel’s erroneous reliance on the outside independent test as basis for reinstating Legette’s benefits, Nucor filed a Petition for Judicial Review on December 14, 2010. The parties briefed the issues, and on May 24, 2011, the ALC issued an order holding that Nucor’s arguments that benefits must be denied pursuant to S.C. Code Ann. § 41-35-120(2) and (4) were without merit. In so holding, the ALC found that “[t]he Department’s finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order.” *See*, Order, at p. 4, attached hereto as Exhibit B. The order remanded to the Agency on the single and narrow issue of whether

¹ S.C. Code Ann. § 41-35-120(2), (3) and (4) are collectively referred to herein as “the Statute.”

disqualification from benefits comported with the requirements set forth under S.C. Code Ann. § 41-35-120(3)(iii)(C) which deals with certification of the testing laboratories.

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC “no longer has jurisdiction in the matter *because Judge Durden’s Order is a final order in this matter.*” Email correspondence is attached hereto as Exhibit C. (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal with the South Carolina Court of Appeals appealing the ALC’s application of South Carolina Code Ann. § 41-35-120(2) and (4) to the dispute. Thereafter, the Court of Appeals issued an order dated October 13, 2011 dismissing the appeal as one that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority, supra.*

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC’s remand Order, and issued its decision on August 18, 2011, which was the subject of Claimant’s appeal to the Appellate Panel. On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties come prepared to discuss whether and to what extent the laboratory at issue complied with the certification requirements set forth in the Statute in light of switch from certification oversight by the National Institute on Drug Abuse (NIDA), to the Substance Abuse and Mental Health Services Administration (SAMHSA). On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the Statute. On December 9, 2011, the Appellate Panel issued its decision, holding that the laboratory was not certified at the time of the subject test as required

under S.C. Code Ann. § 41-350120(3). Neither party appealed this decision. The Appellate Panel's order is attached hereto as Exhibit D.

Nucor thereafter filed a Notice of Appeal with the Court of Appeals asserting that Judge Durden's Order was now final since the only issue on remand had now been disposed of by the Appellate Panel. *See*, January 9, 2012 Notice of Appeal, attached hereto as Exhibit E. On February 2, 2012, the Court of Appeals requested that the parties submit memoranda addressing the issue of appealability within ten (10) days of the date of the correspondence. The parties complied with the request. Significantly, neither party disputed the applicable orders were final.² However, on March 23, 2012, the Court of Appeals disagreed and again dismissed the appeal stating: "the order on appeal is not a final order." *See*, Exhibit F, March 23, 2012 Order.

In response to the Court's March 23, 2012 Order dismissing its appeal, the undersigned communicated with the Clerk of Court for the ALC to determine what needed to be done for purposes of "finalizing the ALC's order." Pursuant to those discussions, the undersigned provided the ALC judge with written correspondence setting forth the history of the case and the bases for the two dismissals by the Court, and requested a "final" order in the matter, or in the alternative, guidance as to what, if any, additional action was required of the parties in order to have a "final" order as set forth in the March 23, 2012 Order of this Court. The correspondence is attached hereto as Exhibit G. The ALC judge responded stating that since the issue on remand had been

² *See*, p. 2 of Legette's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). *See also*, p. 2 of the Agency's Brief ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

resolved and since no appeal was taken from the Appellate Panel's decision, her order of May 24, 2011 was the final order in this matter. *See*, Exhibit A.

ARGUMENT

I. THE ORDER ON APPEAL IS FINAL UNDER SOUTH CAROLINA LAW.

This Court's Order dismissing the instant appeal as not "final" is inconsistent with South Carolina law. In *Charlotte-Mecklenburg*,³ the Supreme Court of South Carolina reiterated the long-standing rule that an order that finally determines the substantive rights of the parties, such as the ALC order on appeal herein, is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* Court emphasized the distinction between an "interlocutory order" and a "final order" as follows: "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission. However, that is not the case here. Here, not only has the issue on remand been resolved, but the ALC judge has repeatedly informed the parties that her

³ 387 S.C. 265, 692 S.E.2d 894 (2010).

order is final and she no longer has jurisdiction over the case. *See*, May 24, 2011 ALC Order and correspondence from the ALC attached as Exhibit A.

South Carolina Code Ann. § 1-23-610 provides for appellate review of final judgment of the ALC. There is no dispute by and among the parties that the ALC's order is final and constitutes the law of the case unless appealed to the appellate courts because all issues have been decided. This position is supported by a long line of South Carolina precedent. *See, e.g. Good v. Hartford Accident & Indemnity Co., supra.* Moreover, *Charlotte-Mecklenburg* has neither been interpreted as, nor is it intended to deny appellants the option of appealing a final order as of right. The Court's March 23, 2012 Order dismissing Nucor's appeal appears to be premised on the assumption that there remain issues to be resolved by the lower courts. However, this assumption is incorrect and has no record support. Nucor's first appeal was within thirty days after the ALC notified the parties that its May 24, 2011 order was final, and that the ALC no longer had jurisdiction over the matter. (*See*, Nucor's initial Notice of Appeal, dated July 5, 2011). The Court dismissed this attempt on October 13, 2011 on the basis that because there was an issue on remand, the ALC order was not yet final. After the Agency rendered a final decision regarding certification of the laboratory, Nucor again timely appealed to this Court, and fully explained the history of the case, including how the applicable orders were final under South Carolina law. However, as with the first appeal, the second attempt was dismissed March 23, 2012. Nucor is not aware of what else can be done to make the ALC's order "final," particularly where the issuing court itself characterizes its order as "final", indicates it has closed its file, no longer has jurisdiction over the matter, and refuses any further involvement with the matter. *See* Exhibit A.

Thus, dismissal of Nucor's appeal contravenes South Carolina law and denies Nucor its right to appeal a final order. Absent immediate review in this Court, there is nothing left to be done except to execute the erroneous final orders of the ALC and the Appellate Panel.

II. REHEARING *EN BANC*

Nucor further contends a rehearing *en banc* is appropriate in this case because the challenged order involves a complicated issue of growing concern to private employers who administer random work-place drug tests on their employees to ensure a safe work environment. Pursuant to Rule 219(a), SCACR, the Court can conduct an *en banc* review "when the proceeding involves a question of exceptional importance." The present case falls squarely within that category.

It is clear that the ALC's and Agency's orders warrant appellate review because of the far reaching consequences on South Carolina employers. Based on the ALC's order (which in turn relies on the Agency's order reinstating benefits on the basis that an outside independent test that was not administered on behalf of the employer, and which was conducted under different testing criteria, comprises "contradictory" results), arguably, virtually every employer in South Carolina will be required to accept outside drug test results proffered by disgruntled employees and will owe them unemployment benefits in spite of their violation of the employer's known drug and alcohol policies. There is no question that if an employee is permitted to obtain and rely on her own outside independent tests, then it will be virtually impossible to terminate an employee based on violation of the employer's drug policies. An employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random

workplace drug tests, while allowing every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether, thereby jeopardizing the safety of other employees. Such a result is contrary to the clear purpose of S.C. Code Ann., § 41-35-120. Further, in affirming the Agency's decision, the ALC failed to review and determine the legal issues presented, including interpretation of S.C. Code Ann., § 41-35-120(2), (4) and whether the plain language of the statute permits the Agency to rely on outside independent tests administered under different testing standards and not performed on behalf of the employer.

In addition, appellate review is necessary in order to clarify the law regarding whether: (1) In determining eligibility for unemployment benefits, the Agency and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120; (2) an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a); and that (3) Section 41-35-120 (3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered superfluous by operation of Section 41-35-120(3)(a); and (4) Sections (2), (3) and (4) of the Statute are mutually exclusive, and thus, failure to prove technical compliance with the laboratory certification requirement as set forth in Section (3)(a)(iii)(B), precludes an employer, *as a matter of law*, from proving that violation of the employer's drug policies constitutes "cause" or "gross misconduct" under Sections (2) and (4) of the Statute.

As a practical matter, however, a definitive appellate ruling is unlikely because while employers rarely contest unemployment benefits proceedings, appealing the

Agency's decisions to the ALC, let alone the appellate courts, is substantially a novelty. As a result, the odds of these issues reaching the appellate courts via a "conventional" path are almost none existent. By conducting an *en banc* review, this Court can establish a uniform rule for the Agency and its tribunals to follow, and it can determine whether Sections (2), (3) and (4) of the Statute are mutually exclusive, whether outside independent test are authorized under the Statute, and whether disqualification from benefits under Section (3) is conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B). These are issues of "exceptional importance" to employers in South Carolina.

The present case is appealable, as explained above, and it provides the perfect opportunity for the Court to consider and rule upon these important legal issues. Therefore, a rehearing *en banc* is warranted, and Appellant's petition should be granted.

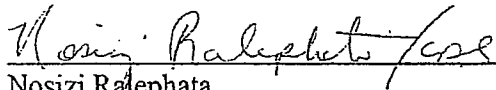
CONCLUSION

The ALC's May 24, 2011 and the Agency's December 9, 2011 orders determine with finality *all* issues raised by Nucor in its appeal to the ALC. Pursuant to the *Charlotte-Mecklenburg* decision and South Carolina Code Ann. § 1-23-610(A), a final judgment has been rendered, and absent an appeal to this Court, this case is effectively terminated. Thus, a rehearing should be granted.

Furthermore, a rehearing *en banc* is warranted because the issues in this appeal are of exceptional and growing importance to employers in this State. These issues require clarification of South Carolina law regarding the proper interpretation and application of S.C. Code Ann. §41-35-120. Without a clear appellate ruling on this matter, employers will have to way of conducting random workplace drug tests to ensure

the safety of all employees since employees will be able to defeat these properly administered tests with their own off-site independent tests that have no indicia of reliance; that are administered under different testing standards, and which are not performed on behalf of the employer. For these reasons, the Court should also grant Appellant's request for a rehearing *en banc*.

TURNER, PADGET, GRAHAM & LANEY, P.A.



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ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 9, 2012
Charleston, SC

Administrative Law Court

DEBORAH BROOKS DURDEN
Administrative Law Judge



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WEB: WWW.SCALC.NET

April 4, 2012

Nosizi Ralephata, Esquire
Turner Padgett, Graham & Laney, P.A.
Post Office Box 22129
Charleston, South Carolina 29413

RE: Nucor Corporation v. S.C. DEW, and Kim A. Legette
Docket No. 10-ALJ-22-0938-AP

Dear Ms. Ralephata:

I am writing in response to your letter of March 28, 2012 requesting that this Court issue a final order disposing of all issues raised in the above-referenced case. Unfortunately that will not be possible, as this Court does not have an open file or any continuing jurisdiction in the matter.

I invite your attention to page six of my order dated May 24, 2012, which states, "With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination." Because the order of remand was a final decision in the matter there is nothing left for this Court to decide absent an appeal of the Department's decision on remand.

Sincerely,

A handwritten signature in cursive script that reads "Deborah Brooks Durden".

Deborah Brooks Durden
Administrative Law Judge

cc: Romi Y. Robinson, Esquire
Kim A. Legette

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Docket No. 10-ALJ-22-0938-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

EXHIBIT B

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided:*
 - (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and
 - (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*
 - (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

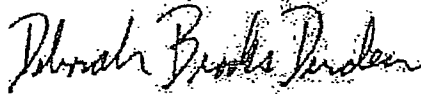
The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

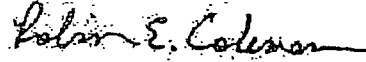


Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

From: Robin Coleman [mailto:rcoleman@scal.c.net]
Sent: Tuesday, June 14, 2011 2:16 PM
To: Ralephata, Nosizi; legal@dew.sc.gov; kimlegette@yahoo.com
Subject: Nucor Corporation v. S.C. DEW, and Kim A. Legette; Docket No. 10-ALJ-22-0938-AP

Ms. Ralephata, Ms. Robinson, Ms. Legette: This Court has received several pieces of correspondence in the above-referenced case since Judge Durden's Order remanding the matter back to the Department, namely Appellant's Motion for Hearing/Oral Argument, Appellant's Notice of Request for Protection, and Respondent's Return to Motion for Hearing/Oral Argument. Please be advised that this Court no longer has jurisdiction in the matter because Judge Durden's Order is a final order in this matter.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

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EXHIBIT C

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)
.....)
Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)
_____)

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

EXHIBIT D

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

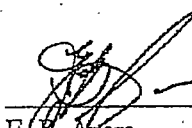
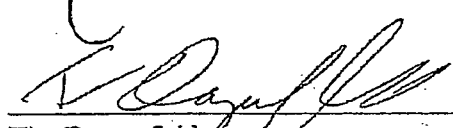
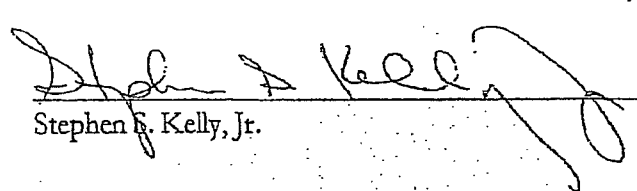
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**


E. B. Ayers
Tim Dangerfield
Stephen F. Kelly, Jr.

Hearing Date: 11/30/11

Date Mailed: 12/9/11

Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED

JAN 10 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

NOTICE OF APPEAL

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011. Appellant received written notice of the entry of this Order on May 24, 2011. Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct, and as basis for her ruling, the ALC Judge relied on offsite independent test results. However, she remanded to the

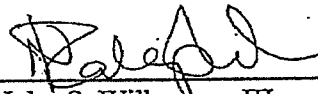
EXHIBIT E

TPGL 4227866v1

lower tribunals the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B).

The South Carolina Department of Employment Workforce Appellate Panel issued its Order regarding the laboratory's certification and whether such certification comports with the Statute's mandate on December 9, 2011, and Appellant received a copy of the Order on or about December 12, 2011. The Appellate Panel's Order is not attached because Appellant are not challenging the decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory. As a result, Judge Durden's Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III

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January 9, 2012

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Columbia, SC 29202

TPGL 4227866v1

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Leggette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 2010-AL-22-00938

ORDER

Appellant has filed a notice of appeal from the Administrative Law Court's order remanding this case to the South Carolina Department of Employment and Workforce for a new hearing to determine whether Respondent Kim A. Leggette was disqualified to receive unemployment benefits pursuant to section 41-35-750 of the South Carolina Code (Supp. 2011). After preliminary review, this Court requested that the parties submit appealability memoranda.

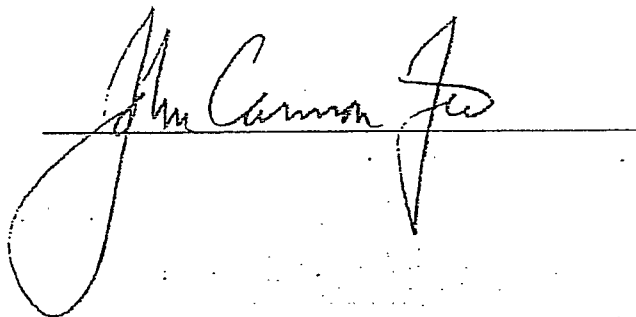
The parties have now submitted their memoranda and, after careful consideration, this appeal is dismissed because the order on appeal is not a final order. See S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2011) (providing that judicial review may only be sought from a final decision of the ALC); Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010) (holding that an order of the Administrative Law Court remanding the case to the Department of Health and Environmental

EXHIBIT F

Control for a determination as to whether any of the parties were entitled to a certificate of need was not a final order and, therefore, was not immediately appealable under § 1-23-610).

IT IS SO ORDERED.

Columbia, South Carolina

A handwritten signature in dark ink, appearing to read "John S. Wilkerson, III", is written over a horizontal line.

cc: John S. Wilkerson, III, Esquire
Nosizi Ralephata, Esquire
Anne E. Mjaatvedt, Esquire
Romi Y. Robinson
The Honorable Jana E. Shealy

FILED

cc 3/23/12

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March 28, 2012

The Honorable Deborah Durden
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Kim A. Legette v. SC Department of Employment and Workforce and Nucor Corporation
Docket Number: 10-ALJ-22-0938-AP
TPGL File No.: 5670.111

Dear Judge Durden:

As you may recall, appellant, Nucor Corporation filed a Petition for Judicial Review on December 14, 2010. The parties briefed the issues, and on May 24, 2011, this Court issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. § 41-35-120(2) and (4) were without merit. In so holding, the Court found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order." See, Order, at p. 4, attached hereto. The Order remanded to the South Carolina Department of Employment and Workforce ("Agency") on the single and narrow issue of whether disqualification from benefits comported with the requirements set forth under S.C. Code Ann. § 41-35-120(3)(iii)(C) which deals with certification of the testing laboratories. *Id.*

On June 2, 2011, Nucor filed a Motion for Oral Argument, and this Court responded via email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" Attached hereto. (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal with the South Carolina Court of Appeals appealing this Court's application of South Carolina Code Ann. § 41-35-120(2) and (4) to the dispute. Thereafter, the Court of Appeals issued an order dated October 13, 2011 dismissing the appeal as one that is not immediately appealable in light of

EXHIBIT G

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TPGL 4373863v1

The Honorable Deborah Durden
March 28, 2012
Page 2

Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). See, October 23, 2011 Order, attached hereto.

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order, and issued its decision on August 18, 2011, which was the subject of Claimant's appeal to the Appellate Panel. On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties "come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services." See, Appellate Panel correspondence attached hereto.

On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the statute. On December 9, 2011, the Appellate Panel issued its decision regarding the narrow issue of whether the laboratory was certified as contemplated under S.C. Code Ann. § 41-350120(3), which provides that a testing laboratory must be certified by the NIDA, CAP or SLED. The Appellate Panel held that the laboratory was not certified at the time of the subject test as required. Neither party appealed this decision. The Appellate Panel's order is attached hereto.

Nucor thereafter filed a Notice of Appeal with the Court of Appeals asserting that Judge Durden's Order was now final since the only issue on remand had been disposed of by the Appellate Panel. See, January 9, 2012 Notice of Appeal, attached hereto. Nucor also explained that the Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct and that the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B) had been ruled on.

On February 2, 2012, the Court of Appeals requested that the parties submit memoranda addressing the issue of appealability within ten (10) days of the date of the correspondence. (Attached hereto). The parties complied with the request. Of significance is that neither party disputed that the applicable Orders were final.¹ Rather, Respondents, while acknowledging the

¹ See, p. 2 of Respondent Kim Legette's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). See also, p. 2 of the South Carolina Department of Employment and Workforce's Brief ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

The Honorable Deborah Durden
March 28, 2012
Page 3

finality of the Orders at issue, argued instead, that Nucor's appeal had been rendered moot based on the Appellate Panel of South Carolina Department of Employment and Workforce's ("Appellate Panel") most recent decision regarding certification of the laboratory pursuant to South Carolina Code Ann. § 41-35-120 (3)(a)(iii)(B). In response, Nucor asserted that Respondents' mootness argument was tantamount to a declaration, without any legal authority, that: (1) South Carolina law permits an employee to obtain an outside independent drug test using different and less sensitive detection levels to trump an employer's properly administered workplace drug tests; (2) In determining eligibility for unemployment benefits, the South Carolina Department of Employment Workforce and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120 ("the Statute"); (3) *As a matter of law*, an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a) of the Statute; and that (4) Section 41-35-120(3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered null and superfluous by operation of Section 41-35-120(3)(a).

However, on March 23, 2012, the Court of Appeals disagreed and again dismissed the appeal stating: "the order on appeal is not a final order." *See*, March 23, 2012 Order. Thus, it is clear that the Court of Appeals has determined that this Court's May 24, 2011 Order is not yet a final order pursuant to *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, *supra*. Pursuant to the Court of Appeal's March 23, 2012, Order, a final order must be issued by this Court before the parties can exercise their appeal options to that court.

As a result, Nucor respectfully requests that this Court issue a final order disposing of all issues raised in this case in order to enable the parties to evaluate and timely determine their appeal options. This case has already had a long and convoluted history, and the parties have expended significant time and resources regarding their respective positions. The dispute has undergone full fact-finding hearings at the Appeals Tribunal on two separate occasions; has been appealed to the Appellate Panel of the South Carolina Department of Employment Workforce (hereinafter "Appellate Panel" or "Agency") twice; has been appealed to the Administrative Law Court (hereinafter "ALC") once; and Nucor has attempted to appeal to the Court of Appeals on two separate occasions.

In the event that this Court determines that resolution of the issues raised requires new and/or additional briefing from the parties, including whether certification of the laboratory renders applicability of Sections (2), (3)(c), and (4) of S.C. Code Ann. § 41-35-120 moot, please let us know.

Both counsel for South Carolina Department of Workforce and counsel for Ms. Legette are copied on this correspondence.

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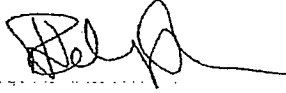
TURNER PADGET

The Honorable Deborah Durden
March 28, 2012
Page 4

We appreciate your consideration of this matter.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/adh

Enclosures

cc: Ms. Sandra Grooms
Ms. Romi Y. Robinson
Ms. Anne E. Mjaatvedt
The Honorable Jana E. Shealy

TPGL 4373863v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden
Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

SC Court of Appeals
APR 09 2012
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v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

I certify this 9th day of April 2012 that I served copies of the **Appellant's**
Petition for Rehearing and Rehearing *En Banc* by United States Mail, postage
prepaid, addressed to the following:

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ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

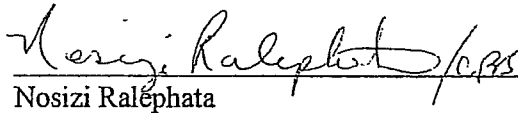
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ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that a copy of the **Appellant's Petition for Rehearing and Rehearing *En Banc*** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

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ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

April 9, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

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FEB 24 2012
SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

RETURN TO RESPONDENTS' BRIEF REGARDING APPEALABILITY

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SUMMARY OF ARGUMENT

The issues raised are ripe for appeal, and it is not disputed that the applicable Orders are final.¹ In this instance, Respondents, while acknowledging the finality of the Orders at issue, have yet again, attempted to thwart South Carolina law and confuse the issues by arguing that Nucor's appeal has been rendered moot based on the Appellate Panel of South Carolina Department of Employment and Workforce's ("Appellate Panel") most recent decision regarding certification of the laboratory pursuant to South Carolina Code Ann. § 41-35-120 (3)(a)(iii)(B).

However, framing the issue as moot is not only a mischaracterization of the dispute between the parties, including the issues that form(ed) the bases of Nucor's appeals, both to the Administrative Law Court ("ALC") and to this Court; but it is also an incorrect and untenable construction of the applicable statute. "A case is 'moot' when judgment, if entered, will have no practical effect on existing controversies." *Peterson Outdoor Advertising Corp. v. Beaufort County*, 291 S.C. 533, 354 S.E.2d 563 (1987). In this case, Nucor's appeal is not moot because there is an actual controversy, the issues are ripe, and judgment will have a practical effect on the controversy.

In arguing mootness, Respondents are in fact, declaring, without any legal authority, that: (1) South Carolina law permits an employee to obtain an outside independent drug test using different and less sensitive detection levels to trump an

¹ See, p. 2 of Respondent Kim Legette's Brief ("Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce ... disposes of the entire controversy, any issues from the May 24, 2011 Order are moot and not appealable."). See also, p. 2 of the South Carolina Department of Employment and Workforce's Brief¹ ("Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits ... which is dispositive on this claim for unemployment benefits.").

employer's properly administered workplace drug tests; (2) In determining eligibility for unemployment benefits, the South Carolina Department of Employment Workforce² and the Administrative Law Court ("ALC") are authorized to apply additional or different criteria or exceptions that are not contained in South Carolina Code Ann. § 41-35-120 ("the Statute"); (3) *As a matter of law*, an employer in South Carolina can terminate an employee for illegal drug use *only if* the employer strictly complies with Section 41-35-120(3)(a) of the Statute; and that (4) Section 41-35-120 (3)(c), which permits an employer to rely information regarding, or consideration of, any drug test results received by the employer as evidence of drug use, is rendered null and superfluous by operation of Section 41-35-120(3)(a).

Both the ALC and the Agency are not authorized to accept or rely on an employee's off-site independent drug test administered using different, less sensitive detection levels, and which Legette knew would not be accepted by Nucor,³ as basis for reinstating Legette's unemployment benefits. If an employee is permitted to obtain and rely on her own outside independent tests, then it will be virtually impossible to terminate an employee based on violation of the employer's drug policies. An employee's use of outside independent tests eviscerates an employer's ability to conduct and rely on random workplace drug tests, while allowing every employee to circumvent an employer's drug policies and utilize methods that defeat the employer's drug tests altogether, thereby jeopardizing the safety of other employees.

² The South Carolina Department of Employment and Workforce, including the Appellate Panel, Appeal Tribunal and Claims Adjudicator will collectively be referred to herein as "the Agency" or "the Department".

³ R. 11, 24, 30, 38, 63-64, 101, 121, 136; Exhibits 4, - 7; Legette's ALC Response Brief.

Further, if as Respondents argue, Section (3)(a) is the *only* provision that can be used to disqualify an employee, then even employees that either confess to using illegal drugs while at work, or employees that are caught using illegal drugs at work would likewise, be entitled to unemployment benefits simply because the employer did not test the subject employee for drugs as set forth under Section (3)(a)(iii)(B) of the Statute. Such a construction not only creates absurd results that are contrary to the language, purpose and intent of the Statute, but also precludes an employer as a matter of law from relying on other applicable provisions of the Statute to reach the same result.

ARGUMENT

It is unfortunate that this case that has now been unnecessarily transformed into a long-drawn, convoluted and hyper-technical legal dispute implicating legal errors and statutory interpretation simply because Legette unjustifiably insists that she is entitled to unemployment benefits. Further, even though Legette insists that she is entitled to unemployment benefits pursuant to Section 3(a) of the Statute, she also acknowledges she failed two drug tests administered on behalf of Nucor, in violation of Nucor's Drug and Alcohol Policies, of which she was fully aware.⁴ For all purposes, these positive drug tests should have ended the inquiry because they comprise uncontested evidence of Legette's violation of Nucor's drug policies. However, Legette, of her own accord, sought and obtained a third independent test from an outside sample collector which was performed according to different testing standards, [R. 63-64], and which she alleges it

⁴ Legette concedes that Nucor has a Drug and Alcohol Policy; that she was aware of this Policy at all times pertinent hereto, and that she was aware that testing positive for drugs pursuant to a drug test administered on behalf of the employer was basis for termination. R. 13, 24, 42, 85-88. Legette also acknowledges that Nucor does not accept outside independent tests. R. 25, 27, 57; Legette's ALC Response Brief, first and second pages.

came back negative for marijuana. [R. 51-52, 54, 56]. It is on the basis of the third independent test that the Appellate Panel and the ALC found there were contradictory results, and thereby reinstated Legette's benefits pursuant to Section (4) of the Statute.

As regards appealability of the ALC's Order, Respondents' "mootness" arguments are the functional equivalent of a declaration by the Court that Sections (2), (3) and (4) of the Statute are mutually exclusive, and thus, failure to prove technical compliance with the laboratory certification requirement as set forth in Section (3)(a)(iii)(B), precludes an employer, *as a matter of law*, from proving that violation of the employer's drug policies constitutes "cause" or "gross misconduct" under Sections (2) and (4) of the Statute.⁵

As an initial matter, it is noteworthy that Respondents' argument is undercut by the fact that the Agency and its lower tribunals applied each of Sections (2), (3) and (4) of the Statute to the exact same set of facts at each stage of the Agency proceedings, thereby substantiating that Nucor's reliance upon any one (or all) of these Sections is proper.⁶ In

⁵ In this brief, when Nucor refers to "noncertified laboratories", the reference is only intended to differentiate those laboratories that do not hold the certification requirements of Section 41-35-120(3)(a)(iii)(B) of the Statute. However, this is not intended to imply or concede that these "noncertified laboratories" do not hold any other relevant certifications, including national and international certifications pertinent to workplace hair sample testing for drugs.

⁶ The Claims Adjudicator determined that Legette was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy, and that this failure to comply with company policies constituted discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2). [R. 13, 85]. The Appeal Tribunal found that Legette was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana and held that Legette was disqualified from receiving benefits under S.C. Code Ann. § 41-35-120 (3). [R. 274-275].

addition, the construction urged by Respondents is contrary to the rules of statutory construction. *See, Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (The agencies charged with enforcing statutes usually receive deference from the courts as to their interpretations of those laws.). Similarly, Respondents make this broad and far reaching conclusion but cite no legal support or precedent for such a crippling interpretation.

Under South Carolina law, “[a] statute shall not be construed by concentrating on an isolated phrase. The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.” *Beaufort County v. S.C. State Election Comm’n*, 395 S.C. 366 (S.C. 2011). In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent. *Id.* Statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Id.* Further, “[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (internal citation omitted). Further, “where possible, *all* provisions of a statute must be given full force and effect.” *Nucor Steel v. S.C. Pub. Serv. Comm’n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). (Emphasis added).

The Appellate Panel held: “while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer’s exam, processed by the same laboratory, indicating the claimant was drug free” and that “Claimant was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120 (4). [R. 1-2].

In this case, the Statute sets forth eight disqualifications to an employee's right to receive unemployment benefits including Sections (2) - discharge for cause, (3) discharge for drug use, and (4) discharge for gross misconduct. Each of these bases is self-contained and independent of the other sections. Under proper facts, the same conduct can disqualify a worker from benefits under more than one statutory condition. See, *Beaufort County v. S.C. State Election Comm'n*, and *Nucor Steel v. S.C. Pub. Serv. Comm'n*, *supra*. In fact, this case provides such an instance, and hence, the Agency's reliance on all three Sections of the Statute.

When faced with two or more applicable sections of a statute, other courts have analyzed and applied each applicable section of the statute at issue. In *Trapeni v. Department of Employment Sec.*, 142 Vt. 317, 320 (Vt. 1982), the Supreme Court of Vermont considered whether either of two disqualification provisions applied to worker who was out of work due to a strike that stopped the project, either of which would have disqualified the employee from benefits: (1) labor dispute disqualification (disqualifies striker if labor dispute stops employer's operations); and (2) voluntary leave disqualification. The court ultimately found neither disqualification was applicable, but both bases were properly considered and applied to the facts of the case.

Similarly, *Administrator v. Sides*, 2000 Conn. Super. LEXIS 2720 (Conn. Super. Ct. Oct. 10, 2000), illustrates another instance where two disqualification grounds were considered: whether substance abuse constituted good cause (thereby rebutting a "for cause" disqualification) and termination based on violation of the absenteeism policy. There, the employee was terminated for violation of the employer's absenteeism policy after missing three days without calling in as required. One of her absences was due to

substance abuse issues. The Employment Security Board tried to read into the statute a requirement that absences due to substance abuse were like sick leave for which good cause was established, thereby invoking the “for cause” clause of the statute. However, although the court ultimately disagreed with the “good cause” argument, that section of the statute was fully considered in addition to the absenteeism policy and the court held that the employee was disqualified from receiving unemployment benefits.

Thus, an employer is not restricted to a single disqualification category. Conduct that disqualifies an employee from benefits under one section of a statute can be also considered under other applicable sections of that statute, if appropriate. To further illustrate the absurd outcome that would result from the position urged by Respondents, consider scenario A, where an employee confesses to using, and being under the influence of illegal drugs while present at work. As a result of this confession, the employer uses a non-certified laboratory to confirm the presence of drugs in the employee’s system, and the results come back positive for illegal drugs. Under these circumstances, based upon Respondents’ argument, that employer would then be precluded from discharging the employee for cause” or “gross misconduct” under Sections 41-35-120(2) or (4) simply because the employer did not test that employee for drugs as required under Section 41-35-120(3)(a)(iii)(B).

Similarly, under scenario B, an employee is caught smoking marijuana on the employer’s premises during scheduled work hours. The employer terminates the employee without performing any form of drug test. Likewise, based on Respondents’ construction of the Statute, that employer would also be precluded from terminating the employee for “cause” or “gross misconduct,” because the employer did not test the

employee as set forth under Section (3)(a)(iii)(B), even though the employer has other evidence of the employee's violation of its drug policies.

Both scenarios A and B, above clearly involve termination based on use of illegal drugs in violation of the employer's drug policies. However, pursuant to Respondents' theory, the employer would be *precluded as a matter of law* from proving that the employee was terminated for "cause" or "gross misconduct" based on her violation of the employer's drug policies because of Section (3)(a)(iii)(B). Not only would this result run afoul of the intent of the Statute – *i.e.* disqualify an employee from receiving unemployment benefits based on her violation of workplace drug policies, such an interpretation would severely circumscribe an employer's ability to provide a safe and drug free workplace for the rest of its employees, and would significantly jeopardize the safety of South Carolina employees as a whole. In addition, reading the Statute as permitting termination based upon drug use that is provable *only* through use of a laboratory certified as set forth under Section 41-35-120(3)(a)(iii)(B) would render Section 3(c) a nullity. Section 3(c) permits an employer to legitimately discharge based on for example, police arrest records, drug tests performed by a treating physician, or believable reports from other employees that they saw the employee using illegal drugs. Here, Respondents' argument rests entirely on the faulty and unsupported assumption that "disqualification for drug use" is the equivalent of "proof of drug use by a laboratory certified" as set forth in Section (3)(a)(iii)(B) of the Statute. When read as a whole, it is clear that whether a laboratory is certified or not as mandated under Section (3)(a)(iii)(B) is a matter that goes to weight, not admissibility, of the test results.

Nucor's interpretation (and the interpretation adopted by the Agency and its lower tribunals in applying Sections (2),(3), and (4) to this dispute), properly recognizes that all three Sections of the Statute apply to the facts of this case, and that these Sections are not mutually exclusive. There is nothing complicated or innovative about such an interpretation. It simply recognizes the common rules of statutory interpretation. In other words, just because a laboratory does not meet the certification requirements of Section (3)(a)(iii)(B) does not mean, nor should it mean that an employer cannot utilize one or more sections of the same statute, which would otherwise be just as applicable to reach the same result. In addition, there is nothing in Section (3)(a) which addresses violations of a drug policy that are discovered by the employer other than testing as set forth in Section (3)(a)(iii)(B), and these are precisely the violations that would fall under Sections (2), (3)(c) and (4) of the Statute.

Furthermore, this is not a case where Nucor has failed to prove drug use: indeed, other than the Appellate Panel's unauthorized reliance on the outside independent test which was administered under different detection standards, all the fact finding bodies found that Legette had been discharged from her employment *because* of her use of illegal drugs in violation of Nucor's Drug and Alcohol Policies. [R. 13, 275]. When an employee, of their own accord, seeks and obtains an independent test, which is administered under different detection standards, it is clear that she is attempting to circumvent an otherwise valid termination and disqualification using unauthorized and incomparable standards in an effort to thwart South Carolina law and the public policy behind a drug free and safe workplace for all employees.

Moreover, if the issue of whether Sections (2), (3) and (4) of the Statute must be applied independent of each other or whether these Sections are mutually exclusive is a novel question of law, then this Court is free to decide the question with no particular deference to the ALC or the Appellate Panel and its lower tribunals. *L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000). In such situations, the appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and the Court's sense of justice. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005). In that regard, this Court has essentially *de novo* review of the issue, thereby rendering Respondents' argument regarding mootness a non-issue.

It is also noteworthy that in her brief, Legette's incorrectly states Judge Durden's findings regarding applicability of Sections (2) and (4). Judge Durden held: "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order", and thus Nucor's arguments as to Sections (2) and (4) "are without merit." [ALC Order, at p. 4.]. This is inconsistent with Legette's statement that "Judge Durden held that the Agency incorrectly decided Respondent Legette's eligibility under the standards of S.C. Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120 (4) – 'Discharge for gross misconduct" in her May 24, 2011 Order.'"⁷ Judge Durden never analyzed which Section of the statute was applicable or whether the Sections were mutually exclusive. Rather, her Order specifically relies on, and incorporates the independent test that was the basis of the Agency's "contradictory test results" finding as

⁷ Legette's Brief, p. 2.

basis for upholding the Appellate Panel's reinstatement of Legette's benefits under Section (4). Thus, Judge Durden's Order *affirms* the Appellate Panel's application of Section (4) to the facts of this case, while dismissing Nucor's arguments that violation of an employer's drug policies constitutes termination for cause as provided under Section (2) of the Statute. In that regard, Judge Durden's Order, likewise, bolsters Nucor's position that each of the Sections at issue is independent and stand-alone, and that Nucor can terminate in reliance upon any one or all three Sections.

Similarly, Respondent Agency's argument that Nucor has conceded that Legette is eligible for benefits under Section 41-35-120(3) is inaccurate. *See*, Agency's Brief, p. 2. The only issue that Nucor has not appealed is whether the laboratory was certified as required under Section (3)(a)(iii)(B), which is the only issue that was remanded and resolved through the Appellate Panel's decision of December 9, 2011. However, as set forth above, Nucor *does not* concede that Legette is entitled to benefits under Section (3)(c). Disqualification from benefits under Section (3) is not conclusively determined by whether or not the laboratory at issue was certified as set forth under Section (3)(a)(iii)(B); rather under Section 3(c), results from a certified laboratory are given primacy, while noncertified laboratory results are given whatever weight the fact finder deems appropriate.

CONCLUSION

Based on the foregoing, a finding that the laboratory was not certified as required under Section (3)(a)(iii)(B) is neither dispositive of this case, nor does it comprise a factual finding that Legette *did not* use illegal drugs in violation of Nucor's Drug and Alcohol Policies. In addition, neither the ALC nor the Agency was unauthorized to rely

an off-site drug test administered under different, less sensitive detection levels, to trump Nucor's tests that Legette admits she failed. It is therefore clear that the issues raised in this appeal are far from resolved, and a decision of this Court will not only grant meaningful relief to Nucor, it will also clarify application of Section 41-35-120, including whether an employee is permitted to rebut an employer's drug test results with her own unauthorized tests, and whether an employer can rely on any applicable Section of the Statute in establishing violation of its policies.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.

A handwritten signature in cursive script, reading "Nosizi Ralephata", followed by a horizontal line.

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ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

February 24, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

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FEB 24 2012

SC Court of Appea

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that on February 24, 2012, copies of the Appellant's Return to Respondents' Brief Regarding Appealability were served upon the following counsel of record by depositing those copies in the United States Mail, postage prepaid, to:

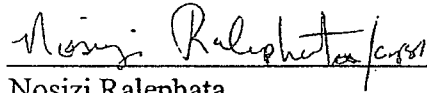
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Ms. Romi Y. Robinson
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The undersigned further certifies that a copy of the **Appellant's Return to Respondents' Brief Regarding Appealability** was sent via United States mail for filing with the Clerk of Court for South Carolina Administrative Law Court, pursuant to the South Carolina Appellate Court Rules.

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February 24, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

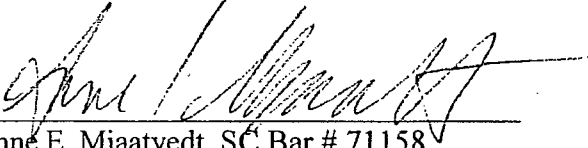
Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

MEMORANDUM OF RESPONDENT KIM A. LEGETTE REGARDING
APPEALABILITY



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Attorney for Respondent Kim A. Legette

February 13, 2012
Charleston, South Carolina

MEMORANDUM OF LAW

On or about January 9, 2012, Appellant Nucor Corporation filed a Notice of Appeal of the May 24, 2011 Order of Honorable Judge Deborah Brooks Durden. In response to this Court's letter of February 2, 2012, Respondent Kim A. Legette submits the following Memorandum of Law.

Because the December 9, 2011 Appellate Panel Decision of South Carolina Department of Employment and Workforce, attached as Respondent Legette's Exhibit A, disposes of the entire controversy, any issues from the the May 24, 2011 Order are moot and not appealable.

PROCEDURAL AND FACTUAL SUMMARY

This a case arising from Respondent Kim A. Legette's application for unemployment benefits through SCDEW following her termination from Appellant Nucor Corp. Appellant has opposed Respondent Legette's receipt of unemployment benefits based on its position that Respondent Legette was terminated for a positive drug test.

Respondent Legette applied for benefits from SCDEW on or before May 5, 2010. As the procedural history of this case within the Agency and the ALC is correctly summarized in the first paragraph of Respondent Legette's Exhibit A,¹ it will not be reviewed in detail here.

Because the Appellant/Employer's position was that Respondent/Claimant had been discharged for a positive drug test, Administrative Judge Durden held that the Agency had incorrectly decided Respondent Legette's eligibility under the standards of S.C. Code Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120(4) – "Discharge for gross misconduct" in her May 24, 2011 Order. (Appellant's Exhibit A). Judge Durden remanded the case back to the SCDEW fact finding body, the SCDEW Appeal Tribunal, and instructed them to determine

¹ Respondent Kim A Legette is here referred to "Respondent/Legette", or as "Respondent/Claimant" to clarify her position as Claimant in the underlying SCDEW administrative process.

her eligibility under the statutory section, §41-35-120 (3), that applies to “discharge for illegal drug use”.

In its December 9, 2011 Order, the SCDEW Appellate Panel decided that the Appellant/Employer had not met the statutory requirements of §41-35-120(3) because it did not submit the test to a certified laboratory, and held that Respondent/Claimant Legette was eligible for benefits. (Exhibit A, Dec. 9, 2011 Decision). That decision became the final disposition of this entire controversy where Appellant did not pursue its required statutory review remedies through the Administrative Law Court pursuant to S.C. Code Ann. § 41-35-750 within 30 days of mailing of that decision.

ARGUMENT

The issues raised in Appellant’s current appeal became moot when the SCDEW Appellate Panel’s December 9, 2011 decision became final.

The S.C. Legislature revised § 41-35-120 in 2010 to distinguish eight different grounds for disqualification. In revising the statute, the Legislature laid out very specific grounds for disqualification on the basis of illegal drug use in § 41-35-120(3). Based on the clear language in the statute, that is the only section that can apply when the employer claims that a positive drug test is the grounds for termination.

Appellant/Employer now wants to appeal the prior ALC decision. Appellant’s prior appeal to this Court was dismissed because the May 24, 2011 ALC decision was clearly not the final order where it remanded the case back to the Agency. (Ct. App. October 13, 2011 Order). Now Appellant attempts to appeal other aspects of the ALC decision, however, that Decision is not appealable.

First, as discussed above, the final Order on this entire controversy is the December 9, 2011 SCDEW Appellate Panel Order, an Order which is not appealable directly to the Court of Appeals under the statute, and further is no longer appealable to the ALC.

Second, the only controversy in this case, whether Respondent/Claimant is eligible for benefits under § 41-35-120, has been fully decided. The issue raised in Appellant's current Appeal – whether a Judge can rely on an offsite drug test under § 41-35-120(2) or (4) – is moot.

“A case becomes moot when judgment, if rendered, will have no practical effect upon [the]existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346 (1973); *Ex parte Moore*, 346 S.C. 274 (2001); *Seabrook v. City of Folly Beach*, 337 S.C. 304 (1999).

Drug test issues are properly decided under § 41-35-120(3), and the issues raised in the prior Appeal are no longer before this Court in this case. The issue of whether independent drug tests can be considered in determining eligibility would have no bearing on this case where it was not a basis for determining Respondent Legette's eligibility in the December 9, 2011 final decision. A appellate court will not pass on moot and academic questions where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486 (1997).

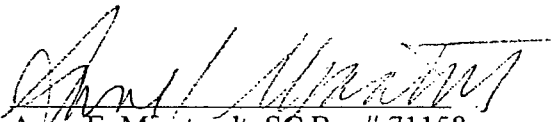
Appellant/Employer is incorrect in stating that the case was remanded on the “narrow issue” of certified laboratory, in fact it was the deciding factor in this case. (May 24, 2011 Order, pg. 5). When an employer discharges an employee where the sole allegation is a positive drug test, none of the other seven grounds for disqualification in § 41-35-120 apply. Then, if as here, that drug test is not performed in accordance with every criteria in § 41-35-120(3), a claimant cannot be held ineligible for benefits.

Here, the December 9, 2011 Order found that the testing laboratory did not meet the certification criteria in § 41-35-120(3)(a)(B), and the Respondent/Claimant is eligible for benefits. Once the December 9, 2011 Order became final, it is the final order regarding Respondent/Claimant's eligibility for unemployment benefits and no controversy remains for this Appeal. Any potential judgment that this Court could make regarding issues raised by Appellant from the May 24, 2011 order would have no practical effect, the SCDEW has made a decision that Respondent/Claimant Legette is eligible for benefits, and that decision is final, making this Appeal moot.

CONCLUSION

Based on the above, Respondent Legette respectfully requests that this Court dismiss Appellant's appeal on the basis that neither the May 24, 2011 ALC decision, nor the December 9, 2011 SCDEW decisions, are appealable and that any appeal is Moot.

Respectfully Submitted:



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Attorney for Respondent Kim A. Legette

February 13, 2012
Charleston, South Carolina

Respondent Legette Exhibit A
December 9, 2011 Appellate Panel Decision

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: [REDACTED])
Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)
_____)

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

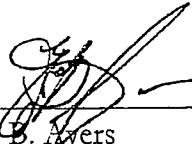
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

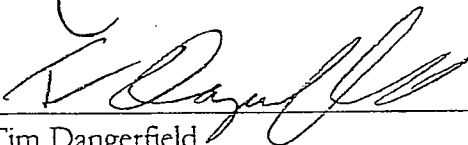
¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

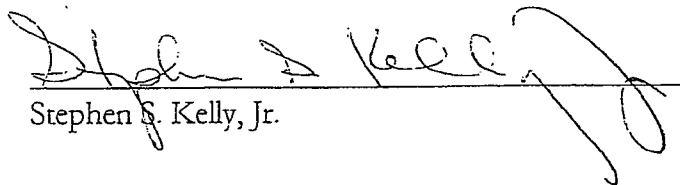
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers

Tim Dangerfield

Stephen S. Kelly, Jr.

Hearing Date: 11/30/11
Date Mailed: 12/9/11
Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

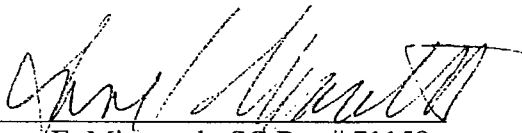
South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Memorandum Of Respondent Kim A. Legette
Regarding Appealability in the above referenced matter by depositing a copy of the same
in the United States Mail on February 13, 2012 to:

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Nosizi Ralephata, Esq.
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ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No.: 2012206406

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

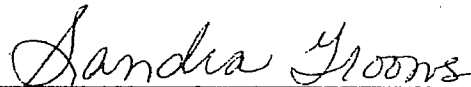
Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

MEMORANDUM OF RESPONDENT SOUTH CAROLINA DEPARTMENT
OF EMPLOYMENT AND WORKFORCE REGARDING APPEALABILITY



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Attorney for Respondent S.C. Department of
Employment and Workforce

February 13, 2012
Columbia, South Carolina

MEMORANDUM OF LAW

Appellant Nucor Corporation filed a Notice of Appeal on January 9, 2012, from an Order of the Honorable Judge Deborah Brooks Durden issued May 24, 2011. Respondent South Carolina Department of Employment and Workforce (SCDEW) concurs and joins in all the arguments submitted to this Court by Respondent Kim Legette in her Memorandum of Law and reiterates the same herein.

Additionally, in accordance with Judge Durden's Order, the Respondent Department has issued a final agency decision on this claim for benefits on December 9, 2011, (Exhibit A) which is dispositive on this claim for unemployment benefits. Appellant did not appeal this final decision of the SCDEW to the Administrative Law Court (ALC) and the time for appeal has expired. Moreover, Appellant concedes and does not challenge the final decision of the SCDEW that holds Respondent Legette is eligible for unemployment benefits under S.C. Code Ann. § 41-35-120 (3). This is the specific statute that governs and controls whether or not a claimant is disqualified from benefits whenever a claimant is discharged by an employer for failing a drug test. Appellant premised its initial appeal to the ALC upon its claim that the employer utilized a drug testing lab that was certified in compliance with S.C. Code Ann. §41-35-120 (3). This issue was disputed in the record, and the Appellate Panel did not make a finding on it. Judge Durden ruled that a determination of whether Legette was disqualified from benefits under §41-35-120 (3) was necessary to the resolution of the case, and remanded the case to the Department to make specific findings and conclusions as to the disputed facts under S.C. Code Ann. 41-35-120 (3). Since the decision of the SCDEW under S.C. Code Ann. 41-35-120 (3) is now final and dispositive on this claim for unemployment benefits, the Appellant's attempted appeal of the May 24, 2011, Order of Judge Durden on other issues is irrelevant, immaterial, moot, and not appealable.

PROCEDURAL AND FACTUAL SUMMARY

This a case arising from Respondent Kim A. Legette's application for unemployment benefits through SCDEW following her termination from Appellant Nucor Corp. Appellant Nucor discharged Respondent Legette for a positive drug test. S.C. Code Ann. § 41-35-120 (3) is the controlling statute and sets forth specific criteria that must be satisfied in order for the Department to disqualify a claimant who is discharged for a positive a drug test result.

Administrative Judge Durden held that the Department had incorrectly decided Respondent Legette's eligibility under the standards of S.C. Code Ann. § 41-35-120(2) – "Discharge for cause" and/or § 41-35-120(4) – "Discharge for gross misconduct" in her May 24, 2011 Order. (Appellant's Exhibit A). Judge Durden remanded the case back to the SCDEW fact finding body, the SCDEW Appeal Tribunal, and instructed them to determine her eligibility under the statutory section, §41-35-120 (3), that applies to "discharge for illegal drug use".

In its December 9, 2011 Order, the SCDEW Appellate Panel decided that the Appellant/Employer had not met the statutory requirements of §41-35-120(3) because it did not submit the test to a certified laboratory, and held that Respondent/Claimant Legette was eligible for benefits. (Exhibit A, Dec. 9, 2011 Decision). That decision became the final disposition of this entire controversy where Appellant did not pursue its required statutory review remedies through the Administrative Law Court pursuant to S.C. Code Ann. § 41-35-750 within 30 days of mailing of that decision.

ARGUMENT

The issues raised in Appellant's current appeal became moot when the SCDEW Appellate Panel's December 9, 2011 decision became final.

The S.C. Legislature revised § 41-35-120 in 2010 to distinguish eight different grounds for disqualification. In revising the statute, the Legislature laid out very specific grounds for disqualification on the basis of illegal drug use in § 41-35-120(3). Based on the clear language in the statute, that is the only section that can apply when the employer claims that a positive drug test is the grounds for termination.

Appellant/Employer now wants to appeal the prior ALC decision. Appellant's prior appeal to this Court was dismissed because the May 24, 2011 ALC decision was clearly not the final order where it remanded the case back to the Agency. (Ct. App. October 13, 2011 Order). Now Appellant attempts to appeal other aspects of the ALC decision, however, that Decision is not appealable.

First, as discussed above, the final Order on this entire controversy is the December 9, 2011 SCDEW Appellate Panel Order, an Order which is not appealable directly to the Court of Appeals under the statute, and further is no longer appealable to the ALC.

Second, the only controversy in this case, whether Respondent/Claimant is eligible for benefits under § 41-35-120, has been fully decided. The issue raised in Appellant's current Appeal – whether a Judge can rely on an offsite drug test under § 41-35-120(2) or (4) – is moot.

“A case becomes moot when judgment, if rendered, will have no practical effect upon [the]existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346 (1973); *Ex parte Moore*, 346 S.C. 274 (2001); *Seabrook v. City of Folly Beach*, 337 S.C. 304 (1999).

Drug test issues are properly decided under § 41-35-120(3), and the issues raised in the prior Appeal are no longer before this Court in this case. The issue of whether independent drug tests can be considered in determining eligibility would have no bearing on this case where it

was not a basis for determining Respondent Legette's eligibility in the December 9, 2011 final decision. An appellate court will not pass on moot and academic questions where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486 (1997).

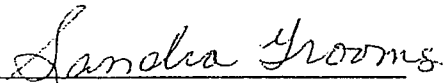
Appellant/Employer is incorrect in stating that the case was remanded on the "narrow issue" of certified laboratory, in fact it was the deciding factor in this case. (May 24, 2011 Order, pg. 5). When an employer discharges an employee where the sole allegation is a positive drug test, none of the other seven grounds for disqualification in § 41-35-120 apply. Then, if as here, that drug test is not performed in accordance with every criteria in § 41-35-120(3), a claimant cannot be held ineligible for benefits.

Here, the December 9, 2011 Order found that the testing laboratory did not meet the certification criteria in § 41-35-120(3)(a)(B), and the Respondent/Claimant is eligible for benefits. Once the December 9, 2011 Order became final, it is the final order regarding Respondent/Claimant's eligibility for unemployment benefits and no controversy remains for this Appeal. Any potential judgment that this Court could make regarding issues raised by Appellant from the May 24, 2011 order would have no practical effect, the SCDEW has made a decision that Respondent/Claimant Legette is eligible for benefits, and that decision is final, making this Appeal moot.

CONCLUSION

Based on the above, Respondent SCDEW respectfully requests that this Court dismiss Appellant's appeal on the basis that neither the May 24, 2011 ALC decision, nor the December 9, 2011 SCDEW decisions, are appealable and that any appeal is Moot.

Respectfully Submitted:



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Attorney for Respondent Department (SCDEW)

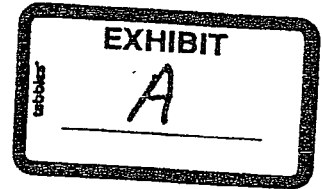
February 13, 2012
Columbia, South Carolina

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Kim A. Leggette)
517 Laurel Ridge Road)
North Charleston, SC 29418)
Claimant SSN: 235-11-8079)
Nucor, Corp.)
c/o Human Resources)
Post Office Box 2259)
Mt. Pleasant, SC 29465)
Liable Employer)

APPELLATE PANEL
DECISION



Appellant: Claimant

The claimant appealed a claims adjudicator's determination mailed May 27, 2010, holding her disqualified from benefits for twenty-six (26) weeks, upon finding she was discharged for cause under S.C. Code Ann. §41-35-120(2). The Department mailed Appeal Tribunal Decision 2010-A-11555 on July 19, 2010, modifying the initial determination and holding the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). The claimant appealed the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel mailed Decision No. 2010-C-2253 on November 19, 2010, reversing the Appeal Tribunal decision and holding the claimant eligible for benefits without disqualification, upon finding the claimant was separated under non-disqualifying circumstances under S.C. Code Ann. §41-35-120(4). The employer appealed to the Administrative Law Court (ALC). The ALC, by an order filed May 24, 2011, remanded the case to the Department to determine whether the claimant was disqualified from benefits pursuant to S.C. Code Ann. §41-35-120(3).

The Appeal Tribunal conducted a de novo hearing on August 15, 2011, and issued a new decision on August 18, 2011. The claimant appealed Appeal Tribunal Decision 2011-A-15157 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified from benefits upon finding the claimant was discharged for illegal drug use under S.C. Code Ann. §41-35-120(3). This decision modified the original claims adjudicator's determination that held the claimant disqualified from benefits upon finding she was discharged for cause.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-15157 is reversed. The claimant is eligible for benefits without disqualification effective April 18, 2010, upon finding the claimant was discharged without cause.

The claimant worked for the employer from August 24, 1998, through April 22, 2010, most recently as cold mill scheduler. The employer terminated the claimant after the claimant tested positive for illegal drugs. The employer has a communicated drug policy that includes random drug testing. The claimant was aware of the employer's drug testing policy. The claimant provided a hair sample on April 6, 2010, and again on April 15, 2010. Both samples were sealed and labeled by a licensed healthcare professional in the claimant's presence. The samples were tested and the results were then confirmed by a laboratory (Omega) using the gas chromatography/mass spectrometry method. The claimant's samples tested positive for illegal drugs. S.C. Code Ann. § 41-35-120(3)(a) stipulates that a testing laboratory must be certified by the National Institute on Drug Abuse (NIDA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). Omega was not certified at the time of the test by either CAP or SLED. Omega received its first accreditation from CAP on September 9, 2010.

Upon review, the Appellate Panel has determined that the pivotal issue in this case is whether Omega was a NIDA/HHS certified laboratory at the time of the test as specified in the statute. Therefore, additional research was performed to determine the origins of NIDA, the nature of the certification program it once administered, and what happened to the certification program when Congress reorganized HHS.

NIDA was a department within the Federal Department of Health and Human Services (HHS). Pursuant to Public Law 100-71 §503(a)(1)(A)(ii), NIDA in 1988 published mandatory guidelines to ensure the accuracy and reliability of federal employee drug testing. Additionally, NIDA administered the National Laboratory Certification Program (NLCP) which certified only those laboratories that met the stringent forensic requirements for urine testing detailed in the mandatory drug testing guidelines. NIDA certified laboratories were routinely published in the Federal Register. Public Law 102-321 reorganized HHS effective October 1, 1992. The research responsibilities of NIDA were transferred to the National Institute of Health, while its public service responsibilities, including administration of the NLCP, were transferred to the newly established Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA has administered certification of laboratories under the NLCP and published the names of certified laboratories in the Federal Register ever since. SAMHSA, like NIDA, only certifies laboratories that meet the mandatory requirements for urine testing.

Omega was not SAMHSA certified when the claimant's hair sample was tested. Omega was certified, however, by a different HHS department, the Centers for Medicare & Medicaid Services, as in compliance with the Clinical Laboratory Improvement Amendments (CLIA). Pursuant to 42 U.S.C. 263a § 353, all laboratories performing diagnostic testing of human specimens must be certified as in compliance with CLIA. 42 CFR 493.3(b)(3) specifically exempts SAMHSA certified drug testing from the CLIA certification requirements. SAMHSA certification is more stringent than CLIA certification, and requires laboratories to comply with specific testing and reporting procedures and pass multiple performance tests. Additionally,

SAMHSA certified laboratories must pass semiannual maintenance inspections to retain their certification. According to HHS statistics, as of October 3, 2011, approximately 19,000 laboratories were certified in compliance with CLIA, while only 37 were SAMHSA certified drug testing facilities.

S.C. Code Ann. §41-35-120(3)(a) requires an indefinite disqualification from benefits when the Department finds that a claimant was discharged for illegal drug use. The disqualification continues until the claimant returns to work and earns at least eight (8) times the weekly benefit amount in covered employment. Disqualification for a positive drug test requires: (1) communication of a policy prohibiting drug use and providing for discharge; (2) collection by a licensed health care professional; (3) testing by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and (4) confirmation by the gas chromatography/mass spectrometry or an equivalently reliable method.

It is undisputed that the claimant submitted to a random drug test pursuant to the employer's communicated policy prohibiting drug use; that the claimant's sample was collected, sealed, and signed by a licensed healthcare professional; that the test was positive for illegal drugs; and that the positive drug test was confirmed by gas chromatography / mass spectrometry. The evidence establishes, however, that the employer's testing facility was not certified by the appropriate institution at the time of the test. NIDA promulgated rigorous forensic testing guidelines to ensure that positive drug test results withstood legal scrutiny. The South Carolina legislature adopted those forensic guidelines by listing NIDA as one of three certification options. We find that the certification program administered by NIDA was transferred to SAMHSA by Public Law 102-321, and that SAMHSA certification is equivalent to NIDA certification under S.C. Code Ann. §41-35-120(3)(a). We further find that the CLIA certification presented by the employer covers only clinical diagnostic testing, and does not satisfy the rigorous forensic certification requirements once administered by NIDA and now administered by SAMHSA. The employer's testing laboratory was not SAMHSA, CAP, or SLED certified at the time of the drug test. Therefore, we find that the employer has failed to meet each statutory requirement necessary to establish discharge for illegal drug use.

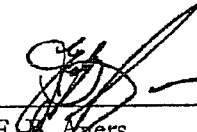
The employer argued that it was impossible to comply with S.C. Code Ann. §41-35-120(3)(a) as written because the statute specifies that a hair sample may be tested, but none of the organizations listed in the statute certified hair testing at the time of the drug test. In support of this argument, the employer provided an internet citation in its written brief alleging that CAP did not certify hair testing prior to July 2010,¹ and maintained that Omega received its CAP accreditation shortly thereafter. Rather than nullify the statute, the employer argued that certification under any HHS department would satisfy the requirements under the statute and the intent of the legislature.

¹ <http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited by the Department on 12/8/2011).

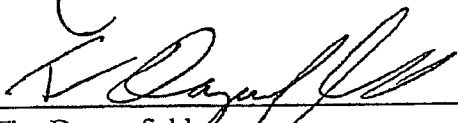
We disagree. The internet citation provided by the employer does not state that CAP did not include hair testing as part of its forensic drug testing program prior to July 2011. Further, CAP has available on its website a 2009 edition of its Standards for Forensic Drug Testing Laboratory Accreditation which includes accreditation for hair testing.² Finally, per CAP's Director, Laboratory Improvement Programs Communications/Media Relations, CAP added hair testing to its forensic drug testing program in May 2007.³ Therefore, we find that CAP certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a CAP certified lab to confirm the hair test. Alternatively, we reject the employer's argument that it was impossible to comply with the statute as written if the organizations listed did not certify hair testing prior to July 2010. The employer could have complied with the letter and spirit of the statute by simply administering a urine drug test and using a certified laboratory to confirm the results.

The Appeal Tribunal decision is reversed.

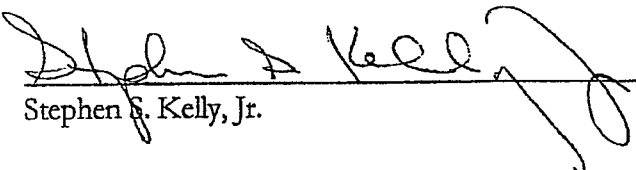
**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 11/30/11
Date Mailed: 12/9/11
Mailed By: LB

² http://www.cap.org/apps/docs/laboratory_accreditation/forensic_urine.pdf (last visited by the Department on 12/8/2011).

³ E-mail from Joe Schram, Director, Laboratory Improvement Programs Communications/Media Relations, College of American Pathologists, to Paul Famolari, Manager, Higher Authority Appeals, South Carolina Department of Employment and Workforce (December 1, 2011, 15:36 EST).

STATE OF SOUTH CAROLINA
In the Court of Appeals

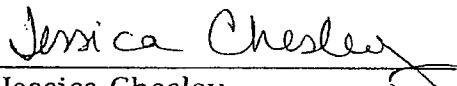
Nucor Corporation,	)	Case Number: 2012206406
Appellant,	)	
	)	
vs.	)	
	)	AFFIDAVIT OF SERVICE
	)	BY MAIL
South Carolina Department of	)	
Employment and Workforce,	)	
Respondent,	)	
	)	

PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Memorandum of Respondent SC Department of Employment and Workforce Regarding Appealability in the above named action on the following:

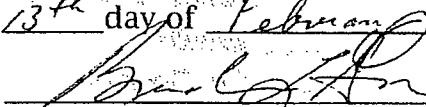
John S. Wilkerson III
Nosizi Ralphata
PO Box 22129
Charleston, SC 29413

Anne E. Mjaatvedt
39 Broad Street, Suite 208
Charleston, SC 29401

That the postage was duly prepaid; and that it was deposited in the United States Mail on the 13th day of February 2012.



Jessica Chesley

SWORN to before me this the
13th day of February, 2012


(L.S.)
Notary Public for South Carolina
My Commission Expires: 2-28-2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Court of Appeals Case Tracking No.: 2012206406

RECEIVED

FEB 13 2012

SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

APPELLANT'S MEMORANDUM IN SUPPORT OF APPEALABILITY

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SUMMARY OF ARGUMENT

At its heart, this is a simple case of an employee who was terminated from her employment after she failed a workplace drug test administered on behalf of the employer in April 2010. Claimant thereafter sought unemployment benefits, and under normal circumstances, the case would have been resolved by December 2010 at the latest. However, the case has undergone full fact-finding hearings at the Appeals Tribunal on two separate occasions; has been appealed to the Appellate Panel of the South Carolina Department of Employment Workforce (hereinafter "Appellate Panel" or "Agency") twice; has been appealed to the Administrative Law Court (hereinafter "ALC") once; and this is Appellant's second appeal to this Court. The legal issues on appeal fall squarely into the category of issues that are "capable of repetition yet constantly evading review." The Appellate Panel's initial unauthorized creation of an exception to the applicable statute based on an off-site independent test that was administered under completely different testing criterion, as basis for reinstating the Claimant's unemployment benefits has caused the vicious cycle and confusion that is now synonymous with this case. And instead of dealing with this unauthorized creation of an exception to the statute as was required on appeal, the ALC chose instead, to affirm the Appellate Panel without legal basis or authority; improperly framed the legal issues presented as "an invitation to re-weigh the facts"; and remanded based on a red herring issue that had not been raised by Respondent.

The parties have exhausted their administrative remedies, including appealing the legal issues to the ALC. Because the issues raised to the ALC, including issues purportedly remanded for further proceedings have been determined with finality, this case is ripe for appeal pursuant to South Carolina Code Ann. § 1-23-380 and 610. As our Supreme Court observed in *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, 387 S.C. 265,

692 S.E.2d 894 (2010), “[t]he right of appeal arises from and is controlled by statutory law.” (citing *Ex parte U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)); see also Rule 201, SCACR. These statutes, by their express terms, permit immediate appellate review of a final order of the ALC and/or the Appellate Panel. The only issue that was remanded by the ALC for additional determination (whether the testing laboratory was certified as required under S.C. Code Ann. § 41-35-120(3)(iii)(C)) has been resolved by the Appellate Panel. The only options available to Appellant Nucor Corporation (hereinafter “Nucor”) are either to accept the ALC Order as the law of the case, or to seek appellate review.

From the beginning, Nucor has argued consistently that: (1) Neither the ALC Judge nor the Appellate Panel had authority to reinstate Legette’s unemployment benefits based on an off-site independent drug test performed after she indisputably failed two tests administered pursuant to Nucor’s Drug and Alcohol Policies; (2) Legette admitted failing the tests administered in compliance with South Carolina law and with Nucor’s drug policies; and (3) Legette’s third test was administered under a different detection standard and could not support a “contradictory results” finding as a matter of law. See, Petition for Judicial Review, attached hereto as Exhibit A. These issues were ignored by the ALC, and now form the basis of Nucor’s present appeal.

It is noteworthy that Legette’s appellate issues have been inconsistent at all levels of review, adapted at every turn in an effort to create factual issues where none otherwise exist. Even though she concedes the proper chain of custody had been followed, Legette initially appealed on the basis that the sample for her Nucor drug screen was improperly collected and handled (a contention clearly contradicted by her own sworn testimony). [June 2, 2010 Appeal]. When that argument failed, she then appealed on the basis that she does not smoke marijuana and that there were contradictory test results. [July 22, 2010 Appeal]. When the Appellate Panel

reinstated Legette's benefits based upon of the alleged "contradictory results," Nucor appealed to the ALC asserting that the Appellate Panel lacked authority to rely on an outside "independent" test. Instead of addressing these legal issues, the ALC remanded for further proceedings the sole issue of whether the testing laboratory was properly certified pursuant to South Carolina law, an issue that is irrelevant to the proper outcome of this appeal. And it is solely on the basis of the certification issue that the Appellate Panel reinstated Legette's benefits. However, even to the extent Nucor concedes the certification issue, Legette is not entitled to benefits because she failed two previous drug tests that complied with the Nucor's Drug and Alcohol Policies and South Carolina law. The failure by the ALC to address the legal issues not only constitutes legal error, but also works a gross injustice because it provides *carte blanche* to disgruntled private sector employees to thwart workplace drug and alcohol policies and procedures in contravention of South Carolina law.

SUMMARY OF FACTS

This appeal arises from Legette's termination on April 22, 2010, from Nucor's steel manufacturing plant in Berkeley County. On April 6, 2010, Legette was tested for drugs pursuant to Nucor's periodic random drug testing policy. Legette verified that the chain of custody had been fully satisfied. Legette also executed the Drug Testing Custody and Control Form certifying that she provided her specimen to the collector, that "the specimen used was sealed with a tamper evident seal in my presence," and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. [R. 28, 37, 40-41, 43; Exhibit 4, R. 98-100; Exhibit 5, R. 102-104].¹ Legette's sample tested positive for 1.25 picograms per milligram of marijuana, which constitutes a basis for immediate termination. [R. 23; Exhibit 4, R. 101;

¹ The references to the Record pertain to the documents that form the ALC record on appeal.

Exhibit 6, R. 121]. Legette was adamant that she does not use illegal drugs, and she requested that another test be administered on behalf of Nucor. [Exhibit 1, R. 85-88].

When an employee requests a second test following a positive one, Nucor's standard practice is to administer the second test under a "level of detection"/"limit of detection" criterion. [Exhibit 5, R. 103; Exhibit 7, R. 137; Claimant's ALC Response Brief, second page]. Pursuant to the "level of detection" criterion, any amount of marijuana/THC detected in a hair sample at or above .10 picograms per milligram is considered a positive result and is yet another basis for immediate termination. [R. 32]. Legette was aware that the second test administered April 15, 2010, would be performed as a "level of detection" test. [Exhibit 5, R. 103; Exhibit 7, R. 137; Claimant's ALC Response Brief, second page]. As part of the second test, she executed another Custody Form, which clearly indicates the test would be performed under the "level of detection" standard. [Id.] The results of that second test were .78 picograms per milligram of marijuana. Because the results exceeded .10 picograms per milligram of marijuana, the second test also was positive for marijuana and served as a basis for immediately terminating Legette for cause pursuant to Nucor's Drug & Alcohol Policy. [R. 38; Exhibit 5, R. 105; Exhibit 7, R. 136].

Prior to her termination on April 15, 2010, and after twice testing positive for marijuana through a process that she herself verified, Legette sought an additional 'independent' drug test that allegedly yielded a negative result. [R. 51-52, 54, 56; Agency's Supplement to ALC R.]. There is no evidence, neither has it ever been argued, that this third test was subject to the same level of detection standard utilized by Nucor. Regardless, it is undisputed that Nucor does not accept independent tests because it has no control over their administration and no assurances of their reliability.

PROCEDURAL BACKGROUND

Based upon the third, uncontrolled test, Legette sought unemployment benefits, asserting she had been wrongfully terminated and that Nucor improperly collected her hair sample. On May 26, 2010, the Claims Adjudicator notified Legette she was disqualified from receiving benefits based on her violation of Nucor's Drug Testing Policy. The Claims Adjudicator also found that failure to comply with company policies constitutes discharge for cause in connection with the work pursuant to S.C. Code Ann. § 41-35-120(2). [R. 13, 85].

Legette appealed to the Appeal Tribunal on June 2, 2010, on the basis that the Adjudicator's decision was in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. After a full evidentiary hearing, the Appeal Tribunal found Legette disqualified to receive benefits based on illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). [R. 274-276].

Legette then appealed to the Appellate Panel, this time on the alternate bases that she does not smoke marijuana and that there were contradictory test results. The Appellate Panel held a hearing on November 17, 2010, observed that the disparate testing results were of concern, and found that "*while an employer may not accept an off-site drug test*, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." [R. 1-2]. (Emphasis added) As a result, the Appellate Panel erroneously determined Legette was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4), and reversed the Appeal Tribunal's Decision. [R. 1-2].

On December 14, 2010, Nucor submitted a Petition for Judicial Review to the ALC, arguing that the Appellate Panel's acceptance of an independent drug test as controlling, with no

evidence that it comported with the statute, was in contravention of the statute's mandate and outside the scope of the Agency's authority. Nucor also argued that the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute. Nucor further argued that Legette's test was administered under a different detection standard and could form the basis of a "contradictory results" finding as a matter of law. These issues were presented as questions of law for the ALC to resolve. *See*, Nucor's brief to the ALC, attached hereto as Exhibit B.

On May 24, 2011, the Honorable Deborah Brooks Durden (hereinafter "Judge Durden") issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. In so holding, Judge Durden found that "[t]he Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, *including the negative test results cited by the Appellate Panel* in its order." Order, at p. 4. (Emphasis added). The order remanded to the Department on the single and narrow issue of whether disqualification from benefits comported with the requirements set forth under S.C. Code Ann. §41-35-120(3)(iii)(C) which deals with certification of the testing laboratories. *Id.* *See*, Exhibit C.

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all parties that the ALC "no longer has jurisdiction in the matter *because Judge Durden's Order is a final order in this matter.*" (Exhibit D) (Emphasis added). In response to this correspondence, Nucor filed a Notice of Appeal in this Court challenging Judge Durden's application of S.C. Code Ann. §41-35-120(2) and (4) to the present dispute. Thereafter, this Court issued its October 13, 2011 Order dismissing the appeal as one that is not immediately appealable in light of *Charlotte-Mecklenburg Hospital Authority v. S.C.*

Dep't of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). *See*, Ct. App. October 13, 2011 Order, attached hereto as Exhibit E.

On August 15, 2011, the Appeal Tribunal conducted a *de novo* hearing pursuant to the ALC's remand Order. At that Hearing, Nucor again presented testimony that it has a drug policy that was communicated to the Legette and that Nucor does not consider outside tests performed at an employee's request. Nucor objected to Legette's testimony regarding the outside test or any reference thereto throughout the hearing. The Appeal Tribunal issued a new decision on August 18, 2011, finding that the Claimant was indefinitely disqualified from benefits pursuant to S.C. Code Ann. § 41-35-120(3) and that the laboratory was certified as required under the Statute.

Legette again appealed to the Appellate Panel, raising as her sole issue that the Appeal Tribunal erred as a matter of law in finding that the laboratory was certified as required under the Statute. *See*, Claimant's Appeal to Appellate Tribunal, attached hereto as Exhibit F.

On November 15, 2011, the Appellate Panel advised the parties that oral argument had been scheduled for November 30, 2011. The Appellate Panel also specifically requested that the parties "come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services." *See*, Appellate Panel correspondence attached hereto as Exhibit G.

On November 30, 2011, the parties argued the sole issue of whether or not the laboratory met the certification specifications set forth in the statute. On December 9, 2011, the Appellate

Panel issued its decision regarding the narrow issue of whether the laboratory was certified as contemplated pursuant to S.C. Code Ann. § 41-350120(3), which provides that a testing laboratory must be certified by the NIDA, CAP or SLED. The Appellate Panel held that the laboratory was not certified at the time of the subject test as required. Neither party appealed this decision, which is a final order pursuant to S.C. Code Ann. § 1-23-380 and became the law of the case.

Nucor filed a Notice of Appeal in this Court asserting that Judge Durden's Order is now final since the only issue on remand had been disposed of by the Appellate Panel. Nucor also explained that the Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct and that the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B) had now been ruled on.

Since neither party appealed the Appellate Panel's decision regarding the issue of the laboratory's certification (the only issue remanded), the ALC's Order is now final as to all issues raised to that body by Appellant and comprises a final order which is ripe for appeal under well-established precedent.

ARGUMENT

I. STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-610(A)(1) (Supp.2009) provides that judicial review may only be sought from a *final* decision of the ALC. *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010). (Emphasis in original). If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Id.* citing *Hooper*

v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

Pursuant to S.C. Code Ann. § 1-23-380(A)(6), an Agency's decision may be reversed or modified if it exceeds the Agency's authority, is affected by other error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. For purposes of the substantial evidence test, "substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. South Carolina Public Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

In addition, "[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Smith v. Regional Medical Center of Orangeburg and Calhoun Counties*, 2011 WL 2535556, 1 (Ct. App. 2011), quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). See also, *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). Both the ALC and the

Court of Appeals are free to decide matters of law with no particular deference to the fact finder. S.C. Code Ann. § 1-23-610 (B)(a) and (d) (Supp. 2009). *See also, Pressley v. REA Constr. Co.*, 374 S.C. 283, 287–88, 648 S.E.2d 301, 303 (Ct. App. 2007).

II. THE APPEAL IS RIPE FOR ADJUDICATION AND SHOULD NOT BE DISMISSED.

The questions presented to the ALC, and which form the bases of this appeal require construction of S.C. Ann. § 41-35-120 to determine whether, in analyzing eligibility for unemployment benefits, the statute permits the Agency (or the ALC) to rely upon third-party drug tests *not* performed on behalf of the employer and using a detection criterion that differs from that utilized by the employer.² The statute in question provides, in relevant part, as follows:

An insured worker is ineligible for benefits for:

* * * * *

(2) Discharge for cause connected with the employment. . . .“Cause connected with the employment” as used in this item requires more than a failure in good performance of the employee as the result of inability or incapacity.

(3)(a) Discharge for illegal drug use, and is ineligible for benefits . . . if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label

² These issues are largely the same issues that formed the bases of Nucor’s appeal to the ALC. *See*, Appellant’s ALC Briefs, including Statement of Issues on Appeal.

test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.

....

(4) Discharge for gross misconduct, . . . if he is discharged due to:

(i) wilful or reckless employee damage to employer property that results in damage of more than fifty dollars;

(ii) employee consumption of alcohol or being under the influence of alcohol on employer property in violation of a written company policy restricting or prohibiting consumption of alcohol;

(iii) employee theft of items valued at more than fifty dollars;

* * * * *

S.C. Code Ann., § 41-35-120.

On appeal to the ALC, Nucor presented legal issues for review by the ALC Judge. Nucor also requested that the ALC Judge interpret and apply the plain language of the statute. Nucor further raised the issue that in actuality, while purporting to rely on Section 41-35-120(4) as basis for overturning the Appeal Tribunal, the Appellate Panel in effect, crafted an unauthorized exception to Section 41-35-120(3) by relying on off-site drug test results not administered on behalf of the employer. The legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains a non-statutorily compliant drug test after failing a statutorily-compliant company drug test. Indeed, the legislature did not provide *any* exception

under which the Commission can disregard the mandate of Section 41-35-120(3); and thus, the Appellate Panel acted outside the scope of its authority as a matter of law.

However, on May 24, 2011, Judge Durden issued an order holding that Nucor's arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. [May 24, 2011 Order, at p. 4]. In so holding, the Judge Durden improperly relied on the Appellate Panel's unauthorized creation of an exception to the statute, including the Appellate Panel's erroneous ruling that there were "contradictory test results." The ALC then remanded the case to the Department on the single and narrow issue of whether the laboratory was certified as required under S.C. Code Ann. §41-35-120(3)(iii)(C). *Id.*

The Appellate Panel heard argument on the certification issue and held the laboratory was not certified. Neither party appealed that ruling; thus, all the issues forming the basis of Nucor's appeal to the ALC have now been decided with finality.

South Carolina Code Ann. § 1-23-610 provides for appellate review of final judgment of the ALC. The ALC's Order is final and constitutes the law of the case unless appealed because all issues have been decided; thus, the ALC's order is the law of the case as to interpretation Section 41-35-120 and its application to the facts of this case. It is also just as clear that if, as a matter of law, neither the Appellate Panel nor the ALC had authority to make *any* findings based on the outside test, there would be no "contradictory" results to speak of and no basis upon which to challenge termination under Section 41-35-120(2) and (4).

Similarly, the *Charlotte-Mecklenburg* decision emphasizes the long-standing rule that a final order is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* provides that "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what

has been determined.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where “there is some further act which must be done by the court prior to a determination of the rights of the parties.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission.

Here, the ALC’s Order concluded, as a matter of law, that Nucor’s arguments regarding S.C. Code Ann. § 41-35-120(2) and (4) lacked merit, and this ruling impermissibly relied on the Appellate Panel’s erroneous conclusion that an outside test was not only authorized under the statute, but also constituted a proper basis for reversing the Appeal Tribunal’s decision. Moreover, the only issue remanded by the ALC has now been conclusively resolved. Now that the issue on remand has been determined with finality, the ALC’s Order is final, and the only opportunity that Nucor has resolve these legal issues (issues that are capable of repetition but have thus far evaded review) is by appeal to this Court.

The ALC’s reliance on the Appellate Panel’s finding regarding “contradictory” test results has no legal support, is contrary to South Carolina law and Nucor’s policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at Nucor’s facility. Further, the ALC order is final and warrants appellate review given its far reaching consequences on South Carolina employers, as well as for its potential to pave the way for future instances of unauthorized reliance on outside tests as a means to challenge otherwise proper and justified terminations for cause. The ALC order unjustifiably eviscerates Nucor’s drug policies, of which Legette was apprised and to which she consented, and imposes an

obligation on Nucor and potentially all employers to accept off-site drug testing results without justification or legal authority. Left unchallenged, the ALC Order (and the underlying Appellate Panel Order) will require virtually every South Carolina employer to accept outside drug test results proffered by terminated employees seeking unemployment benefits in spite of their violation of known drug and alcohol policies.

These issues are ripe for appeal. To hold differently, and to dismiss this appeal, would contravene South Carolina law and work a gross injustice upon Nucor and all similarly situated South Carolina employers. Absent immediate review in this Court, there is nothing left to be done except to execute the erroneous final orders of the ALC and the Appellate Panel.

CONCLUSION

For all of the reasons stated herein, Nucor respectfully submits that its appeal is proper and the issues raised therein are ripe for immediate adjudication.

Respectfully submitted,

Nosizi Ralephata /css

Nosizi Ralephata
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CORPORATION

February 13, 2012
Charleston, South Carolina

TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

EXHIBIT A

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

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December 14, 2010

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Petition for Judicial Review
In the Matter of Kim A. Legette v. Nucor Corporation and S.C. Department of
Employment and Workforce
Order of Appellate Panel Decision, dated November 19, 2010
Decision No. 2010-C-2253
Appeal No. 10377-11778
Our Client – Nucor Corporation

Dear Ms. Shealy:

Please accept this letter as a Petition for Judicial Review pursuant to S.C. Code Ann. § 41-35-750 and Rule 33 of the Rules of Procedure for the Administrative Law Court, and our check for filing fee in the amount of \$100.00. Consequently, on behalf of our client, Nucor Corporation, we hereby request an administrative review of the above-identified Appellate Panel Decision. We have enclosed a copy of the questioned decision for your convenience, and copies of our Hearing Transcript Request and Certificate of Service. A copy of the decision was mailed on November 19, 2010 and received by Nucor Corporation ("Nucor") on November 22, 2010, which is, of course, less than 30 days prior to date of the Petition for Judicial Review. Nucor Corporation's Human Resources contact and representative is Ms. Meleah B. Reynolds, at P.O. Box 2259, Mount Pleasant, SC, 29465; telephone number: (843) 336-6668. The undersigned is attorney for Nucor Corporation and can be contacted using the above information.

On November 17, 2010, the Appellate Panel reversed the Appeal Tribunal's decision, and determined that the Claimant, Ms. Kim A. Legette ("Claimant") was eligible for benefits effective April 18, 2010, for having been separated under non-disqualifying circumstances. For the reasons set forth in detail below, it is evident that the Appellate Panel's Decision is erroneous

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Ms. Jana E. Shealy
December 14, 2010
Page 2

and unsupported by the facts and the law, and has potential far-reaching consequences for substantially all South Carolina employers.

Nucor's steel manufacturing plant is a heavy industrial facility that employs approximately 900 hundred employees. In order to create as safe a work environment as possible, Nucor implemented a zero tolerance policy with regard to illegal drug and substance use. Pursuant to its Drug & Alcohol Policy, Nucor regularly conducts random drug tests weekly on all employees, including the Plant Manager. The disciplinary action for violation of the policy concerning illegal drugs is set forth in Nucor's Policy E-3-6, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." At the beginning of the employment relationship, each employee is provided with an Employee Handbook that contains Nucor's Drug & Alcohol Policy. Claimant was provided with a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. Claimant was at all relevant times, aware of the Drug & Alcohol Policy, and had been subject to random drug tests at Nucor on previous occasions.

In compliance with its Drug & Alcohol Policy and the South Carolina Workforce/Employment Rules and Regulations, Nucor partnered with AccuDiagnostics, a national provider of diagnostic testing, to process its employees' drug test samples. AccuDiagnostics is SAMHSA-certified and reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process. Accudiagnostics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Safety Office. The Safety office then notifies those selected for testing, and provides them with 24 hours to report to the Safety Office for testing.

On April 6, 2010, Claimant was tested for drugs randomly pursuant to Nucor's periodic random drug testing policy. Hair samples were collected at the plant from the 15 employees that had been selected for testing that week. Claimant's samples were taken by a certified Nurse Practitioner employed by Nucor, and the samples were sent to Accudiagnostics' testing laboratory in Mogadore, Ohio. Further, Claimant completed Step 5 of the Drug Testing Custody and Control Form, certifying that she provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. That hair sample taken from Claimant tested positive for 1.25 picograms per milligram of marijuana.

Once an employee tests positive for drugs, that employee meets with the Plant Manager to discuss and determine whether the employee prefers to resign voluntarily in lieu of termination. However, if during that meeting with the Plant Manager, the employee is adamant

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 3

that they did not use any illegal drugs or substances, the Plant Manager offers them the opportunity to undergo a second drug test. The Plant Manager also explains that if an employee opts to undergo a second test, that second test will not be subject to a "limit of detection" minimum cut-off amount, but that the results will be based on any detectable amount above .10 picograms per milligram of marijuana. In other words, any amount of marijuana that is above .10 picograms per milligram of marijuana would be a positive result. Claimant opted to undergo a second test on April 15, 2010, and the results of that second test were .78 picograms per milligram of marijuana. Because the results were above .10 picograms per milligram of marijuana, the second test was also positive for marijuana, and thus, basis for immediately terminating Claimant for cause pursuant to Nucor's Drug & Alcohol Policy.

However, prior to her termination, on April 15, 2010, after testing positive for marijuana twice at Nucor, through a system that she verified herself as having followed the chain of command, Claimant, later the same day, sought an additional independent drug test outside Nucor, which allegedly came back negative for drugs. Based on this independent negative test result, the Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free."

Even assuming for purposes of argument that Claimant did indeed obtain a negative drug test result outside the Nucor facility, there is no question that Claimant was tested at Nucor, according to its drug testing policies and procedures, in compliance with South Carolina laws, and was positive for marijuana on two separate occasions. Nucor, like any employer, is entitled to rely upon drug tests conducted by an outside, certified laboratory for the safety of all employees. The Appellate Panel's Decision is premised on two faulty assumptions: (1) That the independent test that Claimant sought was administered using the same administrative minimum requirement for detecting any amount above .10 picograms per milligram of marijuana; and (2) Nucor should have somehow ignored the two positive drug test results in favor of Claimant's independent test results obtained outside of Nucor, and under unknown conditions. Both assumptions have no legal support, are contrary to South Carolina law and Nucor's policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at its facility.

Pursuant to S.C. Code Ann. § 41-35-120, an employee is disqualified for benefits if she is terminated for cause as follows:

Disqualification for benefits.

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 4

(2) Discharge for cause connected with the employment.

(b) An insured worker is considered to have been discharged for cause pursuant to this item, and is ineligible for benefits if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) any initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or more accurate scientifically accepted methods approved by the National Institute on Drug Abuse

See, S.C. Code Ann. § 41-35-120

Both of the drug tests leading to Claimant's termination were conducted by an outside laboratory, and in compliance with S.C. Code Ann. § 41-35-120. The samples were obtained by a Certified Nurse Practitioner. Both Claimant and the Nurse Practitioner acknowledged in writing that the chain of custody had been complied with. The samples were tested by a national laboratory - certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division, and were confirmed positive in compliance with S.C. Code Ann. § 41-35-120(2).

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 5

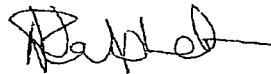
The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site independent drug test where there was evidence that Claimant had failed two drug tests administered in compliance with South Carolina law and with Nucor's drug policy. Further, the Appellate Panel's Decision is of great importance and warrants Judicial Review because of its far reaching consequences on South Carolina employers. Based on the Appellate Panel's Decision, arguably, virtually every employer in South Carolina will be required to accept outside drug test results proffered by disgruntled employees and will owe them unemployment benefits in spite of their violation of the employer's drug and alcohol policies. Outside drug tests are completely out of an employer's control, and there is no way to verify whether the alleged negative results were obtained by an employee through valid means. The Appellate Panel's Decision must therefore be struck down to ensure that every employer's legal right to enforce drug and alcohol policies designed for the protection of its employees is preserved.

As a result, we submit this Petition for Judicial Review on the grounds that Claimant was terminated for cause after failing two drug tests administered by an independent laboratory at the Nucor facility. The Appellate Panel's decision basically and unjustifiably eviscerates Nucor's drug policies, which Claimant was aware of while she was an employee, and instead, imposes an obligation on Nucor to accept off-site independent drug results, without justification or legal authority.

The evidence presented to the Appellate Panel indisputably establishes that Nucor Corporation complied with employment laws of this State and terminated Claimant for cause. As noted by the Appellate Panel, there is no requirement that Nucor Corporation accept off-site independently administered drug tests, and the Appellate Panel's Decision is not supported by the law and the evidence.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Nosizi Ralephata

NR/kmm
Enclosures

cc: Ms. Kim A. Legette
Legal Department - S.C. Department of Employment and Workforce
Mr. Cary Farris

TPGL 3559438v1

November 19, 2010

**SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina**

LETTER OF TRANSMITTAL OF APPELLATE PANEL DECISION

Attached is a copy of the Appellate Panel Decision in your case. If you have questions about the effect of the decision, you may consult an agency representative at the local SCDEW office in your area or at the Benefits Division at the central office in Columbia, S.C.

If you wish to obtain judicial review of the decision, you must comply with the requirements of S.C. Code Ann. §41-35-750 and the Rules of Procedure for the Administrative Law Court.

The law requires that a Petition for Judicial Review must be filed and served within thirty (30) days after the agency's final decision (**see the mailing date above**). The Court may require a filing fee.

The Petition must be filed in the S.C. Administrative Law Court in Columbia, South Carolina:

**Jana E. Shealy, Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
803.734.0550 (phone)**

RECORDED
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MELCHER/RECORDS

You must name the SCDEW and any other party in the case as defendants in the action and you must serve a copy of the Petition for Judicial Review at the following address:

**Legal Department
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202**

For assistance or guidance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

Form App-115
Rev. 6/25/10

IN THE MATTER OF THE CLAIM OF:

Nucor Corporation
c/o Human Resources
PO Box 2259
Mt. Pleasant, SC 29465
Liable Employer

APPELLATE PANEL
DECISION

Appellant: Claimant

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MEMORANDUM

The claimant appealed Appeal Tribunal Decision 2010-A-11555 to the Appellate Panel. The Appeal Tribunal held the claimant indefinitely disqualified for having been discharged for cause connected with the work. This decision modified the claims adjudicator's determination.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2010-A-11555 is reversed. The claimant is eligible for benefits effective April 18, 2010, for having been separated under nondisqualifying circumstances.

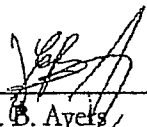
The claimant worked for the employer from August 24, 1998, through April 22, 2010, as a cold mill scheduler. The claimant was discharged after testing positive for an illegal drug in a random drug screen. The claimant asserted the drug testing was faulty. The claimant had previously tested positive for 6.25 picograms per milligram of marijuana on February 13, 2010, only to test negative ten days later. On April 6, 2010, she tested 1.25 picograms and then retested a trace amount of .78 on April 15, 2010. The claimant underwent testing at a different facility that used the same laboratory as the employer and tested negative for any drugs on three occasions, including April 15, 2010. The claimant was adamant that she did not use drugs, and

although the employer stated they do not accept off-site drug testing results, the claimant's drug expert made a point of using the same laboratory so they could be assured the testing was not undermined. The process of collecting the samples was different and may have made a difference in the results, according to the claimant's drug testing expert.

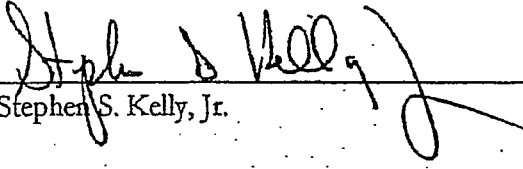
S.C. Code Ann. § 41-35-120 (4) requires that an indefinite benefit disqualification be imposed when the Department finds that a claimant has been discharged for gross misconduct connected with the employment. "Gross Misconduct" includes failure to comply with drug use regulations.

The burden of proving that a claimant has been discharged for cause rests with the employer and after a thorough review of the evidence in this case we have concluded that the employer has not met that burden. The disparate testing results concern us and while the employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free. Therefore, we find the claimant was separated under nondisqualifying circumstances and the Appeal Tribunal decision is reversed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers

Tim Dangerfield

Stephen S. Kelly, Jr.Hearing Date: 11/17/10Date Mailed: 11/19/10

Mailed By: _____

In the Matter of Kim A. Legette v. Nucor Corporation
Decision No. 2010-C-2253
Appeal No. 10377-11778

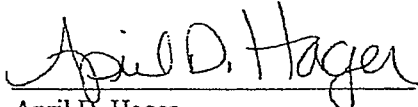
CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2010, a copy of the *Petition for Judicial Review*
and Hearing Transcript Request has been served upon the following by placing same in the
United States Mail, postage prepaid, to:

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Legal Department
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

Ms. Kimberly A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418


April D. Hager

TPGL 3570897v1

EXHIBIT B

STATE OF SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Nucor Corporation,

Docket Number: 10-ALJ-22-0948-AP

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

INITIAL BRIEF OF NUCOR CORPORATION

Mrs. Nosizi Ralephata
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40 Calhoun Street, Suite 200 (29403)
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Attorney for Agency/Respondent

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Phone: 843-709-7073
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Chairman/Respondent

FILED

FEB 17 2011

SC ADMIN. LAW COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
I. THE APPELLATE PANEL'S REVERSAL OF THE APPEAL TRIBUNAL'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	1
II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35- 120(3)	1
III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	1
IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	9
ARGUMENT	10
I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	10

II.	THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3)	15
III.	A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	17
IV.	THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY	21
	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Curtis v. Mississippi Employment Sec. Com'n</i> , 878 So. 2d 1094 (Miss. Ct. App. 2004).....	19, 20
<i>Deese v. South Carolina State Bd. of Dentistry</i> , 286 S.C. 182, 184- 5, 332 S.E.2d 539, 541 (Ct. App. 1985).....	10
<i>Farm Fresh Dairy, Inc. v Blackburn</i> , 841 P2d 1150, (Okla. 1992).....	20
<i>Grace Drilling Co. v. Director of Labor</i> , 31 Ark. App. 81, 790 S.W.2d 907 (1990).....	21
<i>Lee v. South Carolina Employment Sec. Commission</i> , 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982).....	13, 18
<i>McNabb v. Department of Revenue</i> , 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005).....	20
<i>Milliken & Co. v. SC Emp. Comm'n.</i> , 315 SC 492, 445 SE2d 640 (1994).....	15, 16, 18
<i>Overstreet v. Dept. of Employment Sec.</i> , 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988).....	20
<i>Pressley v. Lancaster County</i> , 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).....	10
<i>South Carolina Dept. of Corrections v. Mitchell</i> , 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008).....	10
<i>Stewart v. Duke Mfg. Co.</i> , 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009).....	20
<i>Stone Mfg. Company v. S. C. Employment Security Commission, et al.</i> , 219 S.C. 239, 64 S.E.2d 644 (1951).....	13
<i>Waters v. S.C. Land Res. Conservation Comm'n</i> , 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).....	10

Statutes

S.C. Code Ann. § 1-23-380(A)(6) (2005).....	10, 24
S.C. Code Ann. § 41-35-120.....	1, 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24

Treatises

78 ALR4th 180 § 5-7, "*Drugs-Unemployment Compensation*." 14

STATEMENT OF ISSUES ON APPEAL

- I. THE APPELLATE PANEL'S REVERSAL OF THE APPEAL TRIBUNAL'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW.
- II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3).
- III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.
- IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY.

STATEMENT OF THE CASE

Nucor Steel Berkeley ("Nucor" or "Employer") is a steel manufacturing plant located in Berkeley County, South Carolina, which has approximately 900 hundred employees. Ms. Kimberly A. Legette ("Ms. Legette" or "Claimant") was an employee of Nucor from August 24, 1998 until her termination on April 22, 2010. [ROA 23]. In order to create and ensure a safe work environment, Nucor maintains a zero tolerance policy with regard to illegal drug and substance use. [Exhibit 1, ROA 86-88]. At the beginning of the employment relationship, each employee is provided an Employee Handbook that contains Nucor's Drug and Alcohol Policy. [ROA 24]. Claimant was provided a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. [ROA 28-29; Exhibit 3, ROA 97].

Pursuant to its Drug and Alcohol Policy, Nucor regularly conducts random drug tests. All employees, including the Plant General Manager, are subject to random testing. [ROA 24; Exhibit 1, ROA 86-88]. The consequences for violating the Drug and Alcohol Policy are set forth at Page E-5, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." [Exhibit 1, ROA 88]. Claimant was at all relevant times aware of the Drug and Alcohol Policy and the consequences of violating it, and had been subject to random drug tests at Nucor on previous occasions. [ROA 42; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Nucor's drug testing policies and procedures do not permit or otherwise consider any off-site, independent drug tests obtained by an employee on the employee's own initiative. [ROA 25, 27, 58].

Nucor's drug testing policies and procedures were designed to comply with South Carolina Code Ann. § 41-35-120. To ensure compliance with the statute, Nucor partnered with Omega Laboratories, a national provider of diagnostic testing, to process its employees' drug test samples. [ROA 20-21, 25-27, 70-72]. Omega is certified by the College of American Pathologists and the U.S. Department of Health and Human Services, and is also SAMHSA-certified. Thus, its credentials are beyond dispute. [ROA 27, 69-70; ROA 89-96]. Omega reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process, as required under S.C. Code Ann. § 41-35-120. [ROA 27, 69-70; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85]. In addition, Nucor also partnered with Accudiagnostics LLC., to be its third party administrator for the drug testing program. [ROA 68-69]. Accudiagnostics is responsible for generating the random drug testing selections and facilitates the processing and reporting of the drug test results. [Id]. Accudiagnostics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Nucor Safety Office. [Exhibit 6, ROA 123]. The Safety Office then notifies those selected for testing via internal e-mail. [ROA 42].

On April 6, 2010, Claimant was selected and tested for drugs pursuant to Nucor's periodic random drug testing policy. [ROA 23, 35 - 36]. Hair samples were collected at the plant from Claimant and the 14 other employees randomly selected for testing that week. [ROA 71-75; Exhibit 6, ROA 123]. Claimant's samples were collected by a certified Nurse Practitioner [Exhibit 8, ROA 272-273] employed by Nucor, and the samples were sent to Omega's testing laboratory in Mogadore, Ohio. [ROA 25, 28, 35-

37, 81-82; Exhibit 6, ROA 127-128]. The collection process involves multiple steps, each of which is documented, and the employee/donor verifies in writing that each step has been followed in his or her presence. The following is a summary of the steps taken in the collection process:

- (1) At the time that an employee enters the testing room, he or she is provided with a Drug/Alcohol Authorization and Release Consent Form ("Release"). The Release requires the employee to fill out their full name and give Nucor authorization to collect a sample for processing by an accredited and certified laboratory. Refusal to sign the Release results in immediate termination as outlined in Drug and Alcohol Policy [Exhibit 1, ROA 86-88]. Claimant executed the Release for both the initial confirmatory test on her hair sample collected on April 6, 2010, and the second test of April 15, 2010. [ROA 28; Exhibit 4, ROA 98; Exhibit 5, ROA 102].
- (2) The second step involves the completion of the drug Testing Custody and Control Form ("Custody Form"). The Custody Form is filled out in the presence of the employee, and outlines each step of the collection process. The employee is given the option to choose what part of the body they would like the hair sample to be collected from. The Nurse then collects the sample and places it in an envelope, which is sealed in front of the employee. Claimant requested that the hair sample be taken from her head for both the April 6, 2010 and April 15, 2010 tests. [ROA 28, 37, 40; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (3) After the sample is sealed in the envelope, Section 5 of the Custody Form is required to be executed by the employee, which certifies that the employee provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. Claimant signed Section 5 of the Custody Form, and verified that the chain of custody had been followed and that her sample had been collected as specified on the Custody Form for both the April 6, 2010 and April 15, 2010 tests. [ROA 43-44, 48-49; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (4) The Custody Form is then placed in a plastic bag, together with the envelope containing the sample, and the plastic bag is deposited in a lock box in the presence of the employee. Claimant admitted at the Hearing that this step was completed in her presence for both the

April 6, 2010 and April 15, 2010 tests. [ROA 43; Exhibit 4, ROA 99-101; Exhibit 5, ROA 103-104].

- (5) After the sample is collected and deposited in the lock box, employees are provided with yet another verification step: they have to complete a Drug Testing Procedure for Post Incident and Random Drug Screen form ("Post Incident Form"). This Form requires the employee to confirm that the Release/Consent form was explained; - the option of choosing where the hair sample would be collected from was provided; - the instruments were cleaned with alcohol wipes prior to collection; - the hair sample was placed in the envelope in the presence of the employee; - the employee was required to witness the sealing of the pouch containing their hair sample; and - the employee was provided with a copy of the Custody Form. Again, Claimant executed the Post Incident Form (- for both the April 6, 2010 and April 15, 2010 samples), and checked "Yes" to all the questions (with the exception of the question relating to pubic hair collection, which did not apply as she opted to have her sample collected from her head). [ROA 28, 37, 40-41, 43, 48; Exhibit 4, ROA 100; Exhibit 5, ROA 104].

The hair sample collected from Claimant on April 6, 2010 was confirmed positive for 1.25 picograms per milligram of marijuana (THC), an illegal substance. [ROA 23; Exhibit 4, ROA 101; Exhibit 6, ROA 121]. Pursuant to Nucor's Drug and Alcohol Policy, disciplinary action testing positive is immediate termination. [Exhibit 1, ROA 85-88].

After testing positive for marijuana on April 6, 2010, Claimant, like any other employee that tests positive for illegal drugs, was provided an opportunity to meet with the General Manager to discuss and determine whether she preferred to resign voluntarily in lieu of termination. [ROA 23-25]. Claimant was adamant that she did not use any illegal drugs or substances and opted to undergo a second test at Nucor on April 15, 2010 instead of voluntarily resigning. [*Id.*] As is standard practice, for the second test Nucor required and requested that Claimant's sample be tested pursuant to a "level of detection"/"limit of detection" standard. [ROA 30, 36; Exhibit 5, ROA 102-105; Exhibit

7, ROA 136]. Under the "level of detection" standard, any amount of marijuana/THC detected in Claimant's hair sample at or above .10 picograms per milligram is considered a positive result and is basis for immediate termination. [ROA 32]. Claimant was aware that the second test would be performed as a "level of detection" test, and she executed the Custody Form on April 15, 2010, which clearly indicates that the test would be performed under the "level of detection" standard. [Exhibit 5, ROA 103; Exhibit 7, ROA 137]. Likewise, her toxicology expert testified that the April 15, 2010 test was a "limited detection test," which is "below the limit of detection on a standard test." [ROA 63-64].

In addition to Claimant's verification that Steps 1-5 above had been complied with during the second test, Claimant's Manager was also present and witnessed the entire process. [ROA 37, 47]. At no point did Claimant object to the manner in which the sample was collected. [ROA 39]. She admitted that Nucor's nurse was "professional about [collecting the sample]. She cleaned the scissors which I had not seen done before, cleaned the area, and cut my hair, and that was the first test..." Further, Claimant testified that she observed the nurse collect the sample and place it in an envelope which she then sealed, placed in a lock box, and Claimant signed and dated the envelope. [ROA 43-44, 48-49]. Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse in collecting Claimant's hair sample and forwarding it to the processing laboratory was proper and correct. [ROA 60-61]. He further testified that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62].

The results of Claimant's second test showed .78 picograms per milligram of marijuana. [ROA 38; Exhibit 5, ROA 105; Exhibit 7, ROA 136]. Because the amount of marijuana detected exceeded .10 picograms per milligram, the second test was also a positive test for marijuana and grounds for immediately terminating Claimant pursuant to Nucor's Drug and Alcohol Policy. Accordingly, Claimant was terminated upon Nucor's receipt of the second test results on April 22, 2010.

Prior to her termination and after her second test, Claimant allegedly took an additional independent drug test which she alleges came back negative for drugs. [ROA 51-52, 54, 56]. Although Claimant alleges that her negative independent test was performed on the same day as her second Nucor test (April 15, 2010), she did not produce any documentation evidencing when the independent test was performed, nor what criterion or level of detection was used for that independent test. In fact, *Claimant did not produce the independent test at any point during the underlying proceedings.* Thus, there is no documentary evidence in the record regarding the independent test or its results, nor even evidence that an independent test was taken at all. Regardless, it is undisputed that Nucor has not, and does not accept independent tests because it has no control over their administration and no assurances of their reliability.

Based on this alleged (and undocumented) independent test, Claimant sought unemployment benefits on the basis that she had been wrongfully terminated and that Nucor improperly collected her hair sample. [Discharge for Cause Fact Finding, dated 05/03/2010, ROA 11-12]. On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. [Claims Adjudicator's Determination, ROA 13, 85]. The

determination also noted that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120. [Id.]. Finally, the determination confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory using gas chromatography/mass spectrometry (GC/MS) or a scientifically equivalent method. [Id.].

Upon receipt of the Claims Adjudicator's Determination, Claimant filed a Notice of Appeal to Appeal Tribunal on June 2, 2010, asserting that the Adjudicator's decision was issued in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. [Notice of Appeal to Appeal Tribunal, ROA 14]. A Hearing was scheduled for July 7, 2010 before Joan Marshall, Administrative Officer. [Notice of Hearing Before Appeal Tribunal, ROA 15].

On July 12, 2010, both Nucor and Claimant presented testimony and evidence to the Administrative Officer at the Hearing in Charleston, South Carolina.¹ [ROA 19 - 84]. On July 19, 2010, the Appeal Tribunal mailed a copy of its decision to Nucor and Claimant. [Decision of Appeal Tribunal, ROA 275-276]. The Appeal Tribunal found that Claimant was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana. [Id.]. As a result, the Appeal Tribunal held that Claimant was disqualified from receiving benefits upon a finding that Claimant was discharged for illegal drug use under S.C. Code Ann. § 41-35-120(3). [Decision of Appeal Tribunal, ROA 274-275].

¹ The recitation of facts herein is based on the Transcript of Testimony before Joan Marshall, Administrative Hearing Officer. [ROA 19-84].

On July 22, 2010, Claimant appealed the Decision of the Appeal Tribunal to the Appellate Panel on the basis that she does not smoke marijuana and that there were contradictory test results. [Application for Leave To Appeal To Commission, ROA 276]. The Appellate Panel held a Hearing on November 17, 2010 in Columbia, South Carolina. [Notice of Hearing Before Appellate Panel, ROA 278]. After the Hearing, the Appellate Panel issued its Decision, which was mailed on November 19, 2010. [Appellate Panel Decision, ROA 2]. The Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." As a result, the Appellate Panel held that Claimant was separated under non-disqualifying circumstances, and reversed the Appeal Tribunal's Decision. [Appellate Panel Decision, ROA 1-2].

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review an Administrative Law Court ("ALC") must apply when reviewing an agency's decision:

"The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(A)(6) (2005). *See also, South Carolina Dept. of Corrections v. Mitchell*, 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008). Moreover, when appealing an agency's decision, the burden rests on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

A governmental body's decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Id.* quoting *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). "The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

ARGUMENT

I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW.

The Appellate Panel held that Claimant was entitled to benefits because Claimant was not terminated as a result of "gross misconduct" pursuant to S.C. Code Ann. § 41-35-120(4). This holding is erroneous as a matter of law because the applicable section

governing ineligibility for benefits due to illegal drug use is S.C. Code Ann. § 41-35-120(3). Section 41-35-120(3) mandates that a Claimant is ineligible for benefits in the event of "discharge for illegal drug use" and provides in pertinent part:

An insured worker is ineligible for benefits for:

(3)(a) Discharge for illegal drug use, and is ineligible for benefits beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.

.....

Pursuant to sub-section 41-35-120(3) of the statute, so long as the employer has communicated a policy prohibiting the illegal use of drugs, the violation of which may

result in termination; and the employer administers the drug test in compliance with the three subparts of 3(a)(iii), the Claimant is *ineligible for* benefits. (Emphasis added). The language of Section 41-35-120(3) is not discretionary; it is mandatory. Claimant admitted at the Hearing that Nucor has a Drug and Alcohol Policy; that Nucor communicated this policy to her; and that she was aware that testing positive for illegal drugs was grounds for immediate termination based on the Policy. [ROA 24, 28-29, 42; Exhibit 1, ROA 85-88; Exhibit 3, ROA 97; Claims Adjudicator Decision dated 5/26/2010, ROA 13; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Thus, the evidentiary record indisputably establishes that Nucor met the requirements of Section 41-35-120(3)(a)(i).

Likewise, the evidence on the record firmly establishes that Nucor complied with the provisions of subsection 41-35-120(3)(a)(iii): Claimant tested positive for marijuana on two separate occasions, with results confirmed positive using the gas chromatography/mass spectrometry method conducted by an SAMHSA-certified laboratory, also certified by the American College of Pathologists. [ROA 27, 62, 69-70; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105]. The hair samples were collected by a licensed health care professional - a certified nurse practitioner certified in hair test collection. [ROA 81; Exhibit 8, ROA 272-273]. Again, these facts are undisputed and establish that Nucor met the requirements of subsections 41-35-120(3)(a)(i) and (iii).

Based on the record, Nucor unquestionably met its burden under the applicable statutory provision -- S.C. Code Ann. § 41-35-120(3). Accordingly, Claimant is

ineligible for benefits as a matter of law under the mandatory and unequivocal language of the statute.

The Appellate Panel's decision, based on an inapplicable subsection dealing with employees terminated for gross misconduct, was clear error. See, S.C. Code Ann. § 41-35-120(4). Indeed, the basis for terminating Claimant was violation of Nucor's Drug and Alcohol Policy, not gross misconduct. The Appeal Tribunal applied and relied on § 41-35-120(3) (as required by the Statute) in determining that Claimant was ineligible for benefits because she was terminated for violating Nucor's Drug & Alcohol Policy. Gross Misconduct (S.C. Code Ann. § 41-35-120(4)) was never at issue. [Decision of Appeal Tribunal, ROA 274-275].

However, even assuming *arguendo* that the Appellate Panel somehow had authority to look beyond and ignore the undisputed basis for Claimant's termination (which is expressly denied by Appellant), the Appellate Panel's Decision would still be wrong as a matter of law. The Appellate Panel itself observed in its Order that "Gross Misconduct" includes failure to comply with drug use regulations. [Appellate Panel Decision, ROA 2]. In determining the meaning of the term "misconduct" courts in South Carolina look to the general purpose of the act. *Lee v. South Carolina Employment Sec. Commission*, 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982), citing *Stone Mfg. Company v. S. C. Employment Security Commission, et al.*, 219 S.C. 239, 64 S.E.2d 644 (1951). In *Stone*, the South Carolina Supreme Court held that the term "fault" is not limited to something that is blameworthy, culpable of wrong and that "fault" must be construed as meaning failure or volition." *Lee*, at 588, 291 S.E.2d at 379, citing *Stone* 219 S.C. at 246-247, 64 S.E.2d 644. The court in *Lee* found that "it was clearly the intent of the

legislature that persons unemployed due to their own fault be penalized in some manner from receiving benefits.” *Id.* The court looked to other cases, which have generally indicated that “misconduct” includes (1) the wanton and willful disregard of the employer’s interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee’s interests, duties or obligations. *Id.* (internal citations omitted). Certainly, violation of a drug control policy would constitute fault and gross misconduct under any interpretation of the law. The general purpose of the unemployment statutes – to grant benefits to eligible and deserving claimants – is served by denying benefits to individuals who not only violate workplace policies, but also violate the law by using illegal drugs.

Further, the majority of states define illegal drug use as willful misconduct in the area of unemployment benefits. *See generally*, 78 ALR4th 180 § 5-7, “*Drugs-Unemployment Compensation*.” (Citing cases). The prevailing case law establishes that where an individual is terminated due to her failure to comply with company substance abuse policies, she is precluded from receiving state unemployment benefits. *Id.* Thus, Claimant would be disqualified from unemployment benefits for gross misconduct based on her positive drug test results, even if Section 41-35-120(4) was the applicable statute.

In sum, it was an error of law for the Appellate Panel to reverse the Appeal Tribunal’s decision disqualifying Claimant from unemployment benefits based on § 41-35-120(4) because another directly applicable section of the statute governs the issue. Regardless, it was error to reverse based on § 41-35-120(4) because Claimant’s illegal

drug would meet the standard of "gross misconduct" under the plain meaning and intent of the statute. Accordingly, the Appellate Panel's decision should be overturned.

II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3).

The legislature specifically enacted Section 41-35-120(3) to govern in instances where a Claimant is discharged for illegal drug use. The Appellate Panel erred as a matter of law by failing to apply the proper statute, as discussed above, and/or in its application of the statute. Indeed, the Appellate Panel failed to abide by the specific requirements of subsection 41-35-120(3) by accepting a phantom, independent drug test as controlling, with no evidence that it comported with the statute, nor even evidence of its existence or results. Just as in its application of a different statute above, the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute.

The case of *Milliken & Co. v. SC Emp. Comm'n.*, 315 SC 492, 445 SE2d 640 (1994) (*reversed on other grounds*) is instructive on this point. In *Milliken*, the Commission denied benefits to claimant Gantt under Section 41-35-120(2) finding that acts committed in the break area did not qualify as "cause connected with his most recent work." *Id.* at 496. The S.C. Court of Appeals disagreed and reversed the decision, emphasizing the necessity of deciding cases based on the language of the statute as written by the legislature:

The Commission concluded the alleged disruptive behavior occurred, if at all, in the break area while Gantt was off duty. In our view, the legislature declined to designate the proximity in which the conduct must occur. Instead, the statute only requires the cause of discharge to be connected to Gantt's employment. The legislature shows no intent to limit where the

"cause" for discharge occurred. We, therefore, disagree with the circuit court's reading of the Commission's findings. We find the Commission erred, as a matter of law, in its application of the statute by failing to consider conduct in the break area sufficient to warrant discharge.

Id. at 498, 644.

Similarly here, the legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains an independent drug test after failing a statutorily-compliant company drug test. Indeed, the legislature did not provide *any* exception under which the Commission can disregard the mandate of Section 41-35-120(3). Rather, the legislature sets forth specific criteria for an employer to satisfy in the case of disqualification for benefits upon discharge for illegal drug use, all of which were satisfied here.

First, Section 41-35-120(3)(a)(iii) specifically requires that the drug test be administered on behalf of the employer:

"(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, ..."

S.C. Code Ann. § 41-35-120(3)(iii) (emphasis added). Thus, Claimant's alleged independent drug test is not allowed and has no bearing on whether Claimant was eligible for benefits under Section 41-35-120(3).

Additionally, Section 41-35-120(3) enumerates specific criteria that must be satisfied to establish a drug test's reliability and allow its use as a basis for disqualification for benefits. Nucor's drug tests indisputably complied with the statute and Claimant clearly failed two drug tests which were confirmed positive in compliance with South Carolina law. The statute requires that the sample be procured by a health care professional; that the drug test be performed by a certified laboratory; and mandates

that the results be confirmed positive using the gas chromatography/mass spectrometry method. The legislature imposed these requirements to ensure consistency, uniformity and reliability of the drug testing systems utilized by employers in South Carolina. There is no dispute that Nucor complied with each of these requirements and Claimant failed both tests. [ROA 19-84; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105; Exhibit 6, ROA 106-135; Exhibit 7, ROA 136-271].

On the other hand, there is absolutely no documentary evidence in the record that would show the criteria utilized in processing Claimant's alleged "independent drug test" or whether such "independent test" complied with any of the statutory requirements for reliability. Indeed, there is no documentary evidence that the absent independent drug test was in fact "negative" or that it even exists. Again, the Appellate Panel applied an exception to Section 41-35-120(3) not intended or allowed by the legislature: that the criteria of Section 41-35-120(3)(a)(iii) do not have to be satisfied by a test administered on behalf of the employer.

Claimant's alleged "independent drug test" is irrelevant because it was not performed *on behalf of the employer*, as required by Section 41-35-120(3)(a)(iii). Thus, the Appellate Panel's reliance on the independent test was outside the mandate of the statute and clearly erroneous as a matter of law. Claimant is therefore ineligible for benefits based on discharge for illegal drug use under Section 41-35-120(3) and the Appellate Panel decision must be overturned.

III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.

Pursuant to the correct and applicable statute - S.C. Code Ann. § 41-35-120(3), Claimant is ineligible for benefits as a matter of law. Section 41-35-120(3) provides that where an employer establishes that it discharged an employee for failing a drug test based on a program implemented to promote safety in the employer's workplace, and which was a condition of employment, the terminated employee is disqualified from receiving unemployment benefits as a matter of law. *See also, Milliken & Co. v. SC Emp. Comm'n.*, and *Lee v. SC Employment Sec. Comm'n.*, *supra.* *Milliken & Co. v. SC Emp. Comm'n.*, and *Lee v. SC Employment Sec. Comm'n.*, *supra.*

In this case, the testimony at the Appeals Tribunal hearing and the documents offered as evidence conclusively establish that Nucor terminated Claimant for failing a drug test administered to promote the safety of all Nucor employees; that the testing was a condition of Claimant's employment; and that Claimant's test was administered in compliance with the strict requirements of South Carolina law. These facts are undisputed. Further, Claimant executed the Custody Form verifying that the proper chain of custody had been complied with, and her expert confirmed that the test was performed properly. [ROA 42-43, 48-49, 60-61]. At no point did Claimant object to the manner in which the sample was collected, and she admitted that Nucor's nurse was "professional about [collecting the sample]." [ROA 39]. Claimant could not fault the manner in which the sample was collected or the chain of custody followed. [ROA 57].

Despite this overwhelming and undisputed evidence establishing that Nucor complied with the requirements of Section 41-35-120(3), the Appellate Panel accepted Claimant's appeal based on "contradictory results." This was clear error. There were no "contradictory results" in the record, nor would there be if Claimant actually produced

her supposed "negative test" results. Rather, the alleged "contradictory results" argument is a red herring that Claimant uses as a last resort to obtain benefits that she is disqualified from receiving. There is no dispute that Nucor's second drug test, performed at the request of Claimant, was administered as a "level of detection" test [ROA 30, 30; Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Claimant's alleged independent "negative" test was administered under a different criterion. [ROA 30, 63-64]. The reason for using "level of detection" cut-offs for second tests is to detect trace amounts of illegal drugs that may otherwise escape detection because of the passage of time between tests. Claimant's alleged test would not detect trace amounts and thus is not comparable, nor "contradictory", to Nucor's second test. Had Claimant's independent test been performed using the same criteria, there likely would not have been a different or "contradictory" result. It would have shown the presence of marijuana found in the two previous and admittedly valid tests. And since there is no evidence regarding when it was taken, how it was taken, or whether it was taken at all, it is wholly unreliable. Nucor established an uninterrupted chain of custody, and Claimant verified same. [ROA 43-44, 48-49, 57, 60-62; Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137]. Thus, there were no "contradictory results" and Claimant was properly terminated for violating Nucor's Drug and Alcohol policy, and she is disqualified from unemployment benefits under the correct and applicable statute.

Other jurisdictions have rejected similar arguments and attempts to avoid positive drug test results that led to disqualification for unemployment benefits. For example, in *Curtis v. Mississippi Employment Sec. Com'n*, 878 So. 2d 1094 (Miss. Ct. App. 2004), a claimant's positive test for marijuana following a random drug test was found to

constitute misconduct disqualifying him from receipt of unemployment benefits. The court found that nothing in the record suggested that claimant was singled out or treated differently from any other employees, and nothing in the record supported claimant's assertion that he was "set up" or that his urine was switched. *Id.* Similarly, in *Stewart v. Duke Mfg. Co.*, 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009), an unemployment compensation claimant was disqualified from receiving benefits after being discharged after testing positive for cocaine. The claimant had previously been notified of employer's alcohol and controlled substances policy, and the claimant's test sample was collected and tested in accordance with Department of Transportation (DOT) procedures. *Id.* Likewise, in *Farm Fresh Dairy, Inc. v Blackburn*, 841 P.2d 1150, (Okla. 1992), the employer fired an employee for failing a drug test that was part of program to promote safety in employer's workplace, and which was an agreed to condition of employment. There, the court held that the employee was disqualified from receiving unemployment benefits and observed that under such circumstances, the Employment Security Commission may not require employer to make a further showing, such as impairment or strange conduct on job. *Id.*

Additionally, in *Overstreet v. Dept. of Employment Sec.*, 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988), the court held that a police officer was ineligible for unemployment benefits after being terminated following a positive drug test result. The court considered the police officer's abuse of cocaine "willful misconduct" under the applicable state unemployment statute. *Id.* The court in *McNabb v. Department of Revenue*, 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005), also reached the same result and held that violation of the employer's drug policy disqualified the employee

from unemployment benefits. In *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990), the Court of Appeals of Arkansas held that Grace's former employee's failure to pass a drug test, without more, was a willful violation of Grace's rules, and disqualified the former employee from unemployment benefits. The Grace Drilling court observed: "Such a result is particularly appropriate where, as here, passing such a test was an agreed condition of employment." *Id.*

The authority from this and other jurisdictions makes it clear that employees who fail properly administered company drug tests rarely, if ever, qualify for unemployment benefits. If an employer's drug testing policy and procedure complies with the guidelines and statutes provided by the state, ineligibility is all but presumed in a case of a failed test. The authority establishes that the burden of rebutting that presumption is significant and rarely met. Here, it certainly was not met with Claimant's undocumented, unreliable test and an unsupported claim of "contradictory results". Accordingly, the Appellate Panel's decision, which ignores the clear dictates of Section 41-35-120(3), contradicts the overwhelming authority of this and other jurisdictions, and is against the weight of the undisputed evidence in the record, was error requiring reversal.

IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY.

The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site, unreliable, independent drug test where there was undisputed documentary evidence that Claimant had failed two drug tests administered on behalf of Nucor, in full compliance with South Carolina law and Nucor's drug testing policy. Indeed, the

Appellate Panel's application of an irrelevant statute and creation of an exception to the correct and applicable statute were clear errors of law. Further, blind acceptance of Claimant's unsupported theory of "contradictory results" went against the great weight of evidence in the record and was also error.

In addition to being procedurally and legally incorrect, the Appellate Panel's decision violates public policy. Indeed, the decision significantly constrains employers' ability to enforce drug-free workplace policies and renders Section 41-35-120(3) a nullity. The Appellate Panel's Decision arguably requires every employer in South Carolina to accept and consider outside drug test results proffered by employees who fail company drug tests, without regard to validity, accuracy, reliability or legitimacy, even if the outside test directly contradicts their own tests administered according the rules set forth by statute. Further, the decision suggests that a discharged employee *need not even produce the independent drug test nor prove its results, much less its compliance with statutory testing requirements*. Rather, an employer's overwhelming evidence establishing a test's accuracy, validity and compliance with statutory requirements can be overcome with a simple plea of "I didn't do it." In sum, the Appellate Panel's decision basically and unjustifiably eviscerates Nucor's and every other South Carolina employers' drug control policies that are in full compliance with the law.

Further, the mandates of Section 41-35-120(3) are rendered impotent if a claimant is able to side-step them with an independent test. The requirements of Section 41-35-120(3) are designed to promote uniformity and reliability in drug testing standards, and provide specific guidelines for employers to follow. It is clear that the legislature had the bigger picture in mind when enacting Section 41-35-120(3). Indeed, the legislature also

intended to give teeth to an overriding policy promoting safety and drug-free workplaces by unequivocally denying benefits to those who test positive for illegal drugs at work. It is doubtful that the legislature envisioned that the policy could be circumvented by an outside, independent drug test with no indicia of reliability. Outside, independent drug tests are completely out of an employer's control, and there is no way to verify whether results are obtained by an employee through valid means. Likewise, independent drug tests, accepted in lieu of valid workplace tests, allow for the very real possibility that an employee can work under the influence of illegal drugs without recourse. In short, they fly in the face of what the legislature intended by enacting Section 41-35-120(3).

In this case, Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse was proper and correct, [ROA 61-62] and that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62]. Based on Claimant's expert witness' testimony, it is also clear that the independent test did not conform to the criterion utilized by Nucor in instances where an employee who has already had a confirmed positive drug test, and requests a second test to prove that she is drug free. [ROA 62-63]. Similarly, Claimant admitted under oath that the chain of custody was strictly adhered to. [ROA 43-44, 48-49, 57, Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137].

The Appellate Panel erred in disregarding this evidence undisputed and compelling evidence. Therefore, the Appellate Panel erred in reversing the Appeal Tribunal and public policy demands that the Appellate Panel's decision be overturned.

CONCLUSION

Nucor complied with employment laws of this State and terminated Claimant for cause, and Claimant is disqualified from unemployment benefits as a matter of law. The Appellate Panel's Decision is not supported by the facts or evidence, and is contrary to the mandate of S.C. Code Ann. § 41-35-120(3) and public policy, and should be overturned pursuant to subsections (a), (c) – (e) of S.C. Code Ann. § 1-23-380(A)(6).

Respectfully submitted,



Nosizi Ralephata
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ATTORNEYS FOR NUCOR CORPORATION

February 17, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

I hereby certify that on February 17, 2011, a copy of the *Initial Brief of Nucor Corporation* has been served upon the following parties via overnight delivery, in the United States Mail, postage prepaid, to:

Ms. Romi Y. Robinson
Legal Department-Dept. of Employment and Workforce
P.O. Box 995
Columbia, SC 29202
Phone: 803-737-2666
Email: legal@dew.sc.gov
Attorney for Agency/Respondent

Ms. Kim Legette
517 Laurel Ridge Road
North Charleston, SC 29418
Claimant/Respondent

April D. Hager
April D. Hager

FILED

FEB 17 2011

SC ADMIN. LAW COURT

EXHIBIT C

STATE OF SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

Docket No. 10-ALJ-22-0938-AP

ORDER

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

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May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

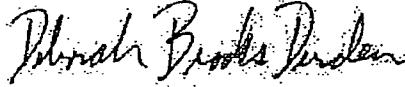
The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328. (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record: S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011

SC ADMIN. LAW COURT

EXHIBIT D

From: Robin Coleman [<mailto:rcoleman@scalco.net>]

Sent: Tuesday, June 14, 2011 2:16 PM

To: Ralephata, Nosizi; legal@dew.sc.gov; kimlegette@yahoo.com

Subject: Nucor Corporation v. S.C. DEW, and Kim A. Legette; Docket No. 10-ALJ-22-0938-AP

Ms. Ralephata, Ms. Robinson, Ms. Legette: This Court has received several pieces of correspondence in the above-referenced case since Judge Durden's Order remanding the matter back to the Department, namely Appellant's Motion for Hearing/Oral Argument, Appellant's Notice of Request for Protection, and Respondent's Return to Motion for Hearing/Oral Argument. Please be advised that this Court no longer has jurisdiction in the matter because Judge Durden's Order is a final order in this matter.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

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EXHIBIT E

The South Carolina Court of Appeals

Nucor Corporation,

Appellant,

v.

South Carolina Department of
Employment and Workforce and Kim
A. Legette,

Respondents.

The Honorable Deborah Brooks Durden
Administrative Law Court
Case No. 10-ALJ-22-0938-AP

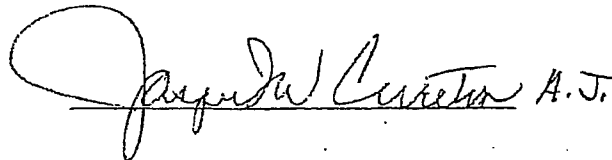
ORDER

Kim A. Legette (Legette) filed a claim for unemployment benefits on April 23, 2010, with the Department of Employment and Workforce (Department) after being discharged from her employment with Nucor Corporation (Nucor). The claims adjudicator found Nucor discharged Legette for cause connected with the employment and that accordingly, subsection 41-35-120(2) of the South Carolina Code (Supp. 2010) disqualified Legette from receiving benefits. The Appeal Tribunal affirmed the claims adjudicator's decision to deny Legette benefits, but found subsection 41-35-120(3), which addresses discharge for illegal drug use, disqualified her from receiving benefits. Legette appealed, and the Appellate Panel reversed the Appeal Tribunal's decision, finding Nucor failed to prove it discharged Legette for cause pursuant to subsection 41-35-120(2) or for gross misconduct pursuant to subsection 41-35-120(4). Nucor appealed the Appellate Panel's decision, and the Administrative Law Court

(ALC) affirmed the Appellate Panel's holding that Legette was not disqualified from receiving unemployment benefits pursuant to subsections 41-35-120(2) or (4). However, the ALC found the Appellate Panel failed to address whether subsection 41-35-120(3), regarding illegal drug use, disqualified Legette from receiving unemployment benefits. Accordingly, the ALC remanded the matter to the Department for a determination of whether Legette's discharge disqualified her from receiving benefits pursuant to subsection 41-35-120(3). Nucor appealed the order to this Court, and Legette filed a motion to dismiss, arguing the order was not immediately appealable.

After a careful consideration of the parties' memoranda and other filings, this Court dismisses this appeal as not immediately appealable because the underlying order was not a final decision. See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (holding section 1-23-610 of the South Carolina Code (Supp. 2010) governs the appealability of appeals from the ALC and limits review to final decisions); id. at 267, 692 S.E.2d at 894-95 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. . . . A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined (internal citations omitted)).

IT IS SO ORDERED.

A.J.

FILED
10/18/11

Columbia, South Carolina

cc: Anne E. Mjaatvedt, Esquire
Romi Y. Robinson, Esquire
Nosizi Ralephata, Esquire

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EXHIBIT F

235-11-8079-1

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SCDEW

AUG 24 2011

Lower Authority Appeals

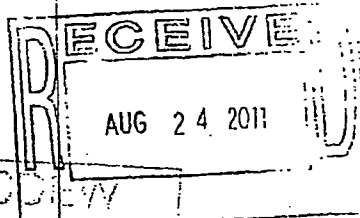
Anne Mjaatvedt Law Firm, LLC

39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anne@semlawyer.com

1110129

August 22, 2011



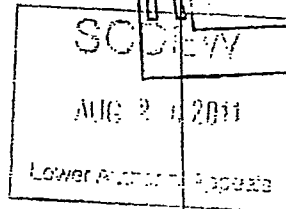
Via Facsimile and Certified Mail, Return Receipt Requested

Appellate Panel

South Carolina Department of Employment and Workforce

P.O. Box 995

Columbia, SC 29202



App 111

Serv
8/25
AK

RE: Appeal of Decision No: 2011-A-15157

Claimant: Kim A. Legette

Hearing Date: August 15, 2011

Employer: Nucor

To the Honorable Appellate Panel:

I represent the Claimant, Kim A. Legette, in the above-referenced matter. On August 19, 2011, Ms. Legette received Decision No. 2011-A-15157, mailed August 18, 2011.

By this letter, the Claimant timely appeals the Tribunal's decision and here requests that the Appellate Panel overturn that decision as being clearly erroneous as a matter of law and incorrect based on facts in the record, and/or grant an appeal hearing before the full Panel.

The grounds for this appeal is that the Tribunal's decision was in error as a matter of law where it incorrectly found that Omega Laboratory, the drug testing laboratory, meets the certification qualifications required by S.C. Code Ann. § 41-35-120(3)(a)(iii)(B). The Tribunal based its decision on the erroneous assumption that any "HHS" certification places a drug test laboratory in compliance with the statute. This finding is incorrect. Omega does not meet the certification requirements as a matter of law where it is not on the list in the Federal Register as being certified by "HHS/SAMHSA (formerly: HHS/NIDA)".

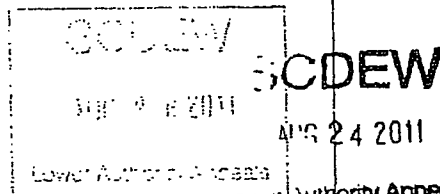
The Employer here claimed that Claimant was discharged for illegal drug use. Because the consequences of a finding of discharge for illegal drug use are so severe, the Legislature established specific requirements for employers that subject their employees to work place drug testing. The Legislature required that both the sample collector and the laboratory testing the samples meet certain qualifications. Most relevant here, the testing laboratory must be certified by the National Institute of Drug Abuse ("NIDA"), the College of American Pathologists or SLED. S.C. Code Ann. § 41-35-120(3)(a)(iii)(B).

The problem arises as NIDA no longer exists. However, under a federal reorganization in 2006, its functions for oversight of the National Laboratory Certification Program that was the basis of NIDA certification now resides with the Substance Abuse and Mental Health Services Administration (SAMHSA). The Federal Register ("FR") for April 2, 2010 and May 14, 2010, entered as Agency exhibits, contain a list of the laboratories currently certified. Omega is not on that list. Further, the FR clearly states "HHS/SAMHSA (formerly: HHS/NIDA)". The Decision is incorrect in its finding that any "HHS" certification is sufficient.

SC Dept. of
Employment & Workforce

AUG 25 2011

Received Benefits Div.



Where the S.C. Legislature enacted the statute requiring NIDA certification, the intent of the Legislature can only be effectuated by requiring SAMHSA certification of laboratories. Therefore, Omega's only certificate, through the Centers for Medicare and Medicaid Services at HHS, is not sufficient under the law. Omega is not certified pursuant to S.C. Code § 41-35-120(3), therefore, the Employer has not, and cannot meet its burden to show that Claimant is ineligible for benefits. This is not a matter of factual proof, it is a matter of law that a laboratory must be "HHS/SAMHSA (formerly: HHS/NIDA)" certified under the S.C. statute.¹ Claimant moves this Appellate Panel to take judicial notice that Omega is not certified HHS/SAMHSA and therefore is not NIDA certified as required under the statute.

Further, Employer's own evidence makes it clear that HHS certification cannot reflect the Legislature's intent in requiring employer's to use laboratories qualified to perform forensic laboratory analysis. Employer's exhibit 2 is an organizational chart of the U.S. Department of Health and Human Services. This department is organized into over 31 offices and programs, among them SAMHSA, Office of Civil Rights, Food and Drug Administration and the Office of Global Affairs, clearly offices with highly disparate programs, where SAMHSA is the only appropriate certification. The employer's agent's testimony regarding whether SAMHSA only certifies urine testing is irrelevant to the Legislature's intent to require laboratories with nationally recognized forensic drug test qualifications.

As Respondent admitted that Omega is not CAP or SLED certified, the only remaining issue at the August 15 hearing was whether Omega was NIDA certified under the statute, and as a matter of law, it is not. The Decision is incorrect where it finds that any certification from the Federal Department of Health and Human Services (HHS) complies with the statute in lieu of NIDA certification.

It is on this basis that the Claimant appeals the Tribunal's Decision and respectfully requests that the Commission find that Claimant was separated under nondisqualifying circumstances and reverse the Appeal Tribunal's decision.

Very truly yours,

Anne E. Mjaatvedt

S.C. Dept. of
Employment & Workforce
AUG 25 2011

¹ This Appellate Panel originally held the Employer had not met its burden of proof of cause for discharge (Appellate Panel Decision 2010-C-2253). Employer appealed the Commission's finding to the ALJ, who upheld the Panel's decision regarding no cause under 41-35-120(2) and (4), and ordered that the case be remanded to the Appeal Tribunal due to reference to the incorrect portion of the relevant statute regarding work place drug testing. It is the decision of the Appeal Tribunal following the August 15, 2011 hearing that is the subject of this appeal.

EXHIBIT G

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov



Nikki R. Haley
Governor

Abraham J. Turner
Executive Director

Phone: (803) 737-0239

Fax: (803) 737-0124

November 15, 2011

Nosizi Ralephata
Turner Padgett Graham & Laney, P.A.
Post Office Box 22129
Charleston, SC 29403

Re: Leggette v. Nucor, Appeal 10129-15740

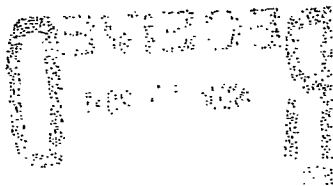
Dear Ms. Ralephata,

The Appellate Panel has scheduled the above appeal for oral argument on November 30, 2011, at 3:00 p.m. The Panel asks that you come prepared to discuss the practical impact of Public Law 102-321, which reorganized the Department of Health and Human Services, as well as the differences and similarities between the laboratory certification program once administered by the National Institute on Drug Abuse (NIDA), and the laboratory certification programs currently administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Centers for Medicare & Medicaid Services.

Sincerely,

Paul R. Famolari
Manager, Higher Authority Appeals

Cc: Claimant
Claimant Attorney
Employer
Imaging
File



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

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SC Court of Appeals

Nucor Corporation, ...Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

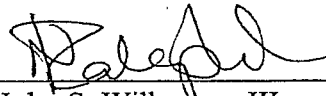
NOTICE OF APPEAL

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011. Appellant received written notice of the entry of this Order on May 24, 2011. Judge Durden's Order finally determined application of South Carolina Code Ann. § 41-35-120 regarding termination of an employee for cause and for gross misconduct, and as basis for her ruling, the ALC Judge relied on offsite independent test results. However, she remanded to the

lower tribunals the single and narrow issue of whether the laboratory was properly certified as required under South Carolina Code Ann. § 41-35-120, subsection (3)(iii)(B).

The South Carolina Department of Employment Workforce Appellate Panel issued its Order regarding the laboratory's certification and whether such certification comports with the Statute's mandate on December 9, 2011, and Appellant received a copy of the Order on or about December 12, 2011. The Appellate Panel's Order is not attached because Appellant are not challenging the decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory. As a result, Judge Durden's Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

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TPGL 4227866v1

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

Docket No. 10-ALJ-22-0938-AP

ORDER

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:
 - (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and
 - (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*
 - (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

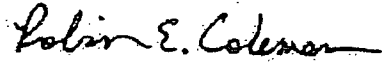


Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE
HEARINGS**

Kim A. Legette,

Appellant,

vs.

Nucor Corporation,

Respondent.

APPEAL No.: 10129-15740

BRIEF OF NUCOR CORPORATION

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TPGL 4166517v1

SUMMARY OF ARGUMENT

Nucor Corporation (“Nucor” or “Employer”) respectfully submits this brief in support of its position that it has provided ample evidence that Omega’s certifications comply with South Carolina Code Ann. § 41-35-120(3)(iii)(B) (“the Statute”), including an HHS-Certificate of Compliance. The Statute requires that workplace drug tests be performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division. However, the National Institute on Drug Abuse (“NIDA”) was subsumed into the United States Department of Health and Human Services (“HHS”) in 1992 pursuant to Public Law 102-321. The certification formerly done by NIDA is now performed by SAMHSA; however, the 1992 re-organization did not turn NIDA into SAMHSA. NIDA is *not* SAMHSA – NIDA still exists and operates under the National Institutes of Health (“NIH”) - another division of HHS. Its focus is now on research. Only the certification of laboratories that test U.S. Department of Transportation (“DOT”) employees for drugs was transferred to SAMHSA. *See*, Transcript at pp. 17, 23-24. *See also*, Exhibit 2 to Transcript.

As evidenced by Claimant’s submission at the August 15, 2011 Hearing (“the Hearing”), HHS is the “tree” and the divisions are all branches of that tree. *See*, Exhibit 4 to Transcript (“Transcript”). Exhibit 4 fully illustrates the interdependency of those branches to HHS: Each separate notice contained in Exhibit 4 clearly delineates HHS in bold capital letters as the primary entity before identifying the particular division with less emphasis. The notices all refer back to HHS as the primary body with ultimate responsibility and oversight obligations. There is no question that HHS is *the* entity to which all these divisions report and it is *the* entity that sets the standards to which all divisions must adhere. In fact, pursuant to Exhibit 4, the notice regarding the list of approved federal laboratories states on its face that it is from HHS. To argue

that the HHS-CLIA certificate is somehow inadequate when it was issued by *the* primary body defies logic and is contrary to the intent of the Statute.

Below is brief overview of HHS, including the roles of the operating agencies at issue here. As shown in detail below, there is a distinction between certification for urine laboratories and certification for hair testing laboratories. Similarly, there is separate regulation which applies to testing of urine samples for federal agencies in the mass transportation and other sensitive transportation fields, which is completely distinct from regulation of private sector hair specimen tests. The Claimant in this case is not a DOT employee or even a government employee, and the test at issue was a private sector hair specimen test, which was undertaken by a laboratory certified to test hair specimens by HHS.

HHS

HHS is the United States government's principal agency for protecting the health of all Americans and providing essential human services. <http://www.hhs.gov/open/contacts> (last visited 11/25/2011). HHS' programs are administered by eleven (11) operating divisions, including The Centers for Medicare & Medicaid Services (CMS) and Substance Abuse and Mental Health Services Administration (SAMHSA). *Id.* In 1992, the National Institute on Drug Abuse ("NIDA") was subsumed into HHS. *See*, workplace.samhsa.gov/DrugTesting/pdf/ReplacesNIDA.pdf. As a result of this re-organization, NIDA no longer has any role in certifying laboratories, and the certification process is now through HHS. *Id.* *See also*, Transcript at pp. 17-18.

SAMHSA

Much of the confusion in this case stems out of the re-organization that transferred some of NIDA's responsibilities to SAMHSA in 1992. SAMHSA, an agency of the HHS, was

established by an act of Congress in 1992 under Public Law 102-321. Pursuant to Public Law 102-321, the Secretary for HHS is authorized to promote the coordination of service programs conducted by other departments and agencies with those of SAMHSA. *See*, Public Law 102-321 (d) and (e).

SAMHSA was created as a services agency to focus attention, programs, and funding on improving the lives of people with or at risk for mental and substance abuse disorders. *See*, <http://www.hhs.gov/samhsa/about/1336.html> (last visited 11/25/2011). HHS establishes the standards for Federal workplace drug testing programs under authority of Public Law 100-71 and Executive Order No. 12564. As a result of the Executive Order and Public Law, HHS published the Mandatory Guidelines for Federal Workplace Drug Testing Programs in the Federal Register on April 11, 1988 (53 FR 11979), which were revised on June 9, 1994 (59 FR 29908), to establish comprehensive standards for all aspects of the Federal workplace drug testing program. The Mandatory Guidelines require all *urine* specimens to be collected using chain of custody procedures to document the integrity and security of the specimen from the time of collection until receipt by the laboratory. (Emphasis added). *See*, **61916 Federal Register / Vol. 64, No. 219 / Monday, November 15, 1999 / Notices**.

HHS notifies Federal agencies of the Laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines. *See*, Exhibit 4. It is also clearly delineated on the face of the Notice that the list of laboratories certified under SAMHSA are only those labs “which meet the minimum standards to engage in *Urine Drug Testing* for Federal Agencies. *Id.* The entire SAMHSA Drug Testing program, including the *Urine Specimen Collection Handbook* (effective 10/1/ 2010) is aimed solely at urine testing for federally mandated workplace drug testing programs. (Emphasis added). *See*,

<http://www.workplace.samhsa.gov/Dtesting.html> (last visited 11/25/2011). SAMHSA has published multiple guidelines and brochures to help clarify its role with regard to drug testing in the workplace, the type of testing and certification, and the employers that fall within its testing scope. For example, the HHS-SAMHSA brochure titled "Drug Testing in the Workplace" provides in pertinent part:

3. When Did Workplace Drug Testing Begin, and How Has It Evolved?

"Organizations with contracts from any U.S. Federal agency must comply with the provisions of the Act if the contract is a) for \$100,000 or more, b) for services rather than goods, and c) performed in the United States. The Act covers all contracts and grants awarded to individuals.

Since the Drug-Free Workplace Act became law, workplace drug testing has evolved. In 1991, Congress passed and the president signed into law the Omnibus Transportation Employee Testing Act.

It requires that the transportation industries (aviation, trucking, railroad, mass transit, and pipeline) regulated by the Department of Transportation (DOT) test employees working in certain safety-sensitive positions for drugs and alcohol. The transportation industry has established additional policies on drug and alcohol testing, to ensure that workers operate aircraft, trains, trucks, and buses safely and responsibly."

See, www.workplace.samhsa.gov/WPWorkit/pdf/drug_testing_in_the_workplace_br.pdf - 2010-05-06 (last visited 11/25/2011). SAMHSA certification for laboratories performing hair specimen tests is presently not available, even for DOT employees. SAMHSA has proposed guidelines for certifying laboratories performing hair and oral fluid drug testing, however, certification through the National Laboratory Certification Program will *not* be available until these guidelines are officially approved.

SAMHSA is distinguishable from CLIA because of its deliberately restricted regulatory scope - it is limited to *urine* testing for five drug classes performed on DOT employees. See, Transcript at p. 127. The SAMHSA Guidelines make it clear that they do not apply to drug

testing performed under any legal authority other than Mandatory Federal Workplace Drug Testing. *Id.* Specifically, neither criminal justice drug testing programs nor non-federal workplace drug testing fall under the regulatory scope of SAMHSA.

CMS/CLIA

The Centers for Medicare & Medicaid Services (CMS) is charged with the implementation of CLIA, including laboratory registration, fee collection, surveys, surveyor guidelines and training, enforcement, accrediting organizations and exempt states. *See*, <http://www.cms.gov/CLIA> (last visited 11/25/2011). CMS regulates all laboratory testing (except research) performed on humans in the United States through the Clinical Laboratory Improvement Amendments (CLIA) in its role as a division of HHS. *Id.* The objective of the CLIA program is to ensure quality laboratory testing. Congress passed the Clinical Laboratory Improvement Amendments (CLIA) in 1988 establishing quality standards for all laboratory testing to ensure the accuracy, reliability and timeliness of patient test results regardless of where the test was performed. *Id.* A laboratory is defined as any facility which performs laboratory testing on specimens derived from humans for the purpose of providing information for the diagnosis, prevention, treatment of disease, or impairment of, or assessment of health. *Id.* CLIA is user fee funded; therefore, all costs of administering the program must be covered by the regulated facilities, including certificate and survey costs. *Id.*

CLIA has applied a single set of requirements that apply to almost all laboratory testing of human specimens. *Id.* CLIA also established enforcement procedures and sanctions applicable when laboratories fail to meet standards. The CLIA certification is specific to hair specimen testing and is issued on behalf of HHS. Because SAMHSA does not certify laboratories that do hair specimen testing (*see*, Exhibit 4), Omega obtained certification from

CMS/CLIA - the HHS division that does provide certification to laboratories that engage in hair specimen testing.

ARGUMENT

A. Legal Standard

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-343 (S.C. 2011), quoting *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted). In ascertaining legislative intent, “a court should not focus on any single section or provision but should consider the language of the statute as a whole.” *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v. S.C. Workers’ Comp. Comm’n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). “A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

“Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” *Bennett v. Sullivan’s Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Courts must reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

B. Analysis

In this case, the drug test performed on Claimant were performed by a laboratory that is certified by CMS/CLIA, the only division within HHS which provides certification to those laboratories performing drug tests on hair specimens. It is clear that the intent of the statute was to ensure that only nationally recognized accreditation bodies would certify laboratories to perform the hair panel drug tests on private sector employees. It is just as clear that CMS/CLIA is one of the eleven operating divisions of HHS, and *the* division within HHS that certifies hair panel drug testing. The focus and intent of the Statute is to ensure uniformity, consistency and national standards in drug testing. The HHS-CLIA certificate meets those requirements and gives practical, reasonable, and fair interpretation consonant with the purpose and design of the Statute. *See, Sloan v. S.C. Bd. of Physical Therapy Exam’rs, supra.*

The requirements of S.C. Code Ann. § 41-35-120(3)¹ are designed to promote uniformity and reliability in drug testing standards, and provide specific guidelines for employers to follow.

¹ Pursuant to sub-section 41-35-120(3) (iii) an insured worker is ineligible for benefits if:

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

Indeed, the legislature also intended to give teeth to an overriding policy promoting safety and drug-free workplaces by unequivocally denying benefits to those who test positive for illegal drugs at work if the test is administered on behalf of the employer by a laboratory that is certified by a nationally recognized accrediting body. The general purpose of the unemployment statutes – to grant benefits to eligible and deserving claimants – is served by denying benefits to individuals who not only violate workplace policies, but also violate the law by using illegal drugs. The legislature imposed these requirements to ensure consistency, uniformity and reliability of the drug testing systems utilized by employers in South Carolina. In that regard, a declaration that the present HHS-CLIA certificate does not comply with the Statute renders Section 41-35-120(3) a nullity as regards any tests performed on hair samples on behalf of an employer in South Carolina prior to July 2010. This is because although the Statute requires that workplace drug tests be performed by a laboratory certified by the National Institute on Drug Abuse (“NIDA”), the College of American Pathologists (“CAP”) or the State Law Enforcement Division (SLED”); none of these entities had in place a mechanism for certifying laboratories which perform hair specimen drug testing procedures on employees at the time of the subject test. These entities only certified laboratories for urine tests:²

- Prior to July 2010, CAP certifications were based only on urine tests, and were referred to as the CAP-FUDT (College of American Pathologists/Forensic Urine Drug Testing. In 1988 CAP, in consultation with the American Association for Clinical Chemistry, developed the FUDT accreditation program designed specifically for non-federal work place drug testing. It was modeled after the SAMHSA program and covered any drug test performed on urine. See,

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

² See, Transcript at pp. 18, 124-127.

<http://drugtestingbook.com/laboratory-accreditation-regulation/accreditation-programs-for-workplace-drug-testing-laboratories/> (last visited 11/29/2011).

- Similarly, per discussions with SLED, that entity has never had a certification program in place as outlined in the Statute – be it for urine testing or hair testing.³
- Likewise, NIDA only approved drug testing programs aimed at the transportation industries, and its certification program related to laboratories that tested for drugs in urine samples; not hair specimen samples. See, <http://www.nih.gov/about/almanac/organization/NIDA.htm#legislation> (last visited 11/28/2011).

As set forth in the SAMHSA literature and compliance materials, references to SAMHSA and NIDA certification apply only to urine testing of those Federal contractors and all recipients of Federal grants who fall within the transportation industries (aviation, trucking, railroad, mass transit, and pipeline) regulated by DOT. See, Exhibit 4 to Transcript. Because Omega is primarily responsible for conducting drug tests on hair samples on non-DOT employees, SAMHSA certification would not apply to it, nor would Omega be listed in the monthly list of approved labs under SAMHSA since SAMHSA certification is directed at urine testing in the workplace for those jobs that fall within the purview of the DOT⁴. See, Transcript, pp. 16, 127, and Exhibit 4. Thus, a laboratory can only be SAMHSA or NIDA certified if it conducts urine tests, not hair tests, on DOT employees. *Id.* Similarly, prior to July 2010, a laboratory could only attain the CAP certification if it was primarily focused on urine proficiency testing.⁵

It is also noteworthy that Omega had CAP certification for urine specimen tests during the time that its laboratories were testing urine samples, up to 2008. At that time, CAP did not certify labs for hair specimen tests. However, Omega ceased testing urine samples in or around 2008, and as soon as hair specimen testing certification became available through CAP in or

³ Based on telephone discussions with representatives of SLED, in or around March/April 2011, and November 2011, including Ms. Susan Porter, in-house counsel for SLED.

⁴ In fact none of the labs listed on Exhibit 4 are South Carolina labs.

⁵ The drug tests at issue were performed on April 6, 2010 and April 15, 2010

around July 2010, Omega obtained its certification through that body, and is currently certified to perform drug tests on hair specimens by CAP. Moreover, at the time of the subject test, Omega had at least three certifications specific to drug testing on hair specimens, including (1) the HHS-CLIA certificate; (2) the International Organization for Standardization/International Electrotechnical Commission "ISO/IEC" 17025:2005 Accreditation – ANSI-ASQ National Accreditation – an internationally recognized accreditation; and (3) the ISO Forensic Quality Services Accreditation Omega obtained its ISO certification before certification for hair specimen sample testing was available through CAP.⁶

Furthermore, HHS, through another one of its operating divisions, the Food & Drug Administration ("FDA") has recognized that "ISO/IEC 17025 is the most widely used laboratory standard for federal testing laboratories, including FDA's own laboratories, and that ISO/IEC 17025 is internationally recognized and accepted world-wide." *See*, Submission Of Laboratory Packages By Accredited Laboratories - [www.fda.gov > Regulatory Information > Guidances](http://www.fda.gov/RegulatoryInformation/Guidances) (last visited 11/28/2011).

In light of the overwhelming evidence regarding Omega's certifications at the time of the subject test, a declaration that Omega's hair specimen tests are not in compliance with the Statute would lead to a result so plainly absurd that it could not have been intended by the Legislature and would defeat the plain legislative intention. *See, Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Such a declaration would in effect, invalidate all the hair specimen tests performed on private sector employees in South Carolina by Omega prior to its September 2010 CAP certification (or any other similarly situated laboratory). The effect of such a declaration would require the re-instatement of all private sector employees in South

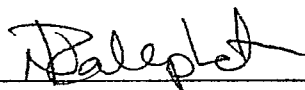
⁶ These certificates, amongst others, were presented as evidence at the initial hearing in July 2010, and were fully incorporated by reference at the August 2011 Hearing.

Carolina, who tested positive for drugs based on tests administered on hair samples by a laboratory certified by HHS, in clear contravention of the statute's purpose and intent. Such a result would not only be absurd, but would run afoul of the rule on statutory construction which requires legislative intent to prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *See, State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010)

CONCLUSION

Under established South Carolina rules of statutory construction, it is clear that the CLIA HHS-Certificate demonstrates Nucor's compliance with South Carolina law regarding workplace drug testing protocols, and proves that Omega, as testified to at the Hearing, is/was certified as required under the Statute.

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENT NUCOR
CORPORATION**

November 30, 2011
Charleston, South Carolina

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE
Before the Appellate Panel

Appeal No. 10129-15740

Kim A. Legette,

Claimant

v.

Nucor Corp.

Liabe Employer

BRIEF FOR CLAIMANT

Claimant Kim A. Legette, by and through her attorney, here submits this Brief in support of her Appeal of the Appeal Tribunal's Decision dated August 18, 2011.

Claimant has timely appealed the Tribunal's decision and here requests that the Appellate Panel overturn that decision as being clearly erroneous as a matter of law and incorrect based on facts in the record.

The principal grounds for this appeal in this workplace drug testing case is that the Tribunal erred in determining that Omega Laboratory met the certification requirement of S.C. Code Ann. § 41-35 120(3)(a)(iii)(B) and in finding that the Claimant should be disqualified for illegal drug use.¹

SAMHSA Certification is NIDA Certification

The Employer here claimed that Claimant was discharged for illegal drug use. Because the consequences of a finding of discharge for illegal drug use are so severe, the South Carolina

¹ This Appellate Panel originally held the Employer had not met its burden of proof of cause for discharge (Appellate Panel Decision 2010-C-2253). Employer appealed the Commission's finding to the ALJ, who upheld the Panel's decision regarding no cause under 41-35-120(2) and (4), and ordered that the case be remanded to the Appeal Tribunal due to reference to the incorrect portion of the relevant statute regarding work place drug testing. It is the decision of the Appeal Tribunal following the August 15, 2011 hearing that is the subject of this appeal.

Legislature established specific requirements for employers that subject their employees to work place drug testing. The Legislature required that both the sample collector and the testing laboratory meet certain qualifications. Most relevant here, the testing laboratory must be certified by “the National Institute of Drug Abuse, the College of American Pathologists or State Law Enforcement Division”. S.C. Code Ann. § 41-35-120(3)(a)(iii)(B). Because it is undisputed that Omega Laboratory was not certified by either the College of American Pathologists (CAP)² or by SLED³ at the time of the drug tests, the only question remaining is whether it was certified by National Institute of Drug Abuse (hereinafter “NIDA”) at the time of the tests. All NIDA certified laboratories are listed monthly in the Federal Register (“FR”). Omega Laboratories is not listed in the FR for April 2, 2010 and May 14, 2010, the period in which the drug tests were performed and therefore is not a NIDA certified laboratory and does not comply with S.C. Code Ann. § 41-35 120(3)(a)(iii)(B).

The confusion over the statute’s certification requirement arises because NIDA no longer oversees workplace drug testing programs. However, where the S.C. Legislature enacted the statute requiring NIDA certification, the intent of the Legislature can only be effectuated by requiring certification by the program that assumed the forensic drug testing laboratory program previously administered by NIDA.

Beginning in 1992, the NIDA office with oversight of workplace drug testing, the National Laboratory Certification Program, was transferred to the Substance Abuse and Mental Health Services Administration (SAMHSA) a new agency in HHS. The Federal Register (“FR”) for April 2, 2010 and May 14, 2010, entered as Agency exhibits, refers to

² Agency Exh. 5

³ Hearing Tr. 18:16-18.

“HHS/SAMHSA (formerly: HHS/NIDA)”, indicating that laboratories formerly certified by NIDA are now certified by SAMHSA.⁴

Public Law 102-321 clearly states that all service related functions, including certifications that were under NIDA are transferred to SAMHSA. 106 STAT. 370-372. This is confirmed in Subtitle E - Section 163(a)(1)(A), “Conforming Amendments” as well. 106 STAT 375.

In order to clarify the practical impact of the reorganization that occurred as a result of Public Law 102-321, Claimant moves that the Appellate Panel take Judicial Notice of several exhibits printed directly from the SAMHSA.gov website and discussed below. Pursuant to the S.C. Rules of Evidence, Rule 201, Judicial Notice can be taken of any fact that is “not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”. Exhibits that meet the Judicial Notice standard are denoted below as a “Cl. Appeal Exh.”⁵

However, while SAMHSA is part of HHS, the transfer of responsibilities that occurred with Public Law 102-321 does not mean that any HHS certification is equivalent to a NIDA certification, as indicated in Agency Exhibit 4 and the exhibits below and in the sections of the law cited above.

The first exhibit, Cl. Appeal Exh. 1, is specifically titled “‘SAMHSA-certified’ Laboratories versus ‘NIDA-certified’ Laboratories”, and states that the National Laboratory Certification Program for certification of laboratories for workplace drug testing is now under “SAMHSA”. Further, it states that NIDA-certified laboratories should now be referred to as “SAMHSA-certified laboratories or HHS-certified laboratories”. However, while this document

⁴ Agency Exh. 4.

⁵ Claimant’s exhibits entered at the Tribunal stage will here be referenced as “Cl. Hearing Exh.” to avoid confusion.

refers to “HHS certified”, it is clear that it is referring to laboratories certified by the NLCP which is completely under the auspices of SAMHSA. While the S.C. Legislature’s reference to NIDA in the statute is out of date, SAMHSA is the exact equivalent to the NIDA certification to which it referred, and that all responsibilities previously under NIDA are now under SAMHSA specifically. Legislative intent can only be effectuated by requiring SAMHSA certification in place of NIDA certification.

SAMHSA is the Federal Agency that Administers All Aspects of Workplace Drug Testing Functions for Federal and Private Employers

Employer has taken the position that NIDA and/or SAMHSA certification is not the correct certification since the regulatory scope of SAMHSA is federal work place urine testing. First and foremost, the S.C. Legislature chose to require NIDA certification. Second, NIDA/SAMHSA certification has long been considered the gold standard for forensic drug testing that is designed to provide legally defensible results based on rigorous chain of custody protocols, laboratory security, and quality assurances. Historically, it has provided some level of quality assurance even to private employers that a laboratory that meets the federal government’s requirements will provide a legally defensible level of forensic toxicology on samples other than urine, even though those private employers do not fall under the federal regulatory regime. *See* Public Law 102-321, Part D. Sec. 541(a), 106 STAT 367; and Fed. Reg. Vol. 73, No. 228, pg. 71858, Background). In addition, all of the documents presented indicated that SAMHSA is the Agency within HHS tasked with all aspects of forensic workplace drug testing. *Id.*

Laboratories certified by SAMHSA are private laboratories that perform forensic drug testing for federal and private sector companies, using the same equipment. The SAMHSA certification is an indication that the laboratory equipment, operators and processes all comply

with SAMHSA standards. The Employer was not correct when its agent, Christopher Gypin (Emp. Witness-2) stated his opinion that SAMHSA certification would not be applicable.⁶

While the SAMHSA FAQ states that SAMHSA does not certify tests run on private samples, those samples are still being run in the same certified laboratories. Cl. Appeal Exh. 4, ¶ 14.⁷

Further, by Executive Order and public law, SAMHSA as an agency is mandated to provide more than just a regulatory scheme for federal workplace drug testing. The SAMHSA document in Cl. Appeal Exh. 2 describes this additional mission regarding substance abuse prevention for non-federal workplaces. The Division of Workplace Programs, a division of SAMHSA, provides information to the private sector for building work place drug free programs. Cl. Appeal Exh. 3, the “Drug Free Workplace Kit”, is an example of the type of information and guidance provided by SAMHSA. Cl. Appeal Exh. 4 is a SAMHSA “Frequently Asked Questions” document, that provides a SAMHSA helpline number for assistance to private businesses in setting up a workplace drug testing program. *Id.* at ¶ 7.

CLIA Certification is not NIDA Certification

The Employer and the Tribunal are incorrect in their position that certification by another division within HHS is sufficient. First, it is a rule of statutory construction that if the Legislature had intended to say HHS, it would have done so, instead it chose to reference a much more specific forensic analysis qualification in NIDA. In addition, Employer’s Exhibit 2, which

⁶ Hearing Tr. 16:20-17:2. It is important to note that Employer Witness-2, Christopher Gypin, is an agent of the Employer, and appeared as an employer witness in his capacity as the owner and vice-president of Accudiagnosics, the company that provides “the avenue to submit samples and to report samples back to Nucor”. Hearing Tr. 15:12-16:9. He then testified that he was at the hearing due to an issue regarding SAMHSA certification raised at the prior hearing. *Id.* lines 15-18. Most importantly, at the end of his testimony, he testified that: “I’m not an expert on laboratory certification you would have to ask one of those”. Hearing Tr. 132:11-15.

⁷ Also, while SAMHSA does not certify hair testing, it has certified the laboratory’s quality control and chain of custody scheme. Further, the S.C. statute does not distinguish hair from urine testing, but under the Employer’s logic, SAMHSA would be appropriate for urine testing while it would not be for hair testing. This is a distinction the Legislature did not make. Interestingly, Employer Witness-2 also stated that CAP is only appropriate for urine testing but provided no evidence.

is an organizational chart of the U.S. Department of Health and Human Services, indicates that the HHS department is organized into over 31 offices and programs, including SAMHSA, Office of Civil Rights, Food and Drug Administration, the Office of Global Affairs, and the Indian Health Services, clearly offices with highly disparate programs, many of which also provide certifications. SAMHSA is the department within HHS tasked with forensic workplace drug testing. Based on the S.C. Legislature's specific reference to NIDA, along with SAMHSA's position as the agency tasked with all aspects of workplace drug testing, SAMHSA certification is the only appropriate certification.

Therefore, Omega's only certification, the CLIA certification through the Centers for Medicare and Medicaid Services at HHS,⁸ is not sufficient under the statute. While CMMS is a department under HHS, it is not the department that oversees workplace drug testing. Further, the SAMHSA FAQ itself specifically contrasts the differing roles of those certifications: "CLIA 88 regulations administered by the Health Care Financing Administration (HCFA) pertain primarily to clinical laboratories doing medical diagnostic testing. The HHS NLCP is for laboratories doing forensic workplace drug testing." Cl. Appeal Exh. 4, ¶ 25. Employer's agent was also incorrect in stating that NIDA responsibilities were absorbed by CLIA.⁹ Employer has presented no evidence for this statement, while the Federal Record and documents from the SAMHSA website discussed above clearly state that the NIDA responsibilities were absorbed by SAMHSA.

Significantly, despite testimony by Employer's Witness-2 (Gypin) as to why he thinks SAMHSA certification is inappropriate, the Employer provided no evidence showing that CLIA addresses any of the alleged deficiencies that it ascribes to SAMHSA. Employer presented no

⁸ Employer's Exh. 1.

⁹ Hearing Tr. 18:7-15.

evidence regarding CLIA certification except that it has an “HHS” watermark, so there is **no evidence** that CLIA certifies workplace drug-testing, that CLIA certified forensic drug testing, that CLIA certifies urine testing, that CLIA certifies hair testing, or that CLIA certified laboratories use a “method approved by the National Institute on Drug Abuse” (as required under S.C. Code § 41-35-120(3)(iii)(C)). When asked if CLIA certification has anything to do with standards of drug testing, Employer answered, “[y]ou would have to look at those standards, I am assuming that it does . . . “.¹⁰ When asked if CLIA proficiency testing involved workplace drug tests, Employer Witness-2 answered, “I don’t know you would have to ask them”.¹¹

SAMHSA Certification is the Sole Certification that Effectuates the S.C. Legislature’s Intent.

Omega is not certified pursuant to S.C. Code § 41-35-120(3), therefore, the Employer has not, and cannot meet its burden to show that Claimant is ineligible for benefits. While the statute may not be up to date in its reference to NIDA, there is no question that in order to effectuate the Legislature’s intent in setting standards for a forensic drug testing laboratory, that laboratory must be either “HHS/SAMHSA (formerly: HHS/NIDA)” certified, College of American Pathologists-certified or SLED-certified under the S.C. statute. By asking the Agency to substitute CLIA certification for the Legislature’s named certifications, Employer is here asking Agency to re-write the statute and substitute its own judgment as to which certification would be most suitable for workplace drug testing. Claimant moves this Appellate Panel to find that Omega is not certified HHS/SAMHSA and therefore is not NIDA certified as required under the statute.

¹⁰ Hearing Tr. 132:1-7.

¹¹ Hearing Tr. 132: 8-10.

Employer has presented no credible evidence that Claimant was Discharged for Illegal Drug Use.

The consequences of a finding of discharge for illegal drug use are so severe that the South Carolina Legislature established specific requirements for employers that subject their employees to work place drug testing. The evidence in the record regarding Nucor's workplace drug testing issues provide a prime example of why this statute was required, and why the statute must be complied with absolutely. The issues with workplace drug testing began with a completely botched drug test in February 2009. The Claimant, who had passed multiple tests over a more than ten years period with Nucor,¹² had a hair sample taken by an unqualified employee at Nucor, who did not know how to do hair tests, dropped the samples and had other troubles with the test. When this test came back with a high number that even Employer's witness admits was not credible,¹³ Ms. Legette tested negative on her retest.

Claimant was called in for a random test again a few weeks later. While this test was taken by a Nurse Practitioner, again there were irregularities, with the Employer requesting what it refers to as a "level of detection test", where "anything above 0.0000 is considered a positive test."¹⁴ Despite ample evidence in the record that none of Employer's witnesses testifying at the hearing indicated any understanding of drug testing, Employer chose to ignore the testing laboratory's "cutoff" guidelines and substituted its own judgment as to what would characterize a positive test. This in itself violates the statutory requirement that the confirmatory test be conducted using a "scientifically accepted method approved by the National Institute on Drug Abuse." S.C. Code Ann. § 41-35 120(3)(a)(iii)(C). It is of interest to note that the Claimant

¹² Hearing Tr. 70:1-7 (Claimant also passed an additional 3 years of DOT testing through City of Charleston).

¹³ Cl. Hearing Exh. 1.

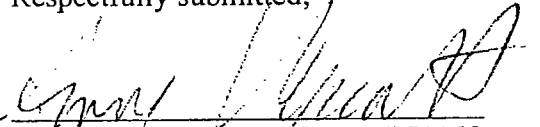
¹⁴ Hearing Tr. 61:8-20. Please note that the transcript is in error in identifying "Claimant Attorney" as the person testifying in this section. It is clear from the surrounding record that this is the testimony of Employer Witness-4, Meleah Reynolds.

passed an independent drug test, taken the same day, that used the same low cutoff of 0.1pg/mg as Employer's 4/15/09 test, and had a negative result from the same laboratory testing laboratory, Omega.¹⁵

CONCLUSION

On these basis, the Claimant appeals the Tribunal's Decision and respectfully requests that the Commission overturn the Tribunal's decision, find that the Employer did not meet the criteria set forth in S.C. Code § 41-35-120, and find that the Claimant was separated under nondisqualifying circumstances and reverse the Tribunal's decision.

Respectfully submitted,



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ATTORNEY FOR THE CLAIMANT

Charleston, South Carolina
November 30, 2011

¹⁵ Cl. Hearing Exh. 4.

Date: April 2006

“SAMHSA-certified” Laboratories
versus
“NIDA-certified” Laboratories

In accordance with Subtitle D of title I of Public Law 102-321, as amended by Public Law 102-352, Section 2(b)(1), a major reorganization occurred within the U.S. Department of Health and Human Services (HHS) on October 1, 1992.

The Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) ceased to exist and all of its major programs were moved to different agencies. The National Institute on Drug Abuse (NIDA) became one of the research institutes within the National Institutes of Health (NIH).

The office within NIDA that had oversight responsibility for the National Laboratory Certification Program (NLCP) was transferred from NIDA to a new agency in HHS. The new agency is called the Substance Abuse and Mental Health Services Administration (SAMHSA). It has three components: the Center for Substance Abuse Prevention, the Center for Substance Abuse Treatment, and the Center for Mental Health Services. The office responsible for managing the NLCP is the Division of Workplace Programs in the Center for Substance Abuse Prevention.

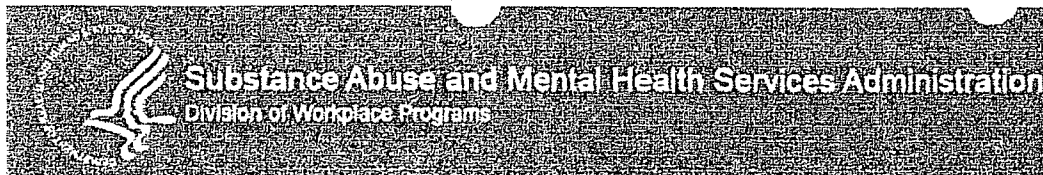
As a result of the reorganization, the drug testing laboratories certified under the NLCP are no longer referred to as “NIDA-certified” laboratories, but rather as “SAMHSA-certified” or “HHS-certified” laboratories. Additionally, it is no longer appropriate to call the required 5-drug class test panel as the “NIDA-5” panel. The correct term to use is either the “SAMHSA-5” or the “HHS-5” panel.

If you have additional questions, please call us at 240-276-2600.

Prepared by:

Division of Workplace Programs
Center for Substance Abuse Prevention
Substance Abuse and Mental Health Services Administration

Cl. Appeal Exh. 1

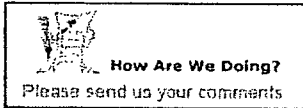


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Key word:

Drug-Free Workplace Help**Drug Testing**
Historical Documents

- SAMHSA Replaces NIDA
- HHS MRO Manual (Effective 11.1.2004)
- HHS MRO Manual (Used before 11/01/2004)
- HHS Urine Specimen Collection Handbook (Effective 11.1.2004 to 10.31.2010)
- Public Comments
- Federal Register Proposed May 2010 Federal CCF Public Comments
- Fed Reg Notices (Proposed Policies)
- Fed Reg Notices (Final Policies)

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section (c) directly and through grants, cooperative agreements, or contracts with public or nonprofit private entities.

“(e) REPORT TO CONGRESS.—Not later than February 1, 1993, and each fiscal year thereafter, the Director shall submit to the Subcommittee on Health and the Environment of the Committee on Energy and Commerce (of the House of Representatives), and to the Committee on Labor and Human Resources (of the Senate), a report describing the activities of the Office during the preceding fiscal year, including a summary of the activities of demonstration projects and a summary of evaluations of the projects.

“OFFICE ON AIDS

Establishment.
42 USC 285p-3.

“SEC. 464U. The Director of the Institute shall establish within the Institute an Office on AIDS. The Office shall be responsible for the coordination of research and determining the direction of the Institute with respect to AIDS research related to—

“(1) primary prevention of the spread of HIV, including transmission via sexual behavior;

“(2) mental health services research; and

“(3) other matters determined appropriate by the Director.”.

SEC. 125. COLLABORATIVE USE OF CERTAIN HEALTH SERVICES RESEARCH FUNDS.

Part G of title IV of the Public Health Service Act is amended by inserting after section 494 (42 U.S.C. 289c) the following new section:

“COLLABORATIVE USE OF CERTAIN HEALTH SERVICES RESEARCH FUNDS

42 USC 289c-1.

“SEC. 494A. (a) IN GENERAL.—The Secretary shall ensure that amounts made available under subparts 14, 15 and 16 of part C for health services research relating to alcohol abuse and alcoholism, drug abuse and mental health be used collaboratively, as appropriate, and in consultation with the Agency for Health Care Policy Research.

“(b) REPORT.—Not later than May 3, 1993, and annually thereafter, the Secretary shall prepare and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate, a report concerning the activities carried out with the amounts referred to in subsection (a).”.

Subtitle C—Miscellaneous Provisions Relating to Substance Abuse and Mental Health

SEC. 131. MISCELLANEOUS PROVISIONS RELATING TO SUBSTANCE ABUSE AND MENTAL HEALTH.

42 USC 290dd-3,
290ee-290ee-3.

Part D of title V of the Public Health Service Act (42 U.S.C. 290dd et seq.) is amended to read as follows:

“PART D—MISCELLANEOUS PROVISIONS RELATING TO SUBSTANCE
ABUSE AND MENTAL HEALTH

“SEC. 541. SUBSTANCE ABUSE AMONG GOVERNMENT AND OTHER
EMPLOYEES.

Inter-
governmental
relations.
Business and
industry.
42 USC 290dd.

“(a) PROGRAMS AND SERVICES.—

“(1) DEVELOPMENT.—The Secretary, acting through the Administrator of the Substance Abuse and Mental Health Services Administration, shall be responsible for fostering substance abuse prevention and treatment programs and services in State and local governments and in private industry.

“(2) MODEL PROGRAMS.—

“(A) IN GENERAL.—Consistent with the responsibilities described in paragraph (1), the Secretary, acting through the Administrator of the Substance Abuse and Mental Health Services Administration, shall develop a variety of model programs suitable for replication on a cost-effective basis in different types of business concerns and State and local governmental entities.

“(B) DISSEMINATION OF INFORMATION.—The Secretary, acting through the Administrator of the Substance Abuse and Mental Health Services Administration, shall disseminate information and materials relative to such model programs to the State agencies responsible for the administration of substance abuse prevention, treatment, and rehabilitation activities and shall, to the extent feasible provide technical assistance to such agencies as requested.

“(b) DEPRIVATION OF EMPLOYMENT.—

“(1) PROHIBITION.—No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the grounds of prior substance abuse.

“(2) APPLICATION.—This subsection shall not apply to employment in—

“(A) the Central Intelligence Agency;

“(B) the Federal Bureau of Investigation;

“(C) the National Security Agency;

“(D) any other department or agency of the Federal Government designated for purposes of national security by the President; or

“(E) in any position in any department or agency of the Federal Government, not referred to in subparagraphs (A) through (D), which position is determined pursuant to regulations prescribed by the head of such agency or department to be a sensitive position.

“(3) REHABILITATION ACT.—The inapplicability of the prohibition described in paragraph (1) to the employment described in paragraph (2) shall not be construed to reflect on the applicability of the Rehabilitation Act of 1973 or other anti-discrimination laws to such employment.

“(c) CONSTRUCTION.—This section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment.



Federal Register

Tuesday,
November 25, 2008

Part V

Department of Health and Human Services

Substance Abuse and Mental Health
Services Administration

Mandatory Guidelines for Federal
Workplace Drug Testing Programs; Notice

Incomplete

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Substance Abuse and Mental Health Services Administration****Mandatory Guidelines for Federal Workplace Drug Testing Programs**

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Revised Mandatory Guidelines.

SUMMARY: This Final Notice of Revisions to the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Revisions to Mandatory Guidelines) addresses collection and testing of urine specimens, the requirements for the certification of Instrumented Initial Test Facilities (IITFs), and the role of and standards for collectors and Medical Review Officers (MROs). Additional notices of Proposed Revisions to the Mandatory Guidelines addressing the use of point of collection testing (POCT), oral fluid testing, sweat patch testing, hair testing, and associated issues will be published at a later date. With regard to the use of alternative specimens including hair, oral fluid, and sweat patch specimens in Federal Workplace Drug Testing Programs, significant issues have been raised by Federal agencies during the review process which require further examination, and may require additional study and analysis. As part of the review process for these alternative tests, the Department of Health and Human Services ("HHS" or "Department") plans to issue a notice in the *Federal Register* requesting information and assistance from the general public to provide or identify data and research findings that address specific areas of interest.

DATES: *Effective Date:* March 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Donna M. Bush, Ph.D., Division of Workplace Programs, CSAP, SAMHSA, 1 Choke Cherry Road, Room 2-1033, Rockville, Maryland 20857, (240) 276-2600 (phone), (240) 276-2610 (Fax), or e-mail at donna.bush@samhsa.hhs.gov.

SUPPLEMENTARY INFORMATION:

Background

The Guidelines were first published in the *Federal Register* on April 11, 1988, (53 FR 11970), and have since been revised in the *Federal Register* on June 9, 1994, (59 FR 29908), on September 30, 1997, (62 FR 51118), on November 13, 1998 (63 FR 63483), and on April 13, 2004, (69 FR 19644). The Guidelines establish the scientific and technical guidelines for Federal workplace drug testing programs and

establish standards for certification of laboratories engaged in drug testing for Federal agencies under authority of section 503 of Public Law 100-71, 5 U.S.C. Section 7301 note, and Executive Order (E.O.) 12564.

The Department also published Proposed Revisions to Mandatory Guidelines in the *Federal Register* on April 13, 2004, (69 FR 19673). These Proposed Revisions to Mandatory Guidelines described changing the Guidelines into a plain language format, expanding the Federal drug testing program to include use of alternative specimens including testing hair, oral fluid, and sweat patch specimens, allowing the use of "point of collection testing" (POCTs) for urine and oral fluid specimens, establishing the requirements for certifying "instrumented initial test facilities" (IITFs) to test specimens, and providing specific standards for collectors, POCT testers, and MROs. There was a 90-day public comment period during which 285 commenters submitted comments on the proposed changes to the Guidelines. These commenters were individuals and public and private entities. The comments are available for public view on the Department's Internet Web site (<http://workplace.samhsa.gov>).

Section 503 of Public Law 100-71, 5 U.S.C. Section 7301 note, required the Department to establish scientific and technical guidelines and amendments in accordance with Executive Order 12564, and to publish Mandatory Guidelines which establish comprehensive standards for all aspects of laboratory drug testing and procedures, including standards that require the use of the best available technology for ensuring the full reliability and accuracy of drug tests and strict procedures governing the chain of custody of specimens collected for drug testing. These revisions to the Mandatory Guidelines promote and establish standards that use the best available technology for ensuring the full reliability and accuracy of urine drug tests, while reflecting the ongoing process of review and evaluation of legal, scientific, and societal concerns.

The submitted public comments and additional comments raised by Federal Agencies during subsequent internal review of the proposed changes to the Guidelines raised significant scientific, legal, and public policy concerns about the use of alternative specimens and POCT devices in Federal agency workplace drug testing programs. Since each alternative specimen and drug testing using POCT devices poses different concerns, the Department established a staggered timeline for

issuing final guidance that allows for further study and research. In assessing the complexity of the task, the Department has decided to publish these final Guidelines with regard to collection and testing urine specimens, establishing the requirements for the certification of IITFs, and establishing specific standards for collectors and MROs. The Department considered several options for issuing one or more Final Notices in the *Federal Register* that may require additional public comment periods, concerning the use of alternative specimens and drug testing technologies such as POCT devices. Since the scientific, legal, and public policy information for drug testing oral fluid, hair, and sweat patch specimens, and using POCT devices is not as complete as it is for the laboratory-based urine drug testing program, developing Final Notices concerning the use of these is more challenging. As described in the notice of Proposed Revisions to Mandatory Guidelines issued April 13, 2004, the performance of alternative specimens in pilot performance testing (PT) programs has been encouraging, with individual laboratory and group performance improving over time. However, there are still three areas of concern. First, the data from the pilot PT programs to date show that not all participants have developed the capability to test for all required drug classes, nor to perform such tests with acceptable accuracy. Second, some drug classes are more difficult to detect than others, for any given type of specimen. Third, the specific drug classes that are difficult to detect vary by type of specimen. As a result, it will require additional study to assist agencies in determining how to select the appropriate type of specimen to be collected from a specific donor, when the use of a specific drug is suspected. Nevertheless, HHS believes that the addition of alternative specimens to the Federal Workplace Drug Testing Program would complement urine drug testing and aid in combating the risks posed from available methods of suborning urine drug testing through adulteration, substitution, and dilution. Thus, HHS will continue to pursue testing using alternative specimens. HHS anticipates issuing further revisions to the Mandatory Guidelines addressing the use of oral fluid, sweat patch, and hair, and the use of POCT devices for urine and oral fluid. These revisions will be published in the *Federal Register*, with opportunity for public comment.

All written comments were reviewed and taken into consideration in the

preparation of these revised Guidelines. The preamble only addresses sections of the draft Guidelines regarding urine testing that were commented on during the public comment period or that the Department is changing. Most section numbers for the Guidelines issued in April 2004 were changed in these Guidelines due to the removal of those sections concerning alternative specimens and POCT as well as for clarity. To make it easier for the public, the preamble refers to the new section number and, where appropriate, the corresponding section number in the Proposed Revisions to Mandatory Guidelines issued in April 2004. Similar comments are considered together in the discussion.

Reason for the Effective Date

An effective date of 18 months from the date of publication of these revised Mandatory Guidelines was chosen to permit the following activities:

(1) It will take at least 12 months for manufacturers of immunoassay test kits to modify or manufacture immunoassay test kits and ensure compliance with any applicable statutory and regulatory requirements before commercialization of the modified kits.

(2) It will take the HHS-certified laboratories at least one month to validate and implement the new test kits.

(3) It will take 2 to 3 months for the National Laboratory Certification Program (NLCP) to challenge the HHS-certified laboratories with performance testing (PT) samples to ensure that the test kits and test results satisfy the required performance criteria.

The effective time frame of 18 months will encompass many activities that will overlap or occur at the same time within different industries and Federal agencies.

Summary of Public Comments and the HHS Response

The following comments were directed to the information and questions in the preamble.

Initial Test Kit Issues

In the proposed Guidelines, the Department requested comments on issues regarding the testing for amphetamine analogs using one or two immunoassay test kits because the laboratory or IITF would be required to test specimens for the target analytes listed under amphetamines. Two commenters believed that two separate initial test kits would be needed to appropriately screen specimens for amphetamines as specified in Section 3.4. One commenter believed three

separate initial test kits may be required. Six commenters believed that one initial test kit could be used to screen for amphetamine, methamphetamine, and their analogs. For the most part, the commenters provided justifications for their comments. The Department has evaluated the comments and has concluded that using either a single initial test kit or multiple initial test kits is acceptable depending on the specificity and sensitivity that the single initial test kit has with amphetamine and methamphetamine and its cross-reactivity with methylenedioxymethamphetamine (MDMA).

Subpart A—Applicability

The Department has revised Section 1.1 to state that the requirements in these Guidelines also apply to collectors and MROs. This revision ensures that collectors and MROs are notified of the applicable requirements under these Guidelines.

In Section 1.5, where terms are defined, the Department has added several new definitions for terms that appear in the Guidelines, and revised several definitions that needed clarification even though no comments were received from the public.

The Department has changed the term to be defined from "adulterated" to "adulterated specimen." The meaning of the term has not changed. Only the wording has been changed to make the definition clearer.

Definitions were added for "alternate responsible person" and "alternate responsible technician," the individuals who are pre-approved by HHS to assume responsibility for the HHS-certified drug testing laboratory or IITF, respectively, when the responsible person or responsible technician is absent for an extended period.

The definition for "cancelled test" was reworded for clarification. The definition is the same.

The term "carryover" was defined. Carryover, as used in these Guidelines, refers to the condition that results when the test result for one sample has been affected by a preceding sample during analysis. For example, if the concentration of a drug in one sample is very high and cannot be completely eliminated from the analytical instrument before the next sample is tested, the residual drug in the analytical instrument contributes to the concentration of that drug in the next sample.

The definition for "certifying scientist" was revised to indicate that a certifying scientist can report any test result reported from an HHS-certified

laboratory. The proposed definition referred to "non-negative or invalid result." Since the term "non-negative" was deleted from these Guidelines, the definition for certifying scientist needed to be revised.

The definition for "certifying technician" was revised to state that a certifying technician can report on the chain of custody and scientific reliability of negative, negative/dilute, and rejected for testing results. This revised definition clarifies which types of results a certifying technician can report. The proposed definition incorrectly permitted the certifying technician to report on the chain of custody and scientific reliability of only negative test results.

The term "confirmatory validity test" was changed to "confirmatory specimen validity test." The term "validity test" was changed to "specimen validity test" throughout the Guidelines, to be consistent with current terminology used by the Department.

The definition for a "cutoff" was revised to apply to specimen validity tests, as well as drug tests. The term is used in both contexts.

The definition for "dilute specimen" was revised to state that the term applies to a urine specimen with creatinine and specific gravity values that are lower than expected but still physiologically possible. This change shows that a dilute specimen is different from a substituted specimen.

The definition for "failed to reconfirm" was revised to clarify that the term applies when a second laboratory tests a split (Bottle B) specimen and is unable to corroborate the original test result reported by the primary laboratory.

The definition for "follow-up test" was removed. The definition for "follow-up test" is provided in Federal agency drug testing plans and does not need to be repeated in the Guidelines.

The definition for an "initial validity test" was changed to "initial specimen validity test" throughout the Guidelines to be consistent with current terminology used by the Department. The term was also revised to include an "invalid result" because an "invalid result" requires using an initial specimen validity test as would an adulterated, diluted, or substituted test result.

To avoid confusion, the definitions for an "instrumented initial test facility" and for a "laboratory" were revised to show that these are permanent locations.

The definition for "invalid result" was revised to clarify that this type of result is reported when the test results

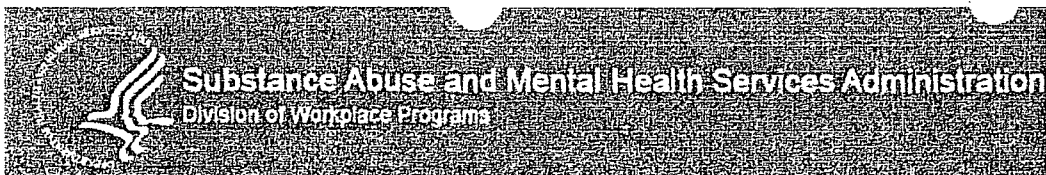
**Division of Workplace Programs (DWP)
Center for Substance Abuse Prevention
Substance Abuse and Mental Health Services Administration**

Prepared: March 2010

About

The Division of Workplace Programs (DWP) is mandated by Executive Order and Public Law to provide oversight for: (1) the Federal Drug-Free Workplace Program aimed at elimination of illicit drug use in the Federal workforce; and (2) the National Laboratory Certification Program (NLCP), which certifies laboratories to conduct forensic drug testing for the Federal agencies and for some federally-regulated industries. Additionally, DWP addresses primary substance abuse prevention through comprehensive drug-free and health/wellness workplace programs. These programs promote safer, healthier, and more productive workplaces. Interventions incorporate a continuum of scientifically-based components, including substance abuse awareness, health/wellness, health risk assessments, brief screenings, drug testing, early identification, intervention, treatment, recovery, and reintegration assisting employees, families and their communities. DWP is committed with helping workplaces meet the demands of health care reform along while reducing health care costs.

Cl. Appeal Exh. 2



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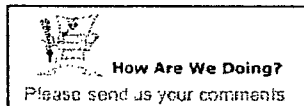
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Did You Know?**Drug Testing**

National Laboratory Certification Program (NLCP)

Program Documents

1. Program Document #44 - Fee Schedule (April 25, 2007)
2. Program Document #43 - Fee Schedule (August 3, 2005)
3. Program Document #42 - Fee Schedule (September 2, 2003)
4. Program Document #41 - Revised Maintenance Inspection Fee for a Category V Laboratory (October 8, 2002)
5. Program Document #40 - Revised Fee Schedule (December 12, 2001)
6. Program Document #39 - Revised Inspection and PT Programs and New Fee Schedule (March 28, 2001)
7. Program Document #38 - Changes in Accessioning and Reporting (July 21, 2000)
8. Program Document #37 - Specimen Validity Testing (July 28, 1999)
9. Program Document #36 - Changing the Opiate Testing Cutoff Concentration (November 13, 1998)
10. Program Document #35 - Guidance for Reporting Specimen Validity Test Results (September 28, 1998)

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Download Print Kit

Welcome to the Drug-Free Workplace Kit!

This Kit discusses:

- **What to do.** to prepare the workplace, identify issues, and provide assistance to your employees
- **How to do it.** to understand the legal requirements (that may apply to your workplace), build a team, assess your workplace, develop a policy, plan and implement a program, and evaluate the program
- **Additional information.** on resources for workplace substance abuse prevention, including brochures, fact sheets, promotional materials, and links to other Web sites of interest

Browse around, and use what you can. A drug-free workplace can be safer, healthier, and more productive. And it is within the reach of all!

The purpose of this Drug-Free Workplace Kit is to provide public and private workplaces, from small to large and from local to global, with credible, authoritative, evidence-based information, resources, and tools for producing and maintaining drug-free workplace policies and programs.

The Kit was assembled by the Division of Workplace Programs (DWP), in the Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration (often simply SAMHSA elsewhere in the Kit), U.S. Department of Health and Human Services.

DWP has unique and nationally important regulatory, knowledge development, and technical assistance roles and responsibilities for Federal and non-Federal workplaces, with respect to their drug-free workplace policies and programs.

For example, DWP is responsible for two principal activities mandated by Executive Order and Public Law: 1) oversight of the Federal Drug-Free Workplace Program, which aims to eliminate illicit drug use in the Federal workplace; and 2) oversight of the National Laboratory Certification Program, which certifies laboratories to conduct forensic drug testing for

Drug Testing

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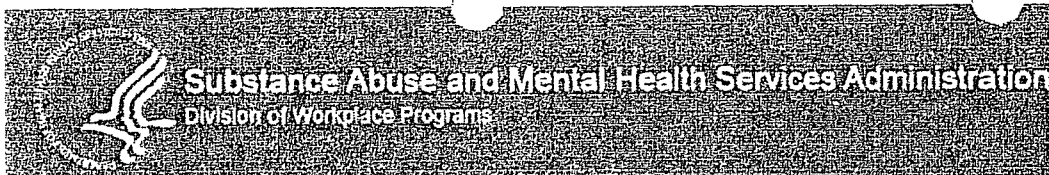
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Federal agencies and federally regulated industries.

To help it meet these two responsibilities, DWP has developed a variety of resources and techniques for addressing substance abuse in workplaces, in part through the provision of primary substance abuse-prevention, early identification, and intervention services for adult and youthful employees, and for their families and communities.

DWP has assembled this Kit from the most promising methods, techniques, and approaches that have been and are being developed and supported by practitioners, researchers, and evaluators in the field, including those that are included in SAMHSA's National Registry of Evidence-based Programs and Practices. Throughout the Kit there are many citations that have been included for further reading.

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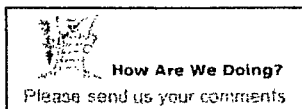
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Did You Know?



Welcome to the Division of Workplace Programs Workplace Resource Center

The Division of Workplace Programs (DWP) is mandated by Executive Order and Public Law to provide oversight for

- The Federal Drug-Free Workplace Program, which aims to eliminate illicit drug use in the Federal workforce, and for
- The National Laboratory Certification Program, which certifies laboratories to conduct forensic drug testing for the Federal agencies and for some federally regulated industries.

Additionally, DWP addresses primary substance abuse prevention through comprehensive drug-free and health/wellness workplace programs. These programs promote safer, healthier, and more productive workplaces.

Interventions incorporate a continuum of scientifically based components, including:

- Substance abuse awareness
- Health/wellness
- Health risk assessments
- Brief screenings
- Drug testing
- Early identification
- Intervention
- Treatment
- Recovery, and
- Reintegration to assist employees, families, and their communities

DWP is committed to helping workplaces meet the demands of health care reform while reducing health care costs.

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CI Appeal Exh. 4

**Substance Abuse and Mental Health Services Administration
Center for Substance Abuse Prevention
Division of Workplace Programs**

Frequently Asked Questions

Updated: March 2005

- 1. Where can a Federal agency or federally regulated employer purchase urine quality control (QC) samples that can be submitted as blind samples along with donor specimens to a drug testing laboratory?**

An updated list is available on this website under the title Sources of Blind Samples or calling DWP at 240-276-2600 to request a faxed copy.

- 2. Where can I find a list of HHS-certified drug testing laboratories?**

The current list of HHS-certified laboratories is published in the Federal Register during the first week of each month. The list is then made available on this website under the title Certified Laboratories.

- 3. Where can I get a previous list of HHS-certified laboratories?**

Call DWP at 240-276-2600 and a copy will be mailed or faxed to you.

- 4. I would like information on testing for alcohol?**

Testing Federal agency employees for alcohol use/abuse is not a part of the HHS Federal Workplace Drug Testing Program. However, the Department of Transportation does permit its regulated industry employers to test its employees for alcohol. Call DOT at 202-366-3784 or visit the DOT website at www.dot.gov/ost/dapc to access DOT regulations.

- 5. Which office is responsible for establishing the policies and guidelines for the Federal Workplace Drug Testing Program?**

Originally, the responsibility for establishing the policies for the Federal Workplace Drug Testing Program was given to the National Institute on Drug Abuse (NIDA). In 1993, HHS reorganized several administrations and the responsibility for the workplace

program was given to the Division of Workplace Programs (DWP) within the Center for Substance Abuse Prevention (CSAP) in the Substance Abuse and Mental Health Services Administration (SAMHSA). Please remember that NIDA is no longer associated with the workplace drug testing program.

- 6. Where can I find a physician who can serve as Medical Review Officer (MRO) for my workplace drug testing program?**

Information on physicians serving as MROs can be found on this website under Medical Review Officers or at the following websites: www.asam.org, www.acoem.org, www.aamro.com.

- 7. Where can I find help in setting up a workplace drug testing program for my business?**

SAMHSA maintains a helpline to specifically assist employers in establishing workplace drug testing programs. Call the Helpline at 1-800-967-5752.

- 8. I am an employee (for example, truck driver, merchant mariner, pilot, etc) covered under the DOT regulations. Can you give me specific information on the DOT regulations?**

Please call DOT directly at 202-366-3784 or visit its website at www.dot/ost/dapc.

- 9. Where can I obtain information on the Nuclear Regulatory Commission fitness-for-duty program?**

Call the NRC program coordinator at 301-415-6474.

- 10. Where can I find the program documents issued by the Division of Workplace Programs pertaining to the National Laboratory Certification Program?**

Several program documents issued by the Division of Workplace Programs are available on this website under the title [NLCP Program Documents](#).

- 11. What percentage of random tests should be conducted each year for an employer to maintain an effective deterrence and detection program?**

There is no established optimum percentage of random tests that will ensure the most effective deterrence and detection program. Logically, a very small percentage (e.g., 5

percent) may not be sufficient to deter or detect someone abusing an illicit substance, while a very high percentage (e.g., 95 percent) might be much more than is needed to maintain an effective program. The Department of Transportation permits the percentage of random tests to vary depending on the positive rate. In some cases, an industry is permitted to test at a 10 percent random rate while another industry is required to test at a 50 percent rate. Please contact DOT at 202-366-3784 for additional information on its policy.

12. How can my laboratory become an HHS-certified drug testing laboratory?

A laboratory can obtain an application for the National Laboratory Certification Program by calling the NLCP contractor by calling 1-800-334-8571 and asking to speak with someone about the NLCP.

13. How can I get my initial drug test kit approved for use by the HHS-certified laboratories?

The Division of Workplace Programs does not approve the drug test kits used by laboratories to screen urine specimens. However, each laboratory is required to use only initial drug test kits that have been cleared for use as medical devices by the Food and Drug Administration. Additionally, after a laboratory chooses the test kits it would like to use for screening specimens, the laboratory is still required to validate its performance and satisfy all the requirements in the Mandatory Guidelines. Visit the FDA website at www.fda.gov for more information.

14. The Federal workplace drug testing program allows Federal agencies to test specimens for 5-drug classes, but I want to have my employees' specimens tested for several other drug classes. Are these other drug classes certified by the HHS National Laboratory Certification Program?

No. HHS certification under the National Laboratory Certification Program only certifies laboratories to test federally regulated specimens for the 5-drug panel as described in the Mandatory Guidelines. HHS does not certify the tests for other drug classes or review the testing performed by certified laboratories for its private-sector clients. The only time private-sector specimens are possibly reviewed is when a laboratory tests private-sector specimens in batches that include federally regulated specimens. Only these private-sector specimens are considered to be tested under the Guidelines. From HHS' perspective, private-sector specimens tested in separate batches and/or for additional drug classes are not reviewed and are not considered to be tested under the Guidelines.

15. Can I have a blood test rather than a urine drug test?

Under no circumstance can a blood specimen be collected and tested as part of the

Federal Workplace Drug Testing Program administered by HHS. However, certain Federal agencies may collect other types of specimens as part of accident or criminal investigations. The testing of those specimens is not a part of this workplace program.

16. How do I verify that a laboratory is certified?

Check the list of certified laboratories on this website. Also, an applicant laboratory is not permitted to claim certification until it is actually certified.

17. Where can I find the NLCP license number for a certified laboratory?

HHS does not issue license numbers to the certified laboratories. Each laboratory receives a notice from the Administrator, SAMHSA, that the laboratory is certified as of a certain date. The laboratory maintains its certification from that date forward until either the laboratory withdraws from the program or its certification is revoked.

18. How does a laboratory maintain its certification?

The Mandatory Guidelines describe in detail what requirements the laboratory must satisfy in order to maintain its certification.

19. Where can I get information on the number of drug tests conducted and the drug positive rates?

An excellent source for information on drug test results can be found on the Quest Diagnostics website (<http://www.questdiagnostics.com/employersolutions/>). Quest updates its reports semiannually. The Institute for Drug-Free Workplace at 202-842-7400 is also a source of information on corporate drug testing programs.

20. I need a drug test for my Coast Guard license. Where do I go to get one?

You should first call your local Coast Guard district office. If the district office cannot help, specific instructions on how to take a drug test for a Coast Guard license are available on the Coast Guard website (<http://www.uscg.mil/hq/g-m/moa/dtdir.htm>). A list of drug testing service agents who can assist mariners with satisfying the drug testing licensing requirements is available at <http://www.uscg.mil/hq/g-m/moa/serpro.htm>. If you are unable to find this information, contact Coast Guard headquarters at 202-267-0684. Other than the list of HHS-certified laboratories, the Division of Workplace Programs cannot provide the information you need to satisfy the Coast Guard's requirements.

21. How can a Federal employee obtain a drug test result?

The Mandatory Guidelines give a Federal employee access to his or her drug test results and the records relating to his or her drug test. The request to obtain the information (commonly referred to a documentation package) must be in writing through the medical review officer (MRO) and the Federal agency. The laboratory sends the documentation to the MRO, and the MRO shares it with the employee and the Federal agency.

22. Who pays for a drug test?

Federal agencies pay for the testing of specimens collected for their workplace drug testing programs. For the private-sector, the employer usually pays for the drug test. If you are self-employed, then you are responsible for paying for the test.

23. How long will a drug be detectable in urine?

The time a drug is detectable in urine is dependent on a number of variables, such as metabolic rate, dose, how it was taken, and the cutoff concentration used by the laboratory to detect the drug. Generally, the drugs in the Federal program are detectable for several days after use.

24. Is testing hair specimens better than testing urine specimens? I heard that drugs can be detected for several months in hair specimens.

It is true that drugs can possibly be detected in hair for 3 to 6 months compared to several days for urine. However, this advantage does not necessarily apply in all circumstances of use and reasons for testing an individual. HHS has been evaluating hair, oral fluid, and sweat testing for the past few years, believes that each type of specimen has advantages and disadvantages, and that the testing of these alternative specimens are complementary to each other rather than equivalent or as a replacement. HHS has proposed Guidelines that would apply to the testing of these other types of specimens, and until the final Guidelines are published and implemented, the laboratory certification program will remain a urine testing program.

25. How do the CLIA 88 regulations affect the laboratories that are HHS-certified under the National Laboratory Certification Program?

The CLIA 88 regulations administered by the Health Care Financing Administration (HCFA) pertain primarily to clinical laboratories doing medical diagnostic testing. The HHS NLCP is for laboratories doing forensic workplace drug testing. Workplace drug testing is not considered to be for medical diagnosis or treatment. HHS-certified

laboratories are not required to comply with CLIA 88 for the testing they do under the HHS Mandatory Guidelines for federally regulated workplace drug testing programs. At this time, workplace drug testing for the private sector is not regulated by either CLIA 88 or the Mandatory Guidelines.

26. Can you give me any information on treatment programs and use of methadone for treating heroin addicts?

All treatment questions should be addressed to the Center for Substance Abuse Treatment. Visit the CSAT website at <http://csat.samhsa.gov> or call CSAT's Division of Pharmacologic Therapies at 240-276-2700.

Prepared by: Division of Workplace Programs

circumvention or evasion thereof, or to facilitate compliance therewith.

“(h) APPLICATION TO DEPARTMENT OF VETERANS AFFAIRS.—The Secretary of Veterans Affairs, acting through the Chief Medical Director, shall, to the maximum feasible extent consistent with their responsibilities under title 38, United States Code, prescribe regulations making applicable the regulations prescribed by the Secretary of Health and Human Services under subsection (g) of this section to records maintained in connection with the provision of hospital care, nursing home care, domiciliary care, and medical services under such title 38 to veterans suffering from substance abuse. In prescribing and implementing regulations pursuant to this subsection, the Secretary of Veterans Affairs shall, from time to time, consult with the Secretary of Health and Human Services in order to achieve the maximum possible coordination of the regulations, and the implementation thereof, which they each prescribe.”.

42 USC 290aa
note.

Subtitle D—Transfer Provisions

SEC. 141. TRANSFERS.

(a) SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION.—Except as specifically provided otherwise in this Act or an amendment made by this Act, there are transferred to the Administrator of the Substance Abuse and Mental Health Services Administration all service related functions which the Administrator of the Alcohol, Drug Abuse and Mental Health Administration, or the Director of any entity within the Alcohol, Drug Abuse and Mental Health Administration, exercised before the date of the enactment of this Act and all related functions of any officer or employee of the Alcohol, Drug Abuse and Mental Health Administration.

(b) NATIONAL INSTITUTES.—Except as specifically provided otherwise in this Act or an amendment made by this Act, there are transferred to the appropriate Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health, through the Director of the National Institutes of Health, all research related functions which the Administrator of the Alcohol, Drug Abuse and Mental Health Administration exercised before the date of the enactment of this Act and all related functions of any officer or employee of the Alcohol, Drug Abuse, and Mental Health Administration.

(c) ADEQUATE PERSONNEL AND RESOURCES.—The transfers required under this subtitle shall be effectuated in a manner that ensures that the Substance Abuse and Mental Health Services Administration has adequate personnel and resources to carry out its statutory responsibilities and that the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health have adequate personnel and resources to enable such institutes to carry out their respective statutory responsibilities.

SEC. 142. TRANSFER AND ALLOCATIONS OF APPROPRIATIONS AND PERSONNEL.

(a) SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION.—Except as otherwise provided in the Public Health Serv-

ice Act, all personnel employed in connection with, and all assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with the functions transferred to the Administrator of the Substance Abuse and Mental Health Services Administration by this subtitle, subject to section 1531 of title 31, United States Code, shall be transferred to the Substance Abuse and Mental Health Services Administration. Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(b) NATIONAL INSTITUTES.—Except as otherwise provided in the Public Health Service Act, all personnel employed in connection with, and all assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with the functions transferred to the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health by this subtitle, subject to section 1531 of title 31, United States Code, shall be transferred to the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health. Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(c) CUSTODY OF BALANCES.—The actual transfer of custody of obligation balances is not required in order to implement this section.

SEC. 143. INCIDENTAL TRANSFERS.

Prior to October 1, 1992, the Secretary of Health and Human Services is authorized to make such determinations as may be necessary with regard to the functions transferred by this subtitle, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, as may be necessary to carry out the provisions of this subtitle and the Public Health Service Act. Such Secretary shall provide for the termination of the affairs of all entities terminated by this subtitle and for such further measures and dispositions as may be necessary to effectuate the purposes of this subtitle.

SEC. 144. EFFECT ON PERSONNEL.

(a) IN GENERAL.—Except as otherwise provided by this subtitle and the Public Health Service Act, the transfer pursuant to this subtitle of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for one year after the date of transfer of such employee under this subtitle.

(b) EXECUTIVE SCHEDULE POSITIONS.—Any person who, on the day preceding the effective date of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without

a break in service, is appointed in the Substance Abuse and Mental Health Services Administration to a position having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in such new position at not less than the rate provided for such previous position, for the duration of the service of such person in such new position.

SEC. 145. SAVINGS PROVISIONS.

(a) **EFFECT ON PREVIOUS DETERMINATIONS.**—All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges that—

(1) have been issued, made, granted, or allowed to become effective by the President, any Federal agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred by this subtitle; and

(2) are in effect on the date of enactment of this Act; shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Director of the National Institutes of Health, or the Administrator of the Substance Abuse and Mental Health Services Administration, as appropriate, a court of competent jurisdiction, or by operation of law.

(b) **CONTINUATION OF PROCEEDINGS.**—

(1) **IN GENERAL.**—The provisions of this subtitle shall not affect any proceedings, including notices of proposed rule making, or any application for any license, permit, certificate, or financial assistance pending on the date of enactment of this Act before the Department of Health and Human Services, which relates to the Alcohol, Drug Abuse and Mental Health Administration or the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, or the National Institute of Mental Health, or any office thereof with respect to functions transferred by this subtitle. Such proceedings or applications, to the extent that they relate to functions transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made under such orders, as if this Act had not been enacted, and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the Administrator of the Substance Abuse and Mental Health Services Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health by a court of competent jurisdiction, or by operation of law. Nothing in this subsection prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this subtitle had not been enacted.

(2) **REGULATIONS.**—The Secretary of Health and Human Services is authorized to issue regulations providing for the orderly transfer of proceedings continued under paragraph (1).

(c) **EFFECT ON LEGAL ACTIONS.**—Except as provided in subsection (e)—

(1) the provisions of this subtitle do not affect actions commenced prior to the date of enactment of this Act; and

(2) in all such actions, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) NO ABATEMENT OF ACTIONS OR PROCEEDINGS.—No action or other proceeding commenced by or against any officer in his official capacity as an officer of the Department of Health and Human Services with respect to functions transferred by this subtitle shall abate by reason of the enactment of this Act. No cause of action by or against the Department of Health and Human Services with respect to functions transferred by this subtitle, or by or against any officer thereof in his official capacity, shall abate by reason of the enactment of this Act. Causes of action and actions with respect to a function transferred by this subtitle, or other proceedings may be asserted by or against the United States or the Administrator of the Alcohol, Drug Abuse and Mental Health Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, and the National Institute of Mental Health, as may be appropriate, and, in an action pending when this Act takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this subsection.

(e) SUBSTITUTION.—If, before the date of enactment of this Act, the Department of Health and Human Services, or any officer thereof in the official capacity of such officer, is a party to an action, and under this subtitle any function of such Department, Office, or officer is transferred to the Administrator of the Substance Abuse and Mental Health Services Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health, then such action shall be continued with the Administrator of the Substance Abuse and Mental Health Services Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health, as the case may be, substituted or added as a party.

(f) JUDICIAL REVIEW.—Orders and actions of the Administrator of the Substance Abuse and Mental Health Services Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health in the exercise of functions transferred to the Directors by this subtitle shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the Administrator of the Alcohol, Drug Abuse and Mental Health Administration or the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, and the National Institute of Mental Health, or any office or officer thereof, in the exercise of such functions immediately preceding their transfer. Any statutory requirements relating to notice, hearings, action upon the record, or administrative review that apply to any function transferred by this subtitle shall apply to the exercise of such function by the Administrator of the Substance Abuse and Mental Health Services Administration or the Directors.

SEC. 146. TRANSITION.

With the consent of the Secretary of Health and Human Services, the Administrator of the Substance Abuse and Mental Health Serv-

ices Administration and the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health are authorized to utilize—

(1) the services of such officers, employees, and other personnel of the Department with respect to functions transferred to the Administrator of the Substance Abuse and Mental Health Services Administration and the Director of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health by this subtitle; and

(2) funds appropriated to such functions for such period of time as may reasonably be needed to facilitate the orderly implementation of this subtitle.

SEC. 147. PEER REVIEW.

With respect to fiscal years 1993 through 1996, the peer review systems, advisory councils and scientific advisory committees utilized, or approved for utilization, by the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse and the National Institute of Mental Health prior to the transfer of such Institutes to the National Institute of Health shall be utilized by such Institutes.

SEC. 148. MERGERS.

Notwithstanding the provisions of section 401(c)(2) of the Public Health Service Act (42 U.S.C. 281(c)(2)), the Secretary of Health and Human Services may not merge the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse or the National Institute of Mental Health with any other institute or entity (or with each other) within the national research institutes for a 5-year period beginning on the date of enactment of this Act.

SEC. 149. CONDUCT OF MULTI-YEAR RESEARCH PROJECTS.

With respect to multi-year grants awarded prior to fiscal year 1993 by the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, and the National Institute of Mental Health with amounts received under section 1911(b), as such section existed one day prior to the date of enactment of this Act, such grants shall be continued for the entire period of the grant through the utilization of funds made available pursuant to sections 464I, 464O, or 464T, as appropriate, subject to satisfactory performance.

SEC. 150. SEPARABILITY.

If a provision of this subtitle or its application to any person or circumstance is held invalid, neither the remainder of this Act nor the application of the provision to other persons or circumstances shall be affected.

SEC. 151. BUDGETARY AUTHORITY.

With respect to fiscal years 1994 and 1995, the Directors of the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, and the National Institute of Mental Health shall notwithstanding section 405(a), prepare and submit, directly to the President for review and transmittal to Congress, an annual budget estimate (including an estimate of

the number and type of personnel needs for the Institute) for their respective Institutes, after reasonable opportunity for comment (but without change) by the Secretary of Health and Human Services, the Director of the National Institutes of Health, and the Institute's advisory council.

Subtitle E—References and Conforming Amendments

SEC. 161. REFERENCES.

42 USC 290aa
note.

Reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to the Alcohol, Drug Abuse and Mental Health Administration or to the Administrator of the Alcohol, Drug Abuse and Mental Health Administration shall be deemed to refer to the Substance Abuse and Mental Health Services Administration or to the Administrator of the Substance Abuse and Mental Health Services Administration.

SEC. 162. TRANSITION FROM HOMELESSNESS.

Part C of title V of the Public Health Service Act is amended—

- (1) in section 521 (42 U.S.C. 290cc-21), by striking out “National Institute of Mental Health” and inserting in lieu thereof “Center for Mental Health Services”; and
- (2) in section 530 (42 U.S.C. 290cc-30), by striking out “through the National” and all that follows through “Abuse” and inserting in lieu thereof “through the agencies of the Administration”.

SEC. 163. CONFORMING AMENDMENTS.

(a) TITLE V.—Title V of the Public Health Service Act is amended—

- (1) in section 521 (42 U.S.C. 290cc-21), by striking “Director of the National Institute of Mental Health” and inserting in lieu thereof “Administrator of the Substance Abuse and Mental Health Services Administration”;

- (2) in section 528 (42 U.S.C. 290cc-28)—

(A) by striking “the National Institute of Mental Health, the National Institute on Alcohol Abuse and Alcoholism, and the National Institute on Drug Abuse” and inserting in lieu thereof “and the Administrator of the Substance Abuse and Mental Health Services Administration” in subsection (a); and

(B) by striking “National Institute of Mental Health” and inserting in lieu thereof “Administrator of the Substance Abuse and Mental Health Services Administration” in subsection (c); and

- (3) in section 530 (42 U.S.C. 290cc-30), by striking “the National Institute of Mental Health, the National Institute on Alcohol Abuse and Alcoholism, and the National Institute on Drug Abuse” and inserting in lieu thereof “the Administrator of the Substance Abuse and Mental Health Services Administration”.

(b) GENERAL PUBLIC HEALTH SERVICE ACT AMENDMENTS.—The Public Health Service Act (42 U.S.C. 201 et seq.) is amended—

- (1) in section 227 (42 U.S.C. 236)—

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

South Carolina Department of Employment Workforce, and
Kim A. Legette Respondents.

RESPONDENT KIM A. LEGETTE'S REPLY TO APPELLANT'S
RETURN TO LEGETTE'S MOTION TO DISMISS APPEAL

Respondent Legette here replies to the issues raised in Appellant's argument section. While Respondent does not concur with Appellant's recitation of the facts, she will reserve response to Appellant's factual recitation if a Return to the Appeal is required.¹

I. The Appeal Is Not Ripe For Adjudication

The ALC's Order is not appealable where the rights of the parties have not yet been determined. The right at issue is whether Respondent Legette is qualified to receive unemployment benefits, and that right has not yet been determined by the Agency or by the ALC. An appeal to the Court of Appeals can only be taken only after that right is determined by the ALC, pursuant to S.C. Code Ann. § 41-35-750 and § 1-23-610.

¹ The time for Respondents' Return to the Appeal is stayed pursuant to SCACR Rule 240(b).

While Respondent Legette did not originally cite to *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control* cited by Appellant, that case in fact directly supports Respondent Legette's position that there is no final judgment here appropriate for appeal by this Court.

The procedural facts in the *Charlotte-Mecklenburg Hospital* case are similar to those in the case at bar. The right at issue was whether a hospital was entitled to a DHEC "certificate of need". The parties had appealed an order by the ALC which upheld in part and remanded in part DHEC's findings regarding that right. The South Carolina Supreme Court dismissed the appeal, holding that the ALC's Order was interlocutory because a final determination had not been regarding the rights of the parties, i.e., whether to issue a "certificate of need". That case and the law cited by the Supreme Court clearly supports Respondent's position:

The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. *Hooper v. Rockwell*, *supra*; *Mid-State Distributors, Inc. v. Century Importers, Inc.*, *supra*; *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co.*, *supra*.

Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 267 (S.C. 2010).

Here, a final order has not been issued by the Agency as to whether Respondent Legette is qualified or eligible for unemployment benefits. Eligibility for unemployment benefits is the right at issue here, and a determination of Respondent Legette's rights has not

been made by the Agency. As in *Charlotte-Mecklenburg*, the ALC's order is interlocutory and there is no basis for appeal.

II. An Employer Cannot Circumvent the Requirements of § 41-35-120(3)

The Appellant's continued arguments regarding the validity of any decision under § 41-35-120(2) and (4) are misleading. First, the Legislature laid out specific requirements for disqualification in §41-35-120(3) where an employer claims an employee was discharged for illegal drug use. Appellant is incorrect where it now tries to convince this Court that an employer should be able circumvent those requirements by using evidence from an improperly performed drug test to support disqualification under another section, such as "cause" (§41-35-120(2)) or "gross misconduct" (§41-35-120(4)).² This would not effectuate the Legislature's intent in amending the disqualification statute in 2010 and laying out certain procedures that an employer must follow. Appellant's argument seems to be that even though its only given reason for discharging Legette was based on a drug test pursuant to §41-35-120(3), and its only evidence was records of drug tests, it is taking the position that it still should be allowed to disqualify Respondent Legette from receiving benefits under some other provision of the statute. Under Appellant's reasoning, §41-35-120(3) would be completely superfluous and its requirements should be ignored.

Second, under Appellant's line of reasoning, if this Court were to decide this Appeal under §41-35-120(2) and/or (4), the remand back to the Agency for determination under §41-35-120(3) also becomes a nullity, even though it is readily apparent from the entire record as well as from Appellant's Return that Appellant's position is that Respondent Legette was discharged for illegal drug use.

² Appellant's Return, p. 8-9.

III. South Carolina Law does not support Judicial Review of the ALC's Order

Appellant's reliance on *Brown v. Greenwood Mills, Inc.* 366 S.C. 379 (Ct. App. 2005)³ is misplaced as *Brown* been explicitly overruled by the South Carolina Supreme Court in *Charlotte-Mecklenburg, supra*, and by this Court, in *Long v. Sealed Air*, 391 S.C. 483, 486 (Ct. App. 2011). In *Long*, this Court cited to *Charlotte-Mecklenburg* in holding that the provisions of S.C. Code Ann. § 14-3-330 relied on in *Brown* do not apply:

Like its ALC counterpart relied on in *Charlotte-Mecklenburg*, section 1-23-380 is a more specific statute that limits review to "a final decision" Id. Under the reasoning of *Charlotte-Mecklenburg* and in light of section 1-23-380, the general appealability provisions of section 14-3-330 are "inapplicable" to the extent they "permit the appeal of interlocutory orders of . . . an administrative agency."

387 S.C. at 266, 692 S.E.2d at 894 (internal cites omitted).

The judicial review process here is the subject of the same specific statute in *Charlotte-Mecklenburg*, S.C. Code Ann. § 1-23-610, and is further governed by another specific statute in § 41-35-750. The other cases cited by Appellant again refer to the analytical framework that applies to § 14-3-330, which this Court and the Supreme Court have held do not apply to judicial review governed by more specific statutes, specifically § 1-23-610. The case at bar falls squarely under the holdings of *Charlotte-Mecklenburg* and *Long*, therefore the ALC order is not appealable as it is not a final judgment.

IV. The rights of the parties, specifically disqualification for benefits, has not been decided.

Appellant again in Section IV asks this Court to overturn its own recent decision, as well as the Supreme Court's decision in *Charlotte-Mecklenburg*. As in *Charlotte-Mecklenburg*, the lower tribunal, SCDEW, has been tasked with "undertaking an additional

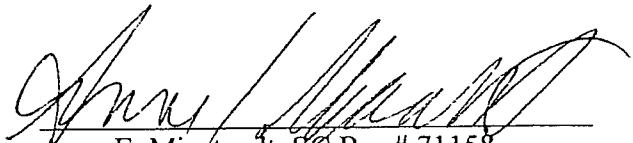
³ Appellant's Return, p. 9-10.

fact finding mission”.⁴ There is no factual contrast between the case at bar and *Charlotte-Mecklenburg* or *Long*. Nor are the further proceedings on remand ministerial, the remand was for further fact finding and adjudication by the Agency.

CONCLUSION

The case law cited in Respondent Legette’s Motion to Dismiss and those cases cited above are clearly on point with the facts and procedural posture of this case. For all of those reasons, Respondent Legette requests that this Court find that Appellant’s appeal should be dismissed.

Respectfully submitted,



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September 10, 2011
Charleston, South Carolina

⁴ Appellant’s Return, p. 13.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

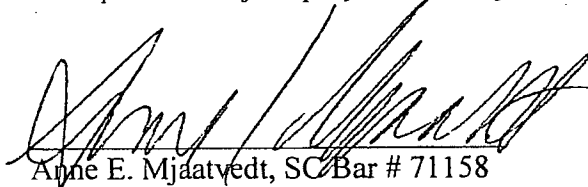
South Carolina Department of Employment Workforce, and
Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served *Respondent Kim A. Legette's Reply To Appellant's Return To Legette's Motion To Dismiss Appeal* in the above referenced matter by depositing a copy of the same in the United States Mail, postage prepaid on September 10, 2011 to the attorneys of record:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Hon. Deborah Brooks Durden, ALJ

ALC Docket No. 10-ALJ-22-0938-AP
CASE NO. 2011194207

Nucor Corporation, ...Appellant,

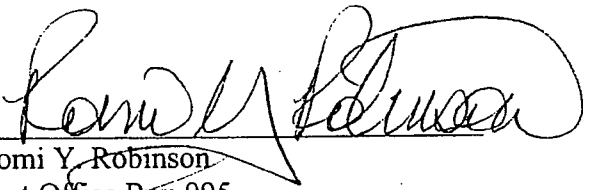
v.

SC Department of Employment and Workforce
and Kim A. Legette, ... Respondents.

RESPONSE TO MOTION TO DISMISS

Respondent S.C. Department of Employment and Workforce (Department) respectfully concurs with and joins in the Motion to Dismiss filed by Respondent Legette. This matter has been remanded to the Department for resolution and is currently being reviewed with full appeal rights remaining after the Department's final decision is issued. SCDEW agrees that Appellant's appeal is premature as it has failed to exhaust administrative remedies pursuant to S.C. Code § 41-35-740.

Respectfully submitted,



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September 6, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

Nucor,	)	Case No. 2011194207
Appellant,	)	
	)	
vs.	)	
	)	AFFIDAVIT OF SERVICE
	)	BY MAIL
South Carolina Department of	)	
Employment and Workforce and	)	
Kim Legette,	)	
Respondent,	)	
_____	)	

PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Response to Motion to Dismiss of the Respondent SC Department of Employment and Workforce in the above named action on the following:

Nosizi' Ralephata, Esq.
PO Box 22129
Charleston, SC 29413

Anne Mjaatvedt, Esq.
39 Broad Street, Suite 208
Charleston, SC 29401

That the postage was duly prepaid; and that it was deposited in the United States Mail on the 6th day of September, 2011.

Jessica Chesley
Jessica Chesley

SWORN to before me this the
6th day of SEPTEMBER, 2011

Kenneth L. Kolman (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/31/2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

APPELLANT'S RETURN TO
RESPONDENT LEGETTE'S MOTION TO DISMISS

TURNER, PADGET, GRAHAM & LANEY, P.A.



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September 2, 2011

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SUMMARY OF FACTS/PROCEDURAL BACKGROUND

This Appeal arises out of Claimant's termination from her employment at Nucor Steel Berkeley ("Nucor") ON April 22, 2010. On April 6, 2010, Claimant was tested for drugs randomly pursuant to Nucor's periodic random drug testing policy. Claimant verified that the chain of custody had been fully complied with. She executed the Drug Testing Custody and Control Form, certifying that she had provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. That hair sample taken from Claimant tested positive for 1.25 picograms per milligram of marijuana. Claimant was adamant that she does not use illegal drugs, and requested that another test be administered on behalf of Nucor.

When an employee requests a second test after failing the initial one, Nucor's standard practice is to administer this second test under a "level of detection"/"limit of detection" criterion. Pursuant to the "level of detection" criterion, any amount of marijuana/THC detected in Claimant's hair sample at or above .10 picograms per milligram is considered a positive result and is basis for immediate termination. Claimant was aware that the second test would be performed as a "level of detection" test, and she underwent the second test on April 15, 2010. As part of that second test, she executed another Custody Form on April 15, 2010, which clearly indicates that the test would be performed under the "level of detection" standard. The results of that second test were .78 picograms per milligram of marijuana. Because the results were above .10 picograms per milligram of marijuana, the second test was also positive for marijuana,

and thus, basis for immediately terminating Claimant for cause pursuant to Nucor's Drug & Alcohol Policy.

However, prior to her termination, on April 15, 2010, after testing positive for marijuana twice at Nucor, through a system that she verified herself as having followed the chain of custody, Claimant, later the same day, sought an additional independent drug test outside Nucor, which allegedly came back negative for drugs. There is no evidence, neither has it ever been argued that this independent test was subject to the same level of detection standard utilized by Nucor. Regardless, it is undisputed that Nucor has not, and does not accept independent tests because it has no control over their administration and no assurances of their reliability.

Based upon this independent test, Claimant sought unemployment benefits asserting that she had been wrongfully terminated and that Nucor improperly collected her hair sample. On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. The Claims Adjudicator also found that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2).

Claimant appealed the decision of the Claims Adjudicator to the Appeal Tribunal on June 2, 2010, asserting that the Adjudicator's decision was issued in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. After a full evidentiary hearing, the Appeal Tribunal held that that Claimant was disqualified from receiving benefits based on illegal drug use under S.C. Code Ann. § 41-35-120(3).

On July 22, 2010, Claimant appealed the Decision of the Appeal Tribunal to the Appellate Panel on the basis that she does not smoke marijuana and that there were contradictory test results. The Appellate Panel held a hearing on November 17, 2010 and observed that the disparate testing results were of concern, and found that “while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer’s exam, processed by the same laboratory, indicating the claimant was drug free.” As a result, the Appellate Panel held that Claimant was separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120(4), and reversed the Appeal Tribunal’s Decision.

On December 14, 2010, Nucor submitted a Petition for Judicial Review to the South Carolina Administrative Law Court (“ALC”) arguing that the Appellate Panel’s acceptance of an independent drug test as controlling, with no evidence that it comported with the statute, was in contravention of the statute’s mandate and outside the scope of the Agency’s authority. Nucor also argued that the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute. Nucor further argued that Claimant’s test was administered under a different detection standard, and thus, could not be the basis of a “contradictory results” finding as a matter of law. These issues were presented as questions of law for the ALC to resolve.

On January 4, 2011, the Honorable Deborah Brooks Durden was assigned to preside over the Appeal. On May 24, 2011, Judge Durden issued an Order holding that Nucor’s arguments that benefits must be denied pursuant to S.C. Code Ann. §41-35-120(2) and (4) were without merit. In so holding, Judge Durden found that “[t]he Department’s finding that Nucor failed to prove that Legette had used illegal drugs is

supported by the evidence in the record, *including the negative test results cited by the Appellate Panel* in its order.” Order, at p. 4. (Emphasis added). The Order then remanded the case to the Department on the single and narrow issue of whether Claimant was disqualified to receive benefits pursuant to S.C. Code Ann. §41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests. *Id.*

On June 2, 2011, Nucor filed a Motion for Oral Argument, and the ALC responded via email dated June 14, 2011, advising all the parties that the ALC “no longer has jurisdiction in the matter *because Judge Durden’s Order is a final order in this matter.*”¹ Upon receipt of this correspondence advising of the finality of the Order, Nucor filed a Notice of Appeal to this Court on June 24, 2011 on the basis that Judge Durden’s Order of May 24, 2011 is final as to application of S.C. Code Ann. §41-35-120(2) and (4) to the present dispute.

ARGUMENT

I. THE APPEAL IS RIPE FOR ADJUDICATION AND SHOULD NOT BE DISMISSED.

Dismissal of this appeal as interlocutory could only result from an erroneous and overly broad reading of the holding in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Upon closer examination, that case actually supports immediate review of the instant appeal. On June 14, 2011, the ALC advised all parties that Judge Durden’s Order was *final*, and the court no longer had jurisdiction in the matter. Specifically, Judge Durden’s Order determined with finality Nucor’s legal and factual arguments regarding application of Section 41-35-120(2) and (4) as to whether Claimant

¹ Emphasis added.

was terminated for cause and/or gross misconduct, including whether the Appellate Panel had the authority to reverse the Appeal Tribunal on a totally different subsection of the statute, in reliance upon a test that was not performed on behalf of the employer. Thus, as regards Section 41-35-120(2) and (4), there is nothing left to be done except the execution of what has been determined.

South Carolina Code Ann. § 1-23-610 provides for appellate review of final judgment of the ALC. The ALC's Order is just such a final decision. To find differently on the basis that the Order remands for further proceedings by the Appeal Tribunal on a singular issue not only ignores Judge Durden's instructions to the parties, but also fails to accurately describe the effect of the ALC's Order and implies that further fact finding on the legal questions at issue (whether the Appellate Panel and ALC's reliance on an outside test not performed on behalf of the employer is wrong as a matter of law, and whether the Appellate Panel had authority to apply additional or different criteria or exceptions to the plain mandates of the statute). To the contrary, the ALC Order decides both these legal issues with finality, and in effect, the reliance on the outside drug test is precisely the issue that disposes of this case. It is clear that if, as a matter of law, neither the Appellate Panel nor the ALC had the authority to make *any* findings based on the outside test, there would be no "contradictory" results to speak of, and no basis upon which to challenge termination under Section 41-35-120(2) and (4).

Further, there is no dispute that these issues will not be revisited again by the lower tribunals or even the ALC, and that the ALC's Order, unless appealed, will be the law of the case as to application of Section 41-35-120(2) and (4). The only issue that was remanded for further proceedings is whether Legette's claim for unemployment benefits is precluded under S.C. Code Ann. § 41-35-120(3), which outlines the circumstances

under which discharge for illegal drug use renders a claimant ineligible for benefits. Thus, the Order's mandate as to §41-35-120(2) and (4) is final and ripe for appeal, and Nucor's appeal should not be dismissed based on Claimants' arguments that the ALC's Order is not final.

The Order is not "interlocutory" because it determines with finality the only legal questions presented and explicitly precludes any further review or argument with regard to Section 41-35-120(2) and (4). Inasmuch as the challenged Order constitutes a final order with regard to the legal question of whether reliance on outside independent tests is authorized under the statute, it is immediately appealable, and Appellant is entitled to immediate appellate review.

II. THE APPEAL SHOULD NOT BE STAYED.

Resolution of these issues is not only ripe for appeal; but it would be a gross injustice to Appellant if this appeal was stayed. By determining the legal issues presented herein, the Court will effectively dispose of the case, thereby putting an end to the vicious cycle created by the Appellate Panel, and in turn, the ALC, which was put in motion when these bodies erroneously ruled as a matter of law that reliance on an outside independent test was authorized under the statute. Once the issue of the alleged "contradictory results," is determined the case will effectively be resolved. This is because even assuming *arguendo*, the lower courts found in Claimants' favor with regard to the issue on remand – whether Claimant was terminated for illegal drug use pursuant to Section 41-35-120(3) - if there are no contradictory results, then termination for cause under Section 41-35-120(2) would dispose of the case. Under Section 41-35-120(2), an employee can be "discharged for cause connected with the employment" This for cause termination is a separate basis that does not require any compliance with Section

41-35-120(3) and includes a situation, like the one at bar, where the employee violates company drug policy. In addition, the absence of any contradictory results likewise, would render dismissal appropriate under Section 41-35-120(4). Accordingly, the interests of judicial efficiency dictate that this Appeal should be heard so as to bring closure to this matter.

III. THE ALC'S ORDER IS SUBJECT TO IMMEDIATE REVIEW.

Claimant's premise rests on the incorrect assumption that South Carolina precedent compels the conclusion that a remand order in an administrative proceeding is never immediately appealable. This statement is incorrect and has been expressly rejected by controlling authority on this issue.

A. The Administrative Procedures Act Affords Immediate Review.

South Carolina Code Ann. § 1-23-380 contemplates judicial review of a "final decision" in contested cases such as this. Thus, the statute, by its express terms, permits immediate appellate review in Department of Employment and Workforce proceedings where the challenged order is a final order; to wit, where the order reaches the merits or affects a substantial right. *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005)² ("An order involves the merits if it finally determines some substantial matter forming the whole *or part of some cause of action* or defense in the case." (emphasis added)). The ALC Order is just such a final decision. Claimant

² A majority of the panel deciding *Long v. Sealed Air* took the position that the reasoning employed in *Brown* was flawed because it invoked the "involves the merits" construct "that is relevant only under section 14-3-330." 391 S.C. 483, 487, 706 S.E.2d 34, 36, n. 4 (Ct. App. 2011). As correctly noted by the dissent, however, the *Brown* Court relied on section 1-23-390, as well as "case law cited by our supreme court in *Montjoy* to interpret 1-23-390." *Id.*, 391 S.C. at 492, 706 S.E.2d at 39, n. 9. Moreover, this Court denied *certiorari* in *Brown*, which, for the reasons stated herein, employed the correct analytical framework and enjoys continued vitality as persuasive authority.

argues that “where the ALC remanded back to the Department for additional determination one of several bases of disqualification appealed to the Agency Appellate Panel, the final act has not been completed. The rights of the parties have not been determined until there is a final determination on all of the appealed potential basis of disqualification.”³ However, this argument fails to accurately describe the effect of the ALC’s Order and implies that further fact finding on the legal questions at issue in this appeal is necessary. To the contrary, the ALC’s Order is a final order as to the only issues in these proceedings – whether or not Claimant was properly terminated for cause under Section 41-35-120(2) of the statute; and whether the Appellate Panel acted outside its authority when it reversed based on an outside test not performed on behalf of the employer pursuant to Section 41-35-120(4). Thus, the order is not “interlocutory” in the sense contemplated by the Court of Appeals because it determines with finality the preceding legal questions presented on appeal.

B. South Carolina Precedent Supports Immediate Review.

The South Carolina Supreme Court’s decisions in *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984) and *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983) indicate the court relied on the traditional formulation of the final judgment rule. In *Owens*, the court dismissed an appeal because the challenged order did not “involve the merits of the action.” *Id.* at 492, 306 S.E.2d at 385. Similarly, in *Hunt*, the court dismissed the appeal as interlocutory where the challenged order remanded the case for the taking of additional testimony and did not affect the merits of the action. 279 S.C. at 343, 306 S.E.2d at 622.

³ See, Motion to Dismiss at p. 3.

Similarly, *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 778 (1993) – relied upon by Claimant in her Motion to Dismiss (at p. 2), follows the same traditional formulation of the final judgment rule. There, the court held that to “involve the merits” for purposes of § 14-3-330(1), an order “must finally determine some substantial matter forming the whole or part of some cause of action or defense.” *See also, Link v. School Dist. of Pickens County*, 302 S.C. 1, 6 (S.C. 1990) (“While we agree that the order granting summary judgment may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as “involving merits.” *Nuaful v. Milligan, Gene’s Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (an order “involves the merits” when it finally determines “some substantial matter forming the whole or a part of some cause of action or defense . . .”).

As set forth above, the “finality” requirement of Section 1-23-610 has been reviewed under substantially the same framework as that employed in Section 14-3-330 analyses. In that sense, the dispositive question is whether the ALC’s Order finally determined Appellant’s rights as to Section 41-35-120(2) and (4). The ALC held that “[t]he Department’s finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order”, and thus Nucor’s arguments as to subsections 41-35-120(2) and (4) “are without merit.” The “evidence in the record” referred to by the ALC judge is the outside independent test that was relied upon by the Appellate Panel in clear contravention of the statute’s mandate. This ruling effectively terminates any and all subsequent evidentiary, legal or factual review of Section 41-35-120(2) and (4). Indeed,

if Nucor had not filed the present appeal, it is highly probable that Claimant would have taken the position that any such appeal rights had been waived. Thus, this appeal should not be dismissed.

IV. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY OPINION DOES NOT COUNSEL IN FAVOR OF DISMISSAL.

As our supreme court observed in *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), “[t]he right of appeal arises from and is controlled by statutory law.” (citing *Ex parte U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)); see also Rule 201, SCACR. To rely on this case as authority for dismissal of the instant appeal, however, would result from an incorrect and overly broad reading of *Charlotte-Mecklenburg*. Without analysis of why the order in that case was not subject to immediate review, mis-application of this case would deny appellate review in any case when the primary legal issue has been decided with finality but where the execution of such an order is tasked to the administrative agency on remand. Upon closer examination, though, the *Charlotte-Mecklenburg Hospital Authority* decision is right on point with regard to the distinction between final orders and truly interlocutory orders. The *Charlotte-Mecklenburg* decision emphasizes the long-standing rule that an order that finally determines the substantive rights of the parties, such as the ALC Order in this case, is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* holding emphasizes the distinction as follows: “A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where “there is some further act

which must be done by the court prior to a determination of the rights of the parties.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission.

In contrast, the ALC’s Order in this case concluded, as a matter of law, that the Appellate Panel’s reliance on an outside test not performed on behalf of the employer was not only authorized under the statute, but proper basis for reversing the Appeal Tribunal’s decision. Thus, *Charlotte-Mecklenburg* militates in favor of immediate appellate review. Accordingly, Appellant requests that the appeal proceed as filed.

Following the Supreme Court’s decision in *Charlotte-Mecklenburg* and the order dismissing this appeal, the Court of Appeals issued its opinion in *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011).⁴ At issue in *Long* was the factual question of whether or not the claimant provided timely notice of her claim, a question that was remanded back to the commission “for further investigation.” *Long*, 706 S.E.2d at 34. Such is not the case here, where the challenged order leaves nothing to be done by the Agency as to Section 41-35-120(2) and (4). As aptly noted by the dissent in *Long*, however, “it is untenable to label [an order reaching the merits] as interlocutory merely because it is accompanied by language remanding the case for further proceedings.” 391 S.C. at 488, 706 S.E.2d at 37 (Geathers, J. dissenting). Instead, the courts must look to the effect of the order and determine whether, as is the case in this appeal, the ruling “has

⁴ As with the ALC, worker’s compensation proceedings are subject to appeal as set forth in Section 1-23-380.

finality with respect to the issue decided and will become the law of the case if it is not immediately appealed.” *Id.* Relying on more recent published authority⁵, the dissent persuasively posits that careful attention to the language used in remand orders is the key to determining whether the order “‘involves the merits’ - and thus reaffirm[s] the legislative intent behind the term ‘final judgment’ as set forth in section 1-23-390.” *Id.*

Even assuming *arguendo* this Court determines that *Long* was correctly decided, it still should not be read to support dismissal of the instant appeal. As the *Long* Court acknowledged, dismissal is not appropriate where “further proceedings on remand are purely ministerial and do not require the exercise of independent judgment or discretion on the part of the commission.” *Long*, 391 S.C. at 485, 706 S.E.2d at 35 (quoting *Hicks v. Piedmont Cold Storage, Inc.*, 324 S.C. 628, 479 S.E.2d 821 (Ct. App. 196)). Here, the ALC held that there was evidence to support the Appellate Panel’s decision, including contradictory test results presented by Claimant. Accordingly, as the order decided the only real legal issue in the case, - whether the Appellate Panel is authorized to consider and reverse the Appeal Tribunal on the basis of outside tests not performed on behalf of the employer – it meets the “final judgment” threshold and should be subjected to immediate appellate review.

⁵ Specifically, the dissent in *Long* relied upon the holdings of *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) and *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009) to support the proposition that the legislative intent of permitting immediate review of “final orders” is satisfied by permitting immediate review of “any ultimate decision on the merits.” *Long*, 391 S.C. at 489-490, 706 S.E.2d at 37-38.

CONCLUSION

For all of the reasons stated herein, Appellant respectfully submits that its appeal is proper and the issues raised therein are ripe for immediate adjudication.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

September 2, 2011
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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APPEAL FROM ADMINISTRATIVE LAW COURT

SC Court of Appeals

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation, ... Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, ... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2011, a copy of *Appellant's Return to Respondent Legette's Motion to Dismiss* has been served upon the following by placing same in the United States Mail, postage prepaid, to:

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TPGL 4005997v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

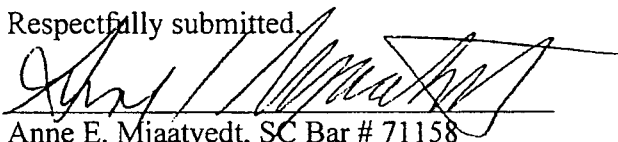
v.

South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

RESPONDENT LEGETTE'S MOTION TO DISMISS APPEAL

Respondent Kim A. Legette respectfully moves this Court pursuant to Rule 240, SCACR, to dismiss Appellant Nucor's Appeal in the above referenced matter on the grounds that the portion of the ALC Order under appeal is not a final judgment in this matter, for the reasons indicated in the following supporting memorandum.

Respectfully submitted,



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Attorney for Respondent Kim A. Legette

August 23, 2011
Charleston, South Carolina

MEMORANDUM

On May 24, 2011, Administrative Law Judge Deborah Brooks Durden issued an Order only part of which is the subject of Appellant's appeal. The ALC Order is attached as **Exhibit A**.

The ALC Order affirmed the S.C. Department of Employment and Workforce (SCDEW) Appellate Panel's finding that Legette was not disqualified for unemployment benefits under S.C. Code Ann. § 41-35-120(2) and (4). However, the same Order also remanded the matter to the SCDEW based on its holding that the Appellate Panel did not make a finding regarding disqualification on the basis of §41-35-120(3), and ordered the SCDEW to consider the issue of whether the drug test laboratory was properly certified under § 41-35-120(3).

The Appellant here appealed the ALC's order affirming the Appellate Panel's allowance of benefits under Sections (2) and (4), however, this Appeal has been prematurely filed because the the issue of disqualification under Section (3) is under consideration through the Department's administrative tribunals.¹

There Has Been No Final Judgment

An order is not a final judgment when there is some further act that must be done prior to a determination of the rights of the parties. Mid-State Distrib., Inc. v Century Importers, Inc., 310 S.C. 330 (1993). A final judgment must: "dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination." Link v. School Dist. of Pickens County, 302 S.C. 1 (1990).

¹ The Legislature recently amended the procedures for appeals of a determination of eligibility for unemployment benefits and disqualification for cause. Following a an initial determination of eligibility, either party can appeal first to the SCDEW Appeals Tribunal (§ 41-35-660), then to the SCDEW Appellate Panel (§ 41-35-7100. From there, a party can appeal to the ALC pursuant to § 41-35-740 and 750, the decision of which can then be appealed to up to this Court under § 41-35-750.

Here, the right at issue is whether Respondent Legette was discharged from her recent employment for reasons that would disqualify her from receiving unemployment benefits. The bases for disqualification are stated in S.C. Code Ann. § 41-35-120 “[Disqualifications for benefits]”. Where the ALC remanded back to the Department for additional determination of one of several basis of disqualification appealed to the Agency Appellate Panel, the final act has not been completed. The rights of the parties have not been determined until there is a final determination on all of the appealed potential basis of disqualification.

Even in cases where sanctions are the only remaining issue, the S.C. Supreme Court has held that the rights of the parties have not been completely determined until the final sanctions order is issued. Culbertson v. Clemens, 322 S.C. 20 (1996).

As there has been no final determination, there is no final judgment appropriate for appeal by this Court.

The Parties Have Not Completed The Exercise Of Their Administrative Remedies And Judicial Review Rights Following The Remand

Based on Judge Durden’s Order remanding the issue of Section (3) back to the Agency, the Agency ordered that the case be remanded back to the level of the Appeal Tribunal for an additional fact finding. That hearing before the Appeal Tribunal occurred on August 15, 2011, and Respondent Legette appealed the Tribunal’s determination to the Appellate Panel on August 22, 2011, pursuant to S.C. Code Ann. § 41-35-710.

If this Court were to allow the current appeal to continue, the issue of disqualification for benefits under Section 120 would be under consideration in two fora simultaneously, which would only lead to increased litigation.

“An appeal may be taken from the decision of the administrative law court pursuant to the South Carolina Appellate Court Rules and Section 1-23-610.” S.C. Code Ann. 41-35-750 The S.C. Supreme Court has held that judicial review following an administrative process is only

appropriate where the appeal is from a final order. Nucor Steel v. South Carolina Publ. Serv. Comm'n, 312 S.C. 79, 439 S.E.2d 270 at 273 (1994). Here, there is no final order where Respondent Legette is pursuing her remedies through the statutory administrative process.

There Is No Basis For Appeal under S.C. Code § 14-3-330 (1)-(4).

As indicated above, there is no other statutory basis for appealability required under S.C. § 14-3-330 (1)-(4). Appellant is incorrect in its position that the June 14, 2011 e-mail from the ALC constitutes proof that the ALC Order is a final judgment on the matter with regard to SCACR Rule 240. (Appellant's Initial Brief, pg. 11.) The June 14, 2011 e-mail was merely a response by the ALC to motions submitted by the parties after the Order was issued, including Appellant Nucor's June 2, 2011 Motion for Oral Argument to the ALC. The e-mail is attached as **Exhibit B**.

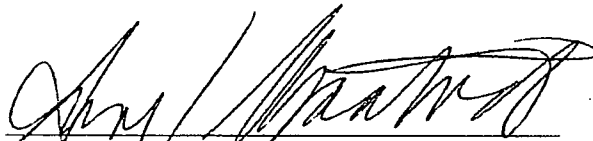
Arguendo, even if this Court should find that those sections addressing § 41-35-120(2) and (4) might be appealable even as fact findings and administrative appeals occur at the lower level, this Court can hold the current appeal in abeyance where there is: 1) strong likelihood of a future appeal, 2) consolidation will best serve the interests of judicial economy; and 3) abeyance will not prejudice any of the parties, Parker v. Shecut, 340 S.C. 226 (2002). Here, Respondent Legette has commenced her appeals at the administrative level, consolidation would clearly serve the interests of judicial economy where the processes will continue at both the administrative and Appellate level if this Appeal continues, and there will be no prejudice to the parties.

However, here, where parties have the right of appeal to the Agency Appellate Panel and to the ALC on the issue of disqualification for benefits, judicial economy is best served by dismissing the current appeal as untimely.

CONCLUSION

For the foregoing reasons, Respondent Legette respectfully requests that this appeal be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anne E. Mjaatvedt", written over a horizontal line.

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Attorney for Respondent Kim A. Legette

August 23, 2011
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 10-ALJ-22-0938-AP

Nucor Corporation Appellant,

v.

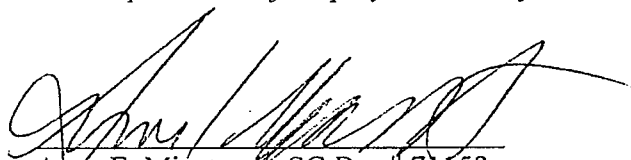
South Carolina Department of Employment Workforce, and Kim A. Legette Respondents.

CERTIFICATE OF SERVICE

I certify that I have served Respondent Kim A. Legette's Motion to Dismiss Appeal in the above referenced matter by depositing a copy of the same in the United States Mail, postage prepaid on August 23, 2011 to the attorneys of record:

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Exhibit A

May 24, 2011 ALC Order

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

Docket No. 10-ALJ-22-0938-AP

ORDER

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:
 - (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and
 - (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*
 - (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

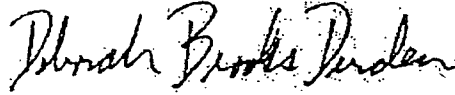
The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

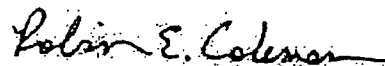
A handwritten signature in cursive script, reading "Deborah Brooks Durden".

Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



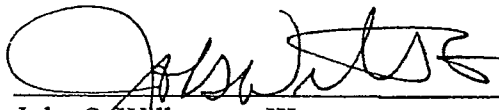
Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III

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ATTORNEYS FOR APPELLANTS

July 5, 2011

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S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

Ms. Kimberly A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418

Exhibit B

June 14, 2011 E-Mail from the ALC to parties

From: Robin Coleman (rcoleman@scalco.net)

To: NRalephata@TurnerPadget.com; legal@dew.sc.gov; kimlegette@yahoo.com;

Date: Tue, June 14, 2011 2:16:16 PM

Cc:

Subject: Nucor Corporation v. S.C. DEW, and Kim A. Legette; Docket No. 10-ALJ-22-0938-AP

Ms. Ralephata, Ms. Robinson, Ms. Legette: This Court has received several pieces of correspondence in the above-referenced case since Judge Durden's Order remanding the matter back to the Department, namely Appellant's Motion for Hearing/Oral Argument, Appellant's Notice of Request for Protection, and Respondent's Return to Motion for Hearing/Oral Argument. Please be advised that this Court no longer has jurisdiction in the matter because Judge Durden's Order is a final order in this matter.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

This email and any attached files are confidential and intended solely for the intended recipient(s). If you are not the named recipient you should not read, distribute, copy or alter this email. Any views or opinions expressed in this email are those of the author and do not represent those of the South Carolina Administrative Law Court.

4-17-11

SCDEW

AUG 24 2011

Lower Authority Appeals

Anne Mjaatvedt Law Firm, LLC

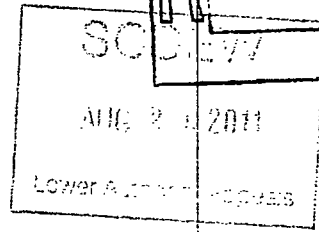
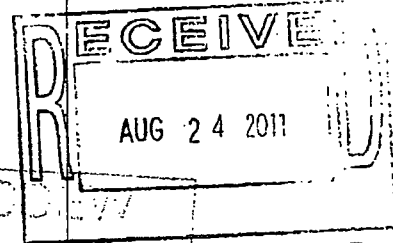
39 Broad Street, Suite 208
Charleston, South Carolina 29401

(843) 793-4240
(843) 278-9239 (Fax)
anne@aemlawyer.com

August 22, 2011

235-11-8079-1

1110129



Via Facsimile and Certified Mail, Return Receipt Requested

Appellate Panel

South Carolina Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

App III

RE: Appeal of Decision No: 2011-A-15157
Claimant: Kim A. Legette

Hearing Date: August 15, 2011
Employer: Nucor

To the Honorable Appellate Panel

I represent the Claimant, Kim A. Legette, in the above-referenced matter. On August 19, 2011, Ms. Legette received Decision No. 2011-A-15157, mailed August 18, 2011.

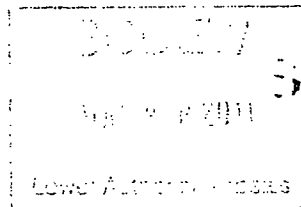
By this letter, the Claimant timely appeals the Tribunal's decision and here requests that the Appellate Panel overturn that decision as being clearly erroneous as a matter of law and incorrect based on facts in the record, and/or grant an appeal hearing before the full Panel.

The grounds for this appeal is that the Tribunal's decision was in error as a matter of law where it incorrectly found that Omega Laboratory, the drug testing laboratory, meets the certification qualifications required by S.C. Code Ann. § 41-35-120(3)(a)(iii)(B). The Tribunal based its decision on the erroneous assumption that any "HHS" certification places a drug test laboratory in compliance with the statute. This finding is incorrect. Omega does not meet the certification requirements as a matter of law where it is not on the list in the Federal Register as being certified by "HHS/SAMHSA (formerly: HHS/NIDA)".

The Employer here claimed that Claimant was discharged for illegal drug use. Because the consequences of a finding of discharge for illegal drug use are so severe, the Legislature established specific requirements for employers that subject their employees to work place drug testing. The Legislature required that both the sample collector and the laboratory testing the samples meet certain qualifications. Most relevant here, the testing laboratory must be certified by the National Institute of Drug Abuse ("NIDA"), the College of American Pathologists or SLED. S.C. Code Ann. § 41-35-120(3)(a)(iii)(B).

The problem arises as NIDA no longer exists. However, under a federal reorganization in 2006, its functions for oversight of the National Laboratory Certification Program that was the basis of NIDA certification now resides with the Substance Abuse and Mental Health Services Administration (SAMHSA). The Federal Register ("FR") for April 2, 2010 and May 14, 2010, entered as Agency exhibits, contain a list of the laboratories currently certified. Omega is not on that list. Further, the FR clearly states "HHS/SAMHSA (formerly: HHS/NIDA)". The Decision is incorrect in its finding that any "HHS" certification is sufficient.

SC Dept. of
Employment & Workforce
AUG 25 2011
Received Benefits Div.



SCDEW

AUG 24 2011

Where the S.C. Legislature enacted the statute requiring NIDA certification, the intent of the Legislature can only be effectuated by requiring SAMHSA certification of laboratories. Therefore, Omega's only certificate, through the Centers for Medicare and Medicaid Services at HHS, is not sufficient under the law. Omega is not certified pursuant to S.C. Code § 41-35-120(3), therefore, the Employer has not, and cannot meet its burden to show that Claimant is ineligible for benefits. This is not a matter of factual proof, it is a matter of law that a laboratory must be "HHS/SAMHSA (formerly: HHS/NIDA)" certified under the S.C. statute.¹ Claimant moves this Appellate Panel to take judicial notice that Omega is not certified HHS/SAMHSA and therefore is not NIDA certified as required under the statute.

Further, Employer's own evidence makes it clear that HHS certification cannot reflect the Legislature's intent in requiring employer's to use laboratories qualified to perform forensic laboratory analysis. Employer's exhibit 2 is an organizational chart of the U.S. Department of Health and Human Services. This department is organized into over 31 offices and programs, among them SAMHSA, Office of Civil Rights, Food and Drug Administration and the Office of Global Affairs, clearly offices with highly disparate programs, where SAMHSA is the only appropriate certification. The employer's agent's testimony regarding whether SAMHSA only certifies urine testing is irrelevant to the Legislature's intent to require laboratories with nationally recognized forensic drug test qualifications.

As Respondent admitted that Omega is not CAP or SLED certified, the only remaining issue at the August 15 hearing was whether Omega was NIDA certified under the statute, and as a matter of law, it is not. The Decision is incorrect where it finds that any certification from the Federal Department of Health and Human Services (HHS) complies with the statute in lieu of NIDA certification.

It is on this basis that the Claimant appeals the Tribunal's Decision and respectfully requests that the Commission find that Claimant was separated under nondisqualifying circumstances and reverse the Appeal Tribunal's decision.

Very truly yours,

Anne E. Mjaatvedt

SC Dept. of
Employment & Workforce

AUG 25 2011

Received Benefits Div.

¹ This Appellate Panel originally held the Employer had not met its burden of proof of cause for discharge (Appellate Panel Decision 2010-C-2253). Employer appealed the Commission's finding to the ALJ, who upheld the Panel's decision regarding no cause under 41-35-120(2) and (4), and ordered that the case be remanded to the Appeal Tribunal due to reference to the incorrect portion of the relevant statute regarding work place drug testing. It is the decision of the Appeal Tribunal following the August 15, 2011 hearing that is the subject of this appeal.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

RECEIVED

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SC Court of Appeals

Nucor Corporation,.....Appellant,

v.

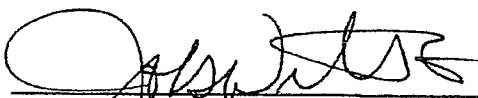
South Carolina Department of Employment
and Workforce, and Kim A. Legette, ...Respondents.

AMENDED NOTICE OF APPEAL

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011, which has the effect of finally determining application of South Carolina Code Ann. § 41-35-120, subsections (2) and (4) regarding termination of an employee for cause. Appellant received written notice of the entry of this Order on May 24, 2011.

TPGL 3899149v1

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III

Nosizi Ralephata

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ATTORNEYS FOR APPELLANTS

July 5, 2011

Other Counsel of Record:

Ms. Romi Y. Robinson
S.C. Department of Employment and Workforce
P.O. Box 995
Columbia, SC 29202

Ms. Kimberly A. Legette
517 Laurel Ridge Road
North Charleston, SC 29418

TPGL 3899149v1

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Docket No. 10-ALJ-22-0938-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

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Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

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- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

- (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

- (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

- (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

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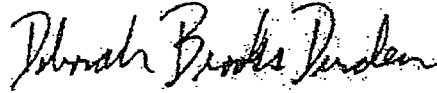
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² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.

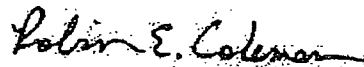
A handwritten signature in black ink, reading "Deborah Brooks Durden". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Decision No. 2010-C-2253
Appeal No. 10377-11778

Nucor Corporation,.....Appellant,

v.

Kim A Legette and South Carolina
Department of Employment and Workforce.....Respondents.

NOTICE OF APPEAL

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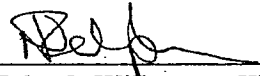
JUN 24 2011

SC Court of Appeals

Appellant hereby appeals the attached Order by the Honorable Deborah Brooks Durden, Administrative Law Judge, pursuant to South Carolina Code Ann. § 1-23-610, dated May 24, 2011, which has the effect of finally determining application of South Carolina Code Ann. § 41-35-120, subsections (2) and (4) regarding termination of an employee for cause. Appellant received written notice of the entry of this Order on May 24, 2011.

TPGL 3880002v1

TURNER, PADGET, GRAHAM & LANEY, P.A.



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ATTORNEYS FOR APPELLANTS

June 22, 2011

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Ms. Kimberly A. Legette
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North Charleston, SC 29418

TPGL 3880002v1

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Nucor Corporation,

Docket No. 10-ALJ-22-0938-AP

Appellant,

vs.

ORDER

South Carolina Department of Employment
and Workforce, and Kim A. Legette,

Respondents.

STATEMENT OF THE CASE

The Appellant, Nucor Corporation (Nucor), appealed the decision of the South Carolina Department of Employment and Workforce (Department), finding the employer discharged Respondent Kim A. Legette (Legette) without cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the record and the briefs, this case must be remanded to the Department to determine whether Legette was disqualified to receive benefits pursuant to S.C. Code Ann. § 41-35-120(3) (Supp. 2010) which deals with discharge based upon positive drug tests.

BACKGROUND

Legette filed a claim for unemployment benefits on April 23, 2010, with the Department, after being discharged from her job with Nucor. The Department initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120(3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate

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JUN 24 2011

SC Court of Appeals

FILED

May 24, 2011

SC ADMIN. LAW COURT

Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances. Appellant Nucor filed an Appeal to the ALC on December 14, 2010.

ISSUES ON APPEAL

Does the evidence in the record support the Department's finding that the employer discharged Legette under non-disqualifying circumstances?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2010); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2010). "[T]he findings of the [D]epartment [of Employment and Workforce] regarding facts, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the administrative law court must be confined to

questions of law.” S.C. Code Ann. § 41-35-750 (Supp. 2010).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” 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) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION

The Appellant argues that the Department erred in finding Legette eligible for unemployment benefits. Appellant asserts that Legette was fired for cause because her termination was based upon a positive drug test. The Appellate Panel decision found that Nucor failed to carry its burden of proving that Legette was fired for cause, citing evidence that an independent test performed the same day as the employer’s exam, and processed by the same laboratory, was negative.

A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm’n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated for cause in the current version of the statute with the term misconduct in the predecessor statute. Id. Although a single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification: 76 Am. Jur. 2d Unemployment Compensation § 69 (updated Nov. 2010).

Here, Nucor first challenges the Department's finding of fact that Nucor failed to prove that Legette was fired for cause and seeks to have this court overturn the Department's finding of fact on this issue. I decline the invitation to engage in a re-weighing of the facts found by the Appellate Panel. The Department's findings of fact, if supported by evidence and in the absence of fraud, must be conclusive and the jurisdiction of the Administrative Law Court must be confined to questions of law. S.C. Code Ann. § 41-35-750 (Supp. 2010). The Department's finding that Nucor failed to prove that Legette had used illegal drugs is supported by the evidence in the record, including the negative test results cited by the Appellate Panel in its order. Therefore, Nucor's arguments that benefits must be denied pursuant to S.C. Code Section 41-35-120(2) and (4) are without merit.

Nucor next argues that Legette's claim for unemployment benefits are precluded under S.C. Code Section 41-35-120(3), which provides for the circumstances under which discharge for illegal drug use renders a claimant ineligible for benefits. Under S.C. Code Ann. § 41-35-120(3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided*:

- (A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

- (B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse¹, the College of American Pathologists or the State Law Enforcement Division; and*

- (C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis Added).

The Department argues that Omega Laboratories (Omega), the lab used by Nucor for the drug test at issue, does not meet the certification requirements of the statute. The Department's

¹ The National Institute on Drug Abuse (NIDA) certification referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

position is supported in the record by the testimony of Dr. Robert Bennett, the documents introduced by Nucor at the hearing, and by Nucor's failure to present evidence or testimony challenging or disputing Bennett's testimony that Omega was not properly certified. The certificate introduced at the hearing does not reflect that Omega is a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division as required by the statute.²

The issue of whether Omega was properly certified is a disputed question of fact upon which the Appellate Panel did not make a finding. The decision of the Appellate Panel addresses only whether Legette was disqualified based upon Subsections (2) and (4) of § 1-35-120 which deal with discharge for cause and discharge for gross misconduct. An employee may be disqualified for benefits under Subsection (3) based upon positive drug tests despite a finding by the Department that she did not use illegal drugs. Subsection (3) provides for a disqualification from benefits based upon a positive drug test under certain situations, which include the method of collection of the specimen, the proper certification of the laboratory performing the test, and the confirmation of the test with a gas chromatography/mass spectrometry method test or its equivalent. The Appellate Panel decision makes no findings or conclusions as to the requirements of subsection (3). Where material facts are in dispute, an administrative body must make specific, express findings of fact. Porter v. S.C. Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). Because a determination of whether Legette was disqualified from receiving benefits under subsection (3) is necessary to the resolution of this case, I must remand the matter to the Department to consider that issue and make the findings of fact needed to determine if the circumstances surrounding Legette's discharge disqualified her for benefits pursuant to S.C. Code Ann. § 41-35-120 (3) (Supp. 2010).

² Nucor has supplemented the record with a new certification document, seeking to convince this court that Omega is HHS-certified. Upon review, this supplementation of the record was improvidently granted based upon my misunderstanding that the document presented was simply a more legible copy of the document relied upon below. Upon inspection, the document submitted to supplement the record contains a logo which did not appear at all on the document presented to the Appellate Panel. The Administrative Law Court's review of decisions of the Department is confined to the record. S.C. Code Ann. § 41-35-750; § 1-23-610(B). I, therefore, reverse my previous order supplementing the record with pages 279-280. It will be up to the Department to decide whether to exercise its discretion to reopen the record on remand to take additional evidence.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REMANDED** for a new hearing. With this Order this Court closes the docket in this matter. Should Appellant desire review of the Department's decision on remand, she will be required to file a separate notice of appeal from that determination.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 24, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robert E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 24, 2011
Columbia, South Carolina

FILED

May 24, 2011
SC ADMIN. LAW COURT

10-10-68
 11-10-68
 12-10-68
 13-10-68

FOR INFORMATION

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

APPEAL FROM SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE APPELLATE PANEL

DOCKET NO. 10-ALJ-22-0938-AP

NUCOR CORPORATION

Appellant

vs.

SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE and KIM A. LEGETTE,

Respondents.

RETURN TO MOTION FOR HEARING/ORAL ARGUMENT

Appellant filed a Motion for a Hearing/Oral Argument on the basis that ALC Rule 36(f) allows certain exhibits to be filed separately from the Record on Appeal.

The court has remanded this case to SCDEW for further proceedings on the matter of Respondent Legette's claim for unemployment benefits after a discharge based on her failure of a drug test. The court's order of May 24, 2011, reversed its previous order allowing Appellant to supplement the record because the document submitted for supplementation contained a logo which did not appear on the document originally submitted at SCDEW's evidentiary hearing.

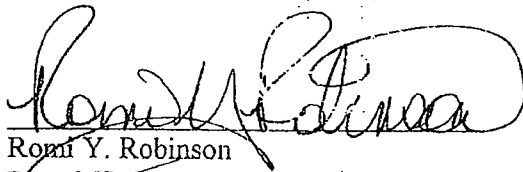
Appellant maintains there is no factual dispute regarding whether the original document with which they attempted to supplement the record was issued by the Department of Health and Human Services but only the legal issue of whether the laboratory in question was certified in the manner required by S.C. Code Ann. § 41-35-120 (3). However, Respondent submits there is a factual

dispute on both issues which are exactly the disputes upon which this court remanded the matter to SCDEW for resolution.

Also, there appears to be no indication or discussion at the hearing before the Appeal Tribunal, and therefore it was also not before the Appellate Panel, that the copy of the certification document entered on page 90 of the Record on Appeal was not an accurate representation of the original document. (R. pp. 25-27, 90)

As this matter is being reopened for further evidentiary proceedings before SCDEW, Respondent submits that a hearing and oral argument before this court is not warranted. (See Exhibit A) Further, the court's order specified that the docket on this matter was closed and thus specifically relinquished jurisdiction of this matter in its remand to SCDEW.

Respectfully submitted,



Romi Y. Robinson

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803-737-2666/803-737-0124 (Fax)

legal@dew.sc.gov

Attorney for Respondent, South Carolina

Department of Employment and Workforce

June 10, 2010

PO Box 995
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www.dew.sc.gov



EXHIBIT
A
Nikki R. Haley
Governor

John L. Finan
Executive Director

631 Hampton Street
P.O. Box 995
Columbia, South Carolina 29202
(803) 737-2666
FAX (803) 737-0124
June 7, 2011

Ms. Nosizi Ralephata, Esquire
P.O. Box 221219
Charleston, SC 29413

RE: Nucor v. SCDEW and Kim Legette
Case No 10-ALJ-22-0938-AP

Dear Ms. Ralephata:

Per Judge Durden's order in the above matter, this case has been remanded to the agency for further proceedings on Ms. Legette's claim. Pursuant to that order, the case is remanded to the Appeal Tribunal to reopen the matter and accept additional testimony and evidence to supplement the record from the previous evidentiary hearing on July 12, 2010. The entirety of the proceedings from the previous evidentiary hearing along with the new evidence will be considered in the decision of the Appeal Tribunal and in any further appeal. A hearing will be scheduled by the Appeal Tribunal in the near future and both parties are advised to appear and be prepared to present any additional evidence they believe is necessary for their case.

With kind regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "Romi Y. Robinson".

Romi Y. Robinson
Attorney for SCDEW

cc: Kim A. Legette

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,
Appellant,

v.

SC Dept. of Employment and Workforce
and Kim A. Legette,
Respondent(s).

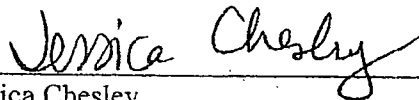
)
) DOCKET NO. 10-ALJ-22-0938-AP
)
) AFFIDAVIT OF SERVICE
) BY MAIL
)
)
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PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Administrative Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Return to Appellant's Motion for Hearing/Oral Argument of the SC Department of Employment and Workforce in the above named action on the following:

Nasizi Ralephata, Esq.
P.O. Box 22129
Charleston, SC 29413

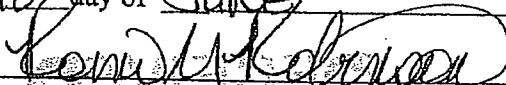
Kim A. Legette
517 Laurel Ridge Rd.
N. Charleston, SC 29418

That the postage was duly prepaid; and that it was deposited in the United States Mail on the 10th day of June, 2011.



Jessica Chesley

SWORN to before me this the
10th day of JUNE, 2011



(L.S.)
Notary Public for South Carolina
My Commission Expires: 5/31/2012

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

APPELLANT'S MOTION FOR A HEARING/ORAL ARGUMENT

NOTICE IS HEREBY GIVEN THAT Appellant Nucor Steel Corporation, through its undersigned attorney, moves for oral argument or a Hearing pursuant to Rule 40 of the Administrative Law Rules. As basis for this Motion, Nucor would show that pursuant to Rule 36(f) of the South Carolina Administrative Court Rules: "Where exhibits are larger, or do not reasonably lend themselves to accurate reproduction, they need not be included in the Record, but shall be filed separately." The copy of the HHS certificate provided by Nucor through its Motion to Supplement the Record is a copy of the same CLIA-HHS certificate issued to Omega, a copy of which was submitted at the Appeal Tribunal Hearing. The copy was entered into evidence as Exhibit 2 with no objection from Claimant. *See*, ROA, pp. 25-26. There is no factual dispute that the original of these copies was issued by HHS, the entity that subsumed the National Institute on Drug Abuse ("NIDA"), and therefore, the only issue is a legal question – i.e. whether an HHS certificate complies with South Carolina law regarding laboratory certification.

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JUN 02 2011

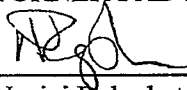
SC ADMIN. LAW COURT

TPGL 3850049v1

South Carolina Code Ann. § 41-35-120(3)(iii)(B) ("the Statute") requires that workplace drug tests be performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division. The substitute CLIA HHS-Certificate simply demonstrates Appellant's compliance with South Carolina law regarding workplace drug testing protocols, and proves that Omega is/was certified as required under the Statute. The CLIA HHS-Certificate was admitted into evidence at the Hearing before the Appellate Tribunal, and was considered by the Tribunal when it found that Claimant was precluded from an award of unemployment benefits. *See*, ROA at pp. 25-26; 89-96; 275. Thus, opinions regarding Omega's qualifications are irrelevant and do not create a factual dispute; rather, whether or not Omega was properly certified is a legal issue that is resolved by analyzing Omega's certificates in reference to the Statute that specifically sets forth the criteria that has to be met in order for a drug testing laboratory to be in compliance with South Carolina law.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, PA



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Attorney for Appellant Nucor Corporation

June 2, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

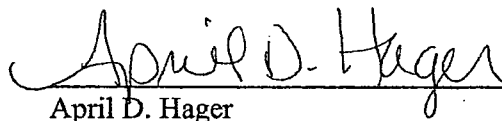
Docket Number: 10-ALJ-22-0938-AP

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2011, a copy of the *Motion for Hearing/Oral Argument* has been served upon the following counsel of record by placing same in the United States Mail, postage prepaid, to:

Ms. Romi Y. Robinson
Legal Department-Dept. of Employment and Workforce
P.O. Box 995
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Attorney for Agency/Respondent

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Claimant/Respondent


April D. Hager

FILED

JUN 02 2011

3 SC ADMIN. LAW COURT

TPGL 3850049v1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
DOCKET NUMBER: 10-ALJ-22-0938-AP

South Carolina Department of Employment and Work Force and Kim A.
Legette, Respondents

Vs.

Nucor Corporation, Appellant

Ms. Nosizi Ralephata

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REPLY BRIEF

The Appellant can dispute this case as much as they want but the fact remains that it is impossible for the drug tests performed on the Claimant to have so many conflicting results over such a short amount of time. In the Appellant's brief and argument there are several conflicting and untrue statements, for example:

- On page 2 of the brief the Appellant states that "Nucor's drug testing policies and procedures do not permit or otherwise consider any off site, independent drug test". On page 1 of the argument the Appellant states "Off site testing is not usually permitted". These are two contradictory statements.
- The Appellant refers to SAMHSA certification in both the brief and argument numerous amounts of times and as of April 12, 2011 Omega laboratories is not SAMHSA certified.
- The Appellant has had ample time to submit certificates of certification for all three employees that performed Claimants hair collection, but they have yet to produce any such certifications.
- Chain of Custody has been broken each time the sample is left in an unsecured area, which leaves the sample vulnerable.
- In the argument the Appellant refers to the Claimant agreeing to the testing procedure and chain of custody, but as stated before if that form is not signed then the Claimant is automatically terminated. Therefore it leaves the Claimant with no other choice but to sign the testing forms.

- The Appellant refers to the off site testing as being unreliable but the off site testing went to the same laboratory as the Appellants; therefore they are saying that their testing is also unreliable. If the Appellant rejects the independent tests they must by default reject their own tests. If the Appellant validates their own testing which they appear to do in all documentations then by default they must accept the independent tests.
- On page 2 of the argument it is said that I wanted a urine test in lieu of the hair test but this statement is not true. I wanted both test but the urine test was denied. I did get the hair test and this test was negative which could have been proven earlier with the urine test.

I never argued or disputed the fact that I was always aware of the Appellant's policy. I am adamant that I did not commit any willful or deliberate act in violation of Nucor policy. I never claimed that the independent test met any specific credentials or criteria I only maintain that the lab of the independent test was the same as the Appellants. With regards to the certification of Omega laboratory they are not SAMHSA certified which they have claimed numerous times throughout the argument, therefore all tests should not be valid. In conclusion I do not feel that the Appellant has met the burden in this case and that the decision should be affirmed.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents

Docket Number: 10-ALJ-22-0938-AP

REPLY BRIEF OF NUCOR CORPORATION

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Claimant/Respondent

FILED

APR 04 2011

SC ADMIN. LAW COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
LEGAL STANDARD	1
ARGUMENT	1
A. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (2)	4
B. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (3)	6
C. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (4)	7
D. Claimant Failed Two Drug Tests Administered in Compliance with S.C. Law	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Able Communications, Inc. v. South Carolina Public Serv. Comm'n</i> , 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)	1
<i>Bass v. Kenco Group</i> , 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005)	1, 8
<i>DeGroot v. Employment Security Comm'n</i> , 285 S.C. 209, 210-11, 328 S.E.2d 668, 669-70 (Ct. App. 1985)	4, 5, 6
<i>Heater of Seabrook Inc., v. Public Serv. Comm'n</i> , 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998)	1
<i>Lee v. S.C. Employment Security Comm'n</i> , 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982)	4, 5, 6
<i>Mickens v. Southland Exchange-Joint Venture</i> , 305 S.C. 127, 406 S.E.2d 363 (1991)	4

Statutes

S.C. Code Ann. § 1-23-380	1
S.C. Code Ann. § 41-35-120	3, 4, 6, 7, 8

LEGAL STANDARD

Pursuant to S.C. Code Ann. § 1-23-380(A)(6), an Agency's decision may be reversed or modified if it exceeds the Agency's authority, is affected by other error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. For purposes of the substantial evidence test, "substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. South Carolina Public Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). "Implicit findings of fact are not sufficient, and where material facts are in dispute, the administrative body must make specific, express findings of fact." *Heater of Seabrook Inc., v. Public Serv. Comm'n*, 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998).

ARGUMENT

The material facts are not disputed, and Claimant admits that she "was very aware of the drug policy that the Appellant Nucor Corporation has in place"; that "violation of the Appellant's policy would constitute fault and gross misconduct under law"; that "off site testing is not usually permitted"; and that the second test administered at Claimant's request on behalf of Appellant on April 15, 2010 was performed pursuant to a level of

detection specification. *See*, Claimant's Brief, first and second pages.¹ Further, although she goes through a litany of alleged "mistakes and inconsistencies," she does not dispute that the April 6, 2010 and April 15, 2010 samples were collected by Appellant's Certified Nurse Practitioner nor that the proper chain of custody was followed, including the fact that she personally executed the chain of custody forms confirming that the collection process was as reflected therein. *See*, Appellant's Initial Brief, at pp. 3-5. Based on Claimant's Brief, it is clear that any alleged "mistakes and inconsistencies" had nothing to do with the tests themselves, but rather, relate to Claimant's perception that she "was rudely told they were not ready for [her]"; that she "was told to step aside while they performed the hair collection on another colleague"; that the Nurse "put her hand in [Claimant's] face"; that the Nurse was "shaking tremendously during the whole specimen collection process" and that Appellant would not consent to her request for a urine test in lieu of a hair test. *See*, second page of Claimant's Brief. Indeed, none of these allegations relate to the substantive issue of whether her hair sample was properly collected as specified in the Statute. Claimant chooses instead to devote an entire page out of her three and a half (3½) page brief on prior tests done in February and March 2010. *See*, second page of Claimant's Brief. Reference to these tests is of no consequence because Claimant's termination was solely based on her positive tests of April 6, 2010 and April 15 2010. Thus, Appellant will not address the allegations

¹ Claimant's Brief is not paginated, and Appellant will make every effort to accurately describe the page(s) referenced.

pertaining to those irrelevant tests herein, but will focus instead, on the April tests which form the basis of Claimant's termination.²

Similarly, Respondent South Carolina Department of Employment Workforce ("SCDEW") does not challenge the propriety of the hair collection process by Nucor's Nurse Practitioner; the chain of custody; the statutory requirement that the drug test be administered on behalf of the Employer; nor the fact that the April 15, 2010 test was administered pursuant to a specific level of detection cut-off, which is designed to detect the presence of marijuana at levels lower than a standard test.

Further, although the Agency's decisions regarding Ms. Legette's claim for unemployment benefits have been predicated upon three different subsections of the Statute, Claimant would still be precluded from unemployment benefits as a matter of the law pursuant to *any* of the three subsections relied upon by the Agency at different stages of this proceeding, as set forth below and in Appellant's Initial Brief.³

² To the extent that the Court determines there is some benefit to reviewing the February and March tests referenced by Claimant, Appellant respectfully requests that it be allowed to fully brief the circumstances surrounding those tests and dispel the notion of alleged "inconsistent results."

³ To illustrate:

On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. [Claims Adjudicator's Determination, ROA 13, 85]. The determination also noted that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120(2).

The Appeal Tribunal held that Claimant was disqualified from receiving benefits upon a finding that Claimant was discharged for illegal drug use under S.C. Code Ann. § 41-35-120(3). [Decision of Appeal Tribunal, ROA 274-275].

The Appellate Panel held that Claimant was entitled to benefits because Claimant was not terminated as a result of "gross misconduct" pursuant to S.C. Code Ann. § 41-35-120(4).

A. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (2).

South Carolina courts have consistently held that an employee's "disregard of the standard behavior which an employer can rightfully expect from an employee" and "intentional and substantial negligent disregard for the employer's interests, duties, and obligations" constitute "misconduct" sufficient to warrant a "for cause" termination and denial of benefits. *Lee v. S.C. Employment Security Comm'n*, 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982); *DeGroot v. Employment Security Comm'n* 285 S.C. 209, 210-11, 328 S.E.2d 668, 669-70 (Ct. App. 1985). Although the statute no longer uses the word "misconduct," the Supreme Court has retained this interpretation of the meaning and application of S.C. Code Ann. § 41-35-120 (2) and explained "disregard of the standard of behavior which an employer can rightfully expect from an employee" this way: "the general rule is that, where the employer's request is *reasonable*, a refusal to comply will constitute misconduct, justifying a discharge for cause." *Mickens v. Southland Exchange-Joint Venture*, 305 S.C. 127, 406 S.E.2d 363 (1991).

The substantial evidence in this record shows that Claimant violated the Appellant's reasonable policy regarding drug and substance abuse. Claimant's failure of two drug tests demonstrates disregard of Nucor's express policies and procedures regarding drug and substance abuse, and the Claims Adjudicator's disqualification for cause finding was appropriate. Binding law in South Carolina supports the Claims Adjudicator's finding. For example, in *Lee v. S.C. Employment Security Comm'n*, the claimant-employee appealed from the order of the Court of Common Pleas in Charleston County affirming the Commission's order denying unemployment benefits to the employee. 277 S.C. at 587, 291 S.E.2d 378. The claimant-employee argued that to be

denied benefits, the employer had to prove that he committed some willful or deliberate act. *Id.* The South Carolina Supreme Court disagreed. *Id.* After reviewing a number of cases interpreting "misconduct," the Court found that the record showed the direct consequences of the claimant-employee's acts or omissions were "causing losses to the employer in having to re-do appellant's work." 277 S.C. at 588, 291 S.E.2d at 379. Thus, the Court held that there was no error in the Commission's order denying benefits. *Id.*

In *DeGroot, v. S.C. Employment Security Comm'n*, a small architectural firm hired the claimant-employee as its secretary. 285 S.C. at 211, 328 S.E. 2d at 669. The claimant-employee was discharged less than one year later. *Id.* The firm's Vice President and Office Manager testified that the claimant-employee was discharged for her refusal to follow instructions and carelessness. *Id.* The Vice President and Office Manager further testified that she made "too many mistakes in typing specifications and some of her work had to be redone by a part-time secretary." *Id.* The claimant-employee testified that she had not been informed of the firm's heavy typing load and asserted that she was really fired for failing to keep up with the work. *Id.* The South Carolina Court of Appeals, citing *Lee*, held that the record contained substantial evidence to support the Commission's finding that the claimant-employee was discharged for misconduct because she "had the ability to avoid numerous typographical mistakes and work at the standard her employer could rightfully expect." 285 S.C. at 212, 328 S.E. 2d at 670.

Just as the employee-claimant in *DeGroot*, here, Claimant was, at the very least, in violation of Nucor's Drug and Alcohol Policy. Indeed, Claimant admits that she was very aware of Nucor's Drug and Alcohol Policy; that she was aware that violation of the

policy would lead to termination; and that Nucor did not consider outside independent tests not performed on its behalf. If the employee-claimants' comparatively minor misconduct in *Lee* and *DeGroot* satisfied the employer's burden under S.C. Code §41-35-120(2), Claimant's conduct here easily rises to a level sufficient to constitute cause for her termination. Indeed, Claimant's drug positive status posed a much greater risk to Appellant than merely exposing it to typographical errors or the need to redo work. Working under the influence of illegal drugs while on duty at a steel manufacturing plant could have potentially exposed Claimant and other Nucor employees to an unsafe work environment, which could have resulted in injury or liability. For this reason alone, the Claims Adjudicator's decision should be upheld.

B. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (3).

As to Subsection (3), as set forth in Appellant's Initial Brief, there were no "inconsistent results" because the second test was administered under a level of detection standard, which involves testing for drugs at levels lower than administered for a standard test. Both Claimant and her expert acknowledge this fact. As set forth in Appellant's Initial Brief, the second drug test, performed by Appellant at the request of Claimant, was administered as a "level of detection" test [ROA 30, 30; Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Claimant's independent and allegedly "negative" test was administered under a different criterion. [ROA 30, 63-64]. The reason for using "level of detection" cut-offs for second tests is to detect trace amounts of illegal drugs that may otherwise escape detection because of the passage of time between tests. *See*, Appellant's Brief at pp. 20-23. Accordingly, the Appellate Panel's finding of "inconsistent results" is not supported by the record.

Further, it is undisputed that Appellant does not accept off-site testing. *See*, second page of Claimant's Brief.⁴ Thus, the Appellate Panel's reliance on an independent test performed outside the facility and not on behalf of the employer in conducting its cause analysis exceeded its authority and was erroneous as a matter of law.

C. Claimant Is Disqualified from Unemployment Benefits Pursuant to S.C. Code Ann. § 41-35-120 (4).

Similarly, as set forth in Appellant's Initial Brief, it was error to apply and reverse the Appeal Tribunal's determination based on Section 41-35-120(4) because Claimant's illegal drug use and/or positive drug test results would meet the disqualification standard of the appropriate statute addressing workplace drug use. Regardless, Claimant's failure of two properly administered drug tests would constitute "gross misconduct" under the plain meaning and intent of the statute erroneously applied by the Appellate Panel. *See*, pp. 14-16 of Appellant's Initial Brief. Accordingly, the Appellate Panel's decision should be overturned.

D. Claimant Failed Two Drug Tests Administered in Compliance with S.C. Law.

Finally, SCDEW's argument that the Appellate Panel's decision should be upheld because of the testing laboratory's lack of certification is misplaced and should be rejected.⁵ In support of its argument that "there is contradictory evidence in the record" with regard to Omega's certifications and compliance with the Statute, Respondent SCDEW relies on the unsubstantiated allegations of Claimant's expert while ignoring the substantial evidence in the record. Indeed, Appellant provided ample evidence that Omega's certifications comply with the Statute, including an HHS-Certificate of

⁴ Respondent SCDEW's brief similarly does not challenge this fact.

⁵ Ironically, Respondent SCDEW seems to give full credence to the alleged independent negative test results from the very same laboratory that it discredits as uncertified in its Brief.

Compliance.⁶ ROA P.90. As Respondent SCDEW notes, the National Institute on Drug Abuse ("NIDA") was subsumed into the United States Department of Health and Human Services ("HHS"). See, SCDEW's Brief at p. 6.⁷ HHS is the United States governments' principal agency for protecting the health of all Americans and providing essential human services. <http://www.hhs.gov/open/contacts> (last visited March 31, 2011). HHS' programs are administered by eleven (11) operating divisions, including The Centers for Medicare & Medicaid Services (CMS) and Substance Abuse and Mental Health Services Administration (SAMHSA). *Id.* CMS regulates all laboratory testing (except research) performed on humans in the United States through the Clinical Laboratory Improvement Amendments (CLIA) on behalf of HHS. The objective of the CLIA program is to ensure quality laboratory testing. See, <http://www.cms.gov/CLIA> (last visited March 31, 2011).

Here, Appellant provided a copy of Omega's HHS-CMS CLIA certificate at the Hearing. ROA P.90. Thus, although Dr. Bennett tries to discredit Omega's certification, there is no question that Appellant provided documentation that demonstrates compliance with the Statute. This evidence must be considered as a whole when determining whether reasonable minds would reach the conclusion the Appellate Panel reached reversing the decisions of the Appeal Tribunal and the Claims Adjudicator. See, *Bass v. Kenco Group*, *supra*. The record contains substantial documentation in support of

⁶ Appellant is filing contemporaneously herewith, a substitute certified copy of the CMS CLIA certificate, which more clearly shows the HHS watermark in the background of the certificate thus, demonstrating Omega was HHS-certified as required by the Statute in light of the reorganization of the United States Department of Health and Human Services, which subsumed NIDA. It is also noteworthy that Omega is the only U.S. drug testing laboratory to have ISO/IEC 17025 Laboratory Accreditation (both screening and GC/MS confirmation processes). See, ROA at pp. 92, 96.

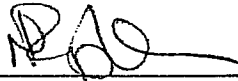
⁷ See, S.C. Code Ann. § 41-35-120(3)(B), which provides: "the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division".

Omega's certifications and compliance with South Carolina law, and reliance upon Dr. Bennett's unsupported and allegedly "contradictory" testimony is misplaced.

CONCLUSION

Claimant should be precluded from receiving benefits as a matter of law, regardless of which subsection is applied. Claimant was terminated for cause, and is therefore disqualified from unemployment benefits as a matter of law. Further, the Appellate Panel's Decision is not supported by the facts or evidence, and should be reversed.

Respectfully submitted,



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April 4, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

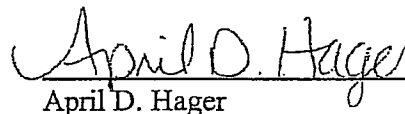
Respondents.

Docket Number: 10-ALJ-22-0938-AP

I hereby certify that on April 4th 2011, a copy of the *Reply Brief of Nucor Corporation* has been served upon the following parties via overnight delivery, in the United States Mail, postage prepaid, to:

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FILED

APR 04 2011

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
DOCKET NUMBER: 10-ALJ-22-0938-AP

South Carolina Department of Employment and Work Force and Kim A.
Legette, Respondents

Vs.

Nucor Corporation, Appellant

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STATEMENT OF THE CASE

In the matter of policies I, the claimant, was very aware of the drug policy that the appellant, Nucor Corporation, has in place and that is why I never violated the policy. I have had random drug testing over the past twenty-six years and never over this time period have I had a positive drug screen. I have chosen to work in a drug-free work place and would not have jeopardized my employment or reputation by using drugs. It is truly out of character for me seeing how I never missed a shift of work and I always abided by all procedures and regulations. Violation of the appellant's drug policy would constitute fault and gross misconduct under law. If you look at all the evidence in this case you can clearly see there were several mistakes, such as it is not possible for an individual to have so many positive and negative results over such a short amount of time. I offered to take any additional test at my expense including urine, blood, and also a polygraph test to prove my innocence.

I am aware that off site testing is not usually permitted, but with all the mistakes that that did occur I needed to prove my innocence. These off site test have been presented several times to the appellant and council. The mistakes in reference to testing done on 2-25-10 and 3-5-10 by the appellant, I have major concerns about the creditability of the way the collection was handled at Nucor. The appellant chose throughout this process to leave information about the first set of test out of the hearings until I brought them forward. Several mistakes were made on the first set of tests such as an uncertified and untrained employee was told to practice on me by performing a crucial step in the testing process which is hair collection. This employee proceeded to mess up and have to reopen and rebag the hair sample which can lead to contamination of the

sample. Also Accu-Diagnostics, that is contracted by the appellant to report results brought to my attention that the 2-25-10 test sample contained red and black hair while the 3-5-10 test contained blonde and brown hair, and also the textures of hair in both samples were different. This is why I feel the outside testing is necessary to this case. The outside tests were collected by a certified medical doctor that specializes in toxicology, of whom I had no previous affiliation with, and the tests were sent to the same laboratory facility as the appellant's specimens. All of the off site tests complied with statutory requirements for reliability, and were collected within an hour after the appellant's samples. I have tried to get these samples sent to a certified lab for DNA and further testing, but the appellant is not cooperating with my attempts.

In reference to the last two tests performed on 4-6-10 and 4-15-10, which are the only tests the appellant presented in their case, there were several mistakes and inconstancies. On the test performed on 4-6-10 I proceeded to go to the Safety office and get my test done but when I got over there I was rudely told that they were not ready for me and to come back later in the day. Later in the afternoon I went back over for the test and I was in line they told me to step aside while they performed the hair collection on another co-worker, this all seemed very odd to me. Then on 4-15-10 I went over to the Safety office for a retest and I was treated very unprofessionally by the Safety Nurse. She proceeded to put her hand in my face when I ask her to explain all the back and forth results, she was also shaking tremendously during the whole specimen collection process. They also refused to let me take a urine test that would have proven I was not under the influence of drugs. Instead they demanded that I be driven home by a coworker which has never occurred before. This is not policy. Also a level of detection was performed

on this specimen but not on the previous specimen they said it was policy to do this but if it was policy why was it not done previously.

I have learned a lot about hair drug testing since this whole thing started. The hair drug testing is very sensitive and can be thrown off by several interfering substances. Also drugs tend to stay in the hair for a minimum of six months. The most crucial step in this type of testing is the collection process as I have already stated. The appellant has never in all the hearings presented formal documentation that anyone employed at Nucor is certified in hair collection. It is advised by the Statute that the samples be procured by a Health care professional and be performed by a certified laboratory that consist of Gas chromatography and Mass spectrometry method. There are several factors that occurred during the collection process which leave the sample vulnerable for errors such as the sample is collected and stored in an unsterile and unsecured area at Nucor. I feel the chain of custody is just a formality because no matter if I agree with how the sample is handled or not I have to sign or I would be terminated.

At each hearing the appellant has had ample opportunity to state their case, but all they have done is state the drug policy which they have clearly not complied with. Both the representatives sent for Nucor chose not to present the case or argue anything I said to the panel on 11/17/10. This leaves me confused on why they are attempting to reverse the decision. Also the appellant never sent the three employees that were subpoenaed for the hearing on 7/12/10 and who were directly involved in the case. This leads me to believe the appellant is trying to protect these individuals from testifying about all the misconduct that has occurred.

In conclusion of this case I am asking that everything is taken into consideration and that the decision is not reversed. I do not feel that the appellant has met the burden in this case. We all can clearly see there is more to this case than what is stated in either brief. As I have presented throughout this whole process I am innocent and I have tried to do everything in my power to prove this. I do not have as many resources as the appellant but I have worked hard and I am trying everyday to prove that I was falsely accused.

Nucor Corporation,
Appellant,

VS

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issue on Appeal 1

Statement of the Case..... 1

Facts 2

Arguments

 I. THE DECISION OF THE APPELLATE PANEL FINDING THE
 EMPLOYER DISCHARGED LEGETTE WITHOUT CAUSE IS
 CLEARLY SUPPORTED BY SUBSTANTIAL EVIDENCE IN
 THE RECORD AS A WHOLE AND IS BINDING ON THE
 COURT.....4

Conclusion 9

TABLE OF AUTHORITIES

<i>Todd's Ice Cream v. SC Employment Security Comm'n</i> , 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984)	5
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	5
<i>DeGroot v. Employment Security Comm'n</i> , 285 S.C. 209, 328 S.E.2d 668 (S.C. App. 1986)	5

STATUTES

S.C. Code Ann. § 41-35-750 (2010)	4, 5
S.C. Code Ann. § 41-35-120 (2).....	1
S.C. Code Ann. § 41-35-120 (3).....	1, 5, 6, 8
S.C. Code Ann. § 41-35-120 (4).....	2, 5

STATEMENT OF THE ISSUES ON APPEAL

- I. IS THE DECISION OF THE APPELLATE PANEL FINDING THE EMPLOYER DISCHARGED LEGETTE WITHOUT CAUSE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE?

STATEMENT OF THE CASE

Kim A. Legette (Legette) filed a claim for unemployment benefits on April 23, 2010, with the South Carolina Department of Employment and Workforce¹ (SCDEW), after being discharged from her job with Nucor Corporation (Employer or Appellant). SCDEW initially held Legette disqualified from receiving benefits for twenty-six weeks by claims adjudicator's determination mailed May 27, 2010, upon finding she was discharged for cause connected with the employment pursuant to S.C. Code Ann. § 41-35-120 (2). Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. The Appeal Tribunal conducted an evidentiary hearing and both parties participated. The resulting decision issued on July 19, 2010, modified the determination and held Legette indefinitely disqualified for having been discharged for illegal drug use pursuant to S.C. Code Ann. § 41-35-120 (3). Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. The Appellate Panel notified the parties of oral argument scheduled on November 17, 2010. The Appellate Panel issued the agency's final decision on November 19, 2010, which reversed the Appeal

¹ Effective March 30, 2010, the South Carolina Employment Security Commission was renamed the South Carolina Department of Employment and Workforce. See, Act 146 of 2010.

Tribunal decision and held Legette was eligible for benefits for having been separated under non-disqualifying circumstances pursuant to S.C. Code Ann. § 41-35-120 (4).

Appellant sought judicial review of SCDEW's final administrative decision by filing with this court on December 14, 2010.

FACTS

Legette worked for the Employer as a cold mill scheduler from August 24, 1998, through April 22, 2010. (R. p. 23) Appellant terminated Legette after a positive drug screen for marijuana, an illegal drug. (R. p. 23) Legette denies drug use which would result in a positive drug test and testified she has not tried marijuana since 1975 when she was a freshman in high school. (R. p. 49) On April 6, 2010, Legette provided a hair sample for a random drug screen pursuant to the Employer's Drug and Alcohol Policy (R. pp. 7, 86-88) The drug screen indicated a level of 1.25 picograms per milligram of marijuana (THC) metabolite. (R. pp. 23, 101) The screening cut off to indicate a positive result for the standard "Hair 5 Drug Panel" test is 1.00 picograms per milligram. (R. pp. 110, 120) Rather than take the option to resign, Legette elected to take a second drug screen through the Employer on April 15, 2010. That screen indicated a level of .78 picograms per milligram. Because of these results, Legette was terminated on April 22, 2010. On both occasions, the samples were collected on Employer premises by Margaretta Grimm, an Adult Nurse Practitioner. (R. p. 25) The samples were sent to Omega Laboratories (Omega), which the Employer uses for all its drug testing.

Under S.C. Code Ann. § 41-35-120 (3), an individual is ineligible for benefits due to illegal drug use if the:

- (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and
- (ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or
- (iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, *provided:*

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse², the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse. (Emphasis added).

During the questioning of Linda Starr (Starr), the Employer's Payroll Benefits Administrator, she indicated that Omega was certified by the College of American Pathologists. (R. pp. 25, 27) Other evidence in the record, however, contradicts this testimony. Starr offered as evidence, documentation of certifications and permits for Omega to support the assertion that they met the requirements of the above statute. (R. p. 26) None of the marked exhibits indicate that Omega was

² The National Institute on Drug Abuse (NIDA) certification as referred to in the statute no longer exists. As a result of reorganization of the Department of Health and Human Services (HHS), "NIDA-certified" laboratories are now referred to as either "SAMHSA-certified" or "HHS-certified".

certified by the College of American Pathologists, SAMHSA, or the State Law Enforcement Division (SLED). (R. pp. 89-96) A notice listing all current SAMHSA-certified laboratories is published in the Federal Register during the first week of each month. Most notably, the press release and information provided by the Employer from the Omega Laboratories website do not indicate any of the certifications required by statute, though it does indicate that they are “enrolled in the Forensic Urine Drug Testing Program” which is administered by the College of American Pathologists. (R. pp. 95-96)

Further, Bennett’s testimony also contradicts the Employer’s assertion that Omega Laboratories meets statutory certification requirements. He testified that several of the credentials presented for Omega would not apply to drug testing procedures. Bennett also testified that the primary accreditation body for drug testing is the Substance Abuse and Mental Health Services Administration (SAMHSA) and he understood from the Omega brochure that they had not yet passed the credentialing procedure for the College of American Pathologists. (R. pp. 65-66)

Christopher Gypin (Gypin), the Vice President of Operations for AccuDiagnostics, testified regarding the procedures of Omega Laboratories. Gypin indicated that Omega is one of the primary labs that AccuDiagnostics uses in its third-party administration of drug testing programs for companies like the Employer. (R. p. 69) Omega performs the actual drug testing but AccuDiagnostics reports the test results to the Employer. (R. pp. 101, 105) Gypin provided

testimony on the random selection process his company uses to determine the participants in the test and the quality assurance procedures at Omega. (R. pp. 72-76) He also testified that Omega uses gas chromatography/mass spectrometry in its confirmation phase of an initial positive result, which is the method indicated in the statute. (R. pp. 69-70) However, Gypin, who is presumably well-versed on such information regarding this facility, does not offer any testimony regarding Omega's credentials and does not challenge or dispute Bennett's testimony that Omega is not certified by SAMHSA or the College of American Pathologists. (R. pp. 68-79)

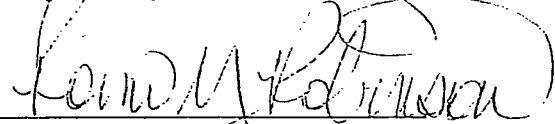
In this case, the Appellate Panel held that the Employer had the burden of proving there was cause for Legette's discharge connected with the employment and they failed to meet that burden. (ROA p. 2.) The drug tests the Employer relied on to terminate Legette's employment did not meet the statutory requirements of §41-35-120 (3). Therefore cause under this subsection has not been established. The lack of proper certification in itself is enough to establish that the Employer did not meet its burden in this matter. Further, the Appellate Panel specifically expressed concerns about the disparate results of the drug tests from the same testing facility from samples taken on the same day. Legette denied illegal drug use while working for the Employer and the Employer has failed to establish illegal drug use in the manner required by statute. The Appellate Panel found that Appellant did not meet its "burden of proving that a claimant has been discharged for cause." (ROA 2.) Reasonable men could reach the same findings

and conclusions based on the record as a whole. Thus, these findings and conclusions are supported by substantial evidence and are binding on the court.

CONCLUSION

Since the decision of the Appellate Panel is supported by substantial evidence in the record as a whole and is in accord with applicable law, the findings are binding on the court and the decision should be affirmed.

Respectfully submitted,



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March 21, 2011

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,	)	Docket No. 10-ALJ-22-0938-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department of	)	
Employment and Workforce and Kim	)	
A. Legette,	)	
Respondent,	)	
_____	)	

PERSONALLY appeared before me Jessica Chesley who being duly sworn, deposes and says: that she is the Legal Assistant for the South Carolina Department of Employment and Workforce; and that she served by mail a copy of the Brief of the Respondent SC Department of Employment and Workforce in the above named action on the following:

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That the postage was duly prepaid; and that it was deposited in the United States Mail on the 21st day of March, 2011.

Jessica Chesley
Jessica Chesley

SWORN to before me this the
21st day of MARCH, 2011

Ken M. Edmond (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/31/2012

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

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FILED

FEB 17 2011

SC ADMIN. LAW COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
I. THE APPELLATE PANEL'S REVERSAL OF THE APPEAL TRIBUNAL'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	1
II. THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35- 120(3)	1
III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	1
IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	9
ARGUMENT	10
I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW	10

II.	THE APPELLATE PANEL'S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3)	15
III.	A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.....	17
IV.	THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY	21
	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Curtis v. Mississippi Employment Sec. Com'n</i> , 878 So. 2d 1094 (Miss. Ct. App. 2004).....	19, 20
<i>Deese v. South Carolina State Bd. of Dentistry</i> , 286 S.C. 182, 184- 5, 332 S.E.2d 539, 541 (Ct. App. 1985).....	10
<i>Farm Fresh Dairy, Inc. v Blackburn</i> , 841 P2d 1150, (Okla. 1992)	20
<i>Grace Drilling Co. v. Director of Labor</i> , 31 Ark. App. 81, 790 S.W.2d 907 (1990)	21
<i>Lee v. South Carolina Employment Sec. Commission</i> , 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982)	13, 18
<i>McNabb v. Department of Revenue</i> , 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005)	20
<i>Milliken & Co. v. SC Emp. Comm'n</i> , 315 SC 492, 445 SE2d 640 (1994)	15, 16, 18
<i>Overstreet v. Dept. of Employment Sec.</i> , 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988).....	20
<i>Pressley v. Lancaster County</i> , 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).....	10
<i>South Carolina Dept. of Corrections v. Mitchell</i> , 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008).....	10
<i>Stewart v. Duke Mfg. Co.</i> , 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009).....	20
<i>Stone Mfg. Company v. S. C. Employment Security Commission, et al.</i> , 219 S.C. 239, 64 S.E.2d 644 (1951)	13
<i>Waters v. S.C. Land Res. Conservation Comm'n</i> , 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)	10

Statutes

S.C. Code Ann. § 1-23-380(A)(6) (2005)	10, 24
S.C. Code Ann. § 41-35-120	1, 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24

Treatises

78 ALR4th 180 § 5-7, "*Drugs-Unemployment Compensation.*" 14

STATEMENT OF ISSUES ON APPEAL

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- IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE, AND IS AGAINST PUBLIC POLICY.

STATEMENT OF THE CASE

Nucor Steel Berkeley ("Nucor" or "Employer") is a steel manufacturing plant located in Berkeley County, South Carolina, which has approximately 900 hundred employees. Ms. Kimberly A. Legette ("Ms. Legette" or "Claimant") was an employee of Nucor from August 24, 1998 until her termination on April 22, 2010. [ROA 23]. In order to create and ensure a safe work environment, Nucor maintains a zero tolerance policy with regard to illegal drug and substance use. [Exhibit 1, ROA 86-88]. At the beginning of the employment relationship, each employee is provided an Employee Handbook that contains Nucor's Drug and Alcohol Policy. [ROA 24]. Claimant was provided a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. [ROA 28-29; Exhibit 3, ROA 97].

Pursuant to its Drug and Alcohol Policy, Nucor regularly conducts random drug tests. All employees, including the Plant General Manager, are subject to random testing. [ROA 24; Exhibit 1, ROA 86-88]. The consequences for violating the Drug and Alcohol Policy are set forth at Page E-5, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." [Exhibit 1, ROA 88]. Claimant was at all relevant times aware of the Drug and Alcohol Policy and the consequences of violating it, and had been subject to random drug tests at Nucor on previous occasions. [ROA 42; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Nucor's drug testing policies and procedures do not permit or otherwise consider any off-site, independent drug tests obtained by an employee on the employee's own initiative. [ROA 25, 27, 58].

Nucor's drug testing policies and procedures were designed to comply with South Carolina Code Ann. § 41-35-120. To ensure compliance with the statute, Nucor partnered with Omega Laboratories, a national provider of diagnostic testing, to process its employees' drug test samples. [ROA 20-21, 25-27, 70-72]. Omega is certified by the College of American Pathologists and the U.S. Department of Health and Human Services, and is also SAMHSA-certified. Thus, its credentials are beyond dispute. [ROA 27, 69-70; ROA 89-96]. Omega reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process, as required under S.C. Code Ann. § 41-35-120. [ROA 27, 69-70; Claims Adjudicator Decision dated 5/26/2010, ROA 13, 85]. In addition, Nucor also partnered with Accudiagnosics LLC., to be its third party administrator for the drug testing program. [ROA 68-69]. Accudiagnosics is responsible for generating the random drug testing selections and facilitates the processing and reporting of the drug test results. [*Id.*]. Accudiagnosics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Nucor Safety Office. [Exhibit 6, ROA 123]. The Safety Office then notifies those selected for testing via internal e-mail. [ROA 42].

On April 6, 2010, Claimant was selected and tested for drugs pursuant to Nucor's periodic random drug testing policy. [ROA 23, 35 - 36]. Hair samples were collected at the plant from Claimant and the 14 other employees randomly selected for testing that week. [ROA 71-75; Exhibit 6, ROA 123]. Claimant's samples were collected by a certified Nurse Practitioner [Exhibit 8, ROA 272-273] employed by Nucor, and the samples were sent to Omega's testing laboratory in Mogadore, Ohio. [ROA 25, 28, 35-

37, 81-82; Exhibit 6, ROA 127-128]. The collection process involves multiple steps, each of which is documented, and the employee/donor verifies in writing that each step has been followed in his or her presence. The following is a summary of the steps taken in the collection process:

- (1) At the time that an employee enters the testing room, he or she is provided with a Drug/Alcohol Authorization and Release Consent Form ("Release"). The Release requires the employee to fill out their full name and give Nucor authorization to collect a sample for processing by an accredited and certified laboratory. Refusal to sign the Release results in immediate termination as outlined in Drug and Alcohol Policy [Exhibit 1, ROA 86-88]. Claimant executed the Release for both the initial confirmatory test on her hair sample collected on April 6, 2010, and the second test of April 15, 2010. [ROA 28; Exhibit 4, ROA 98; Exhibit 5, ROA 102].
- (2) The second step involves the completion of the drug Testing Custody and Control Form ("Custody Form"). The Custody Form is filled out in the presence of the employee, and outlines each step of the collection process. The employee is given the option to choose what part of the body they would like the hair sample to be collected from. The Nurse then collects the sample and places it in an envelope, which is sealed in front of the employee. Claimant requested that the hair sample be taken from her head for both the April 6, 2010 and April 15, 2010 tests. [ROA 28, 37, 40; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (3) After the sample is sealed in the envelope, Section 5 of the Custody Form is required to be executed by the employee, which certifies that the employee provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. Claimant signed Section 5 of the Custody Form, and verified that the chain of custody had been followed and that her sample had been collected as specified on the Custody Form for both the April 6, 2010 and April 15, 2010 tests. [ROA 43-44, 48-49; Exhibit 4, ROA 99; Exhibit 5, ROA 103].
- (4) The Custody Form is then placed in a plastic bag, together with the envelope containing the sample, and the plastic bag is deposited in a lock box in the presence of the employee. Claimant admitted at the Hearing that this step was completed in her presence for both the

April 6, 2010 and April 15, 2010 tests. [ROA 43; Exhibit 4, ROA 99-101; Exhibit 5, ROA 103-104].

- (5) After the sample is collected and deposited in the lock box, employees are provided with yet another verification step: they have to complete a Drug Testing Procedure for Post Incident and Random Drug Screen form ("Post Incident Form"). This Form requires the employee to confirm that the Release/Consent form was explained; - the option of choosing where the hair sample would be collected from was provided; - the instruments were cleaned with alcohol wipes prior to collection; - the hair sample was placed in the envelope in the presence of the employee; - the employee was required to witness the sealing of the pouch containing their hair sample; and - the employee was provided with a copy of the Custody Form. Again, Claimant executed the Post Incident Form (- for both the April 6, 2010 and April 15, 2010 samples), and checked "Yes" to all the questions (with the exception of the question relating to pubic hair collection, which did not apply as she opted to have her sample collected from her head). [ROA 28, 37, 40-41, 43, 48; Exhibit 4, ROA 100; Exhibit 5, ROA 104].

The hair sample collected from Claimant on April 6, 2010 was confirmed positive for 1.25 picograms per milligram of marijuana (THC), an illegal substance. [ROA 23; Exhibit 4, ROA 101; Exhibit 6, ROA 121]. Pursuant to Nucor's Drug and Alcohol Policy, disciplinary action testing positive is immediate termination. [Exhibit 1, ROA 85-88].

After testing positive for marijuana on April 6, 2010, Claimant, like any other employee that tests positive for illegal drugs, was provided an opportunity to meet with the General Manager to discuss and determine whether she preferred to resign voluntarily in lieu of termination. [ROA 23-25]. Claimant was adamant that she did not use any illegal drugs or substances and opted to undergo a second test at Nucor on April 15, 2010 instead of voluntarily resigning. [*Id.*] As is standard practice, for the second test Nucor required and requested that Claimant's sample be tested pursuant to a "level of detection"/"limit of detection" standard. [ROA 30, 36; Exhibit 5, ROA 102-105; Exhibit

7, ROA 136]. Under the "level of detection" standard, any amount of marijuana/THC detected in Claimant's hair sample at or above .10 picograms per milligram is considered a positive result and is basis for immediate termination. [ROA 32]. Claimant was aware that the second test would be performed as a "level of detection" test, and she executed the Custody Form on April 15, 2010, which clearly indicates that the test would be performed under the "level of detection" standard. [Exhibit 5, ROA 103; Exhibit 7, ROA 137]. Likewise, her toxicology expert testified that the April 15, 2010 test was a "limited detection test," which is "below the limit of detection on a standard test." [ROA 63-64].

In addition to Claimant's verification that Steps 1-5 above had been complied with during the second test, Claimant's Manager was also present and witnessed the entire process. [ROA 37, 47]. At no point did Claimant object to the manner in which the sample was collected. [ROA 39]. She admitted that Nucor's nurse was "professional about [collecting the sample]. She cleaned the scissors which I had not seen done before, cleaned the area, and cut my hair, and that was the first test..." Further, Claimant testified that she observed the nurse collect the sample and place it in an envelope which she then sealed, placed in a lock box, and Claimant signed and dated the envelope. [ROA 43-44, 48-49]. Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse in collecting Claimant's hair sample and forwarding it to the processing laboratory was proper and correct. [ROA 60-61]. He further testified that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62].

The results of Claimant's second test showed .78 picograms per milligram of marijuana. [ROA 38; Exhibit 5, ROA 105; Exhibit 7, ROA 136]. Because the amount of marijuana detected exceeded .10 picograms per milligram, the second test was also a positive test for marijuana and grounds for immediately terminating Claimant pursuant to Nucor's Drug and Alcohol Policy. Accordingly, Claimant was terminated upon Nucor's receipt of the second test results on April 22, 2010.

Prior to her termination and after her second test, Claimant allegedly took an additional independent drug test which she alleges came back negative for drugs. [ROA 51-52, 54, 56]. Although Claimant alleges that her negative independent test was performed on the same day as her second Nucor test (April 15, 2010), she did not produce any documentation evidencing when the independent test was performed, nor what criterion or level of detection was used for that independent test. In fact, *Claimant did not produce the independent test at any point during the underlying proceedings.* Thus, there is no documentary evidence in the record regarding the independent test or its results, nor even evidence that an independent test was taken at all. Regardless, it is undisputed that Nucor has not, and does not accept independent tests because it has no control over their administration and no assurances of their reliability.

Based on this alleged (and undocumented) independent test, Claimant sought unemployment benefits on the basis that she had been wrongfully terminated and that Nucor improperly collected her hair sample. [Discharge for Cause Fact Finding, dated 05/03/2010, ROA 11-12]. On May 26, 2010, the Claims Adjudicator notified Claimant that she was disqualified from receiving benefits based on her violation of the Company's Drug Testing Policy. [Claims Adjudicator's Determination, ROA 13, 85]. The

determination also noted that failure to comply with company policies constitutes discharge for cause in connection with the work under S.C. Code Ann. § 41-35-120. [Id.]. Finally, the determination confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory using gas chromatography/mass spectrometry (GC/MS) or a scientifically equivalent method. [Id.].

Upon receipt of the Claims Adjudicator's Determination, Claimant filed a Notice of Appeal to Appeal Tribunal on June 2, 2010, asserting that the Adjudicator's decision was issued in error because her Nucor drug screen was improperly handled and collection of hair was not done properly. [Notice of Appeal to Appeal Tribunal, ROA 14]. A Hearing was scheduled for July 7, 2010 before Joan Marshall, Administrative Officer. [Notice of Hearing Before Appeal Tribunal, ROA 15].

On July 12, 2010, both Nucor and Claimant presented testimony and evidence to the Administrative Officer at the Hearing in Charleston, South Carolina.¹ [ROA 19 - 84]. On July 19, 2010, the Appeal Tribunal mailed a copy of its decision to Nucor and Claimant. [Decision of Appeal Tribunal, ROA 275-276]. The Appeal Tribunal found that Claimant was aware that testing positive for drugs or alcohol were grounds for immediate termination according to the employer's policy; that although Claimant denied she used marijuana, she tested positive for the substance and admitted being in the presence of individuals who used marijuana. [Id.]. As a result, the Appeal Tribunal held that Claimant was disqualified from receiving benefits upon a finding that Claimant was discharged for illegal drug use under S.C. Code Ann. § 41-35-120(3). [Decision of Appeal Tribunal, ROA 274-275].

¹ The recitation of facts herein is based on the Transcript of Testimony before Joan Marshall, Administrative Hearing Officer. [ROA 19-84].

On July 22, 2010, Claimant appealed the Decision of the Appeal Tribunal to the Appellate Panel on the basis that she does not smoke marijuana and that there were contradictory test results. [Application for Leave To Appeal To Commission, ROA 276]. The Appellate Panel held a Hearing on November 17, 2010 in Columbia, South Carolina. [Notice of Hearing Before Appellate Panel, ROA 278]. After the Hearing, the Appellate Panel issued its Decision, which was mailed on November 19, 2010. [Appellate Panel Decision, ROA 2]. The Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free." As a result, the Appellate Panel held that Claimant was separated under non-disqualifying circumstances, and reversed the Appeal Tribunal's Decision. [Appellate Panel Decision, ROA 1-2].

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review an Administrative Law Court ("ALC") must apply when reviewing an agency's decision:

"The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(A)(6) (2005). *See also, South Carolina Dept. of Corrections v. Mitchell*, 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App., 2008). Moreover, when appealing an agency's decision, the burden rests on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

A governmental body's decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Id.* quoting *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). "The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

ARGUMENT

I. THE APPELLATE PANEL'S REVERSAL OF THE HEARING COMMISSIONER'S DECISION BASED ON AN INAPPLICABLE STATUTORY PROVISION - S.C. ANN. § 41-35-120(4) - WAS ERRONEOUS AS A MATTER OF LAW.

The Appellate Panel held that Claimant was entitled to benefits because Claimant was not terminated as a result of "gross misconduct" pursuant to S.C. Code Ann. § 41-35-120(4). This holding is erroneous as a matter of law because the applicable section

governing ineligibility for benefits due to illegal drug use is S.C. Code Ann. § 41-35-120(3). Section 41-35-120(3) mandates that a Claimant is ineligible for benefits in the event of "discharge for illegal drug use" and provides in pertinent part:

An insured worker is ineligible for benefits for:

(3)(a) Discharge for illegal drug use, and is ineligible for benefits beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

(iv) for purposes of this item, "unlawfully" means without a prescription.

.....

Pursuant to sub-section 41-35-120(3) of the statute, so long as the employer has communicated a policy prohibiting the illegal use of drugs, the violation of which may

result in termination; and the employer administers the drug test in compliance with the three subparts of 3(a)(iii), the Claimant *is ineligible for* benefits. (Emphasis added). The language of Section 41-35-120(3) is not discretionary; it is mandatory. Claimant admitted at the Hearing that Nucor has a Drug and Alcohol Policy; that Nucor communicated this policy to her; and that she was aware that testing positive for illegal drugs was grounds for immediate termination based on the Policy. [ROA 24, 28-29, 42; Exhibit 1, ROA 85-88; Exhibit 3, ROA 97; Claims Adjudicator Decision dated 5/26/2010, ROA 13; Appeal Tribunal Decision, mailed 7/19/10, ROA 1-2]. Thus, the evidentiary record indisputably establishes that Nucor met the requirements of Section 41-35-120(3)(a)(i).

Likewise, the evidence on the record firmly establishes that Nucor complied with the provisions of subsection 41-35-120(3)(a)(iii): Claimant tested positive for marijuana on two separate occasions, with results confirmed positive using the gas chromatography/mass spectrometry method conducted by an SAMHSA-certified laboratory, also certified by the American College of Pathologists. [ROA 27, 62, 69-70; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105]. The hair samples were collected by a licensed health care professional - a certified nurse practitioner certified in hair test collection. [ROA 81; Exhibit 8, ROA 272-273]. Again, these facts are undisputed and establish that Nucor met the requirements of subsections 41-35-120(3)(a)(i) and (iii).

Based on the record, Nucor unquestionably met its burden under the applicable statutory provision -- S.C. Code Ann. § 41-35-120(3). Accordingly, Claimant is

ineligible for benefits as a matter of law under the mandatory and unequivocal language of the statute.

The Appellate Panel's decision, based on an inapplicable subsection dealing with employees terminated for gross misconduct, was clear error. *See*, S.C. Code Ann. § 41-35-120(4). Indeed, the basis for terminating Claimant was violation of Nucor's Drug and Alcohol Policy, not gross misconduct. The Appeal Tribunal applied and relied on § 41-35-120(3) (as required by the Statute) in determining that Claimant was ineligible for benefits because she was terminated for violating Nucor's Drug & Alcohol Policy. Gross Misconduct (S.C. Code Ann. § 41-35-120(4)) was never at issue. [Decision of Appeal Tribunal, ROA 274-275].

However, even assuming *arguendo* that the Appellate Panel somehow had authority to look beyond and ignore the undisputed basis for Claimant's termination (which is expressly denied by Appellant), the Appellate Panel's Decision would still be wrong as a matter of law. The Appellate Panel itself observed in its Order that "Gross Misconduct" includes failure to comply with drug use regulations. [Appellate Panel Decision, ROA 2]. In determining the meaning of the term "misconduct" courts in South Carolina look to the general purpose of the act. *Lee v. South Carolina Employment Sec. Commission*, 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982), citing *Stone Mfg. Company v. S. C. Employment Security Commission, et al.*, 219 S.C. 239, 64 S.E.2d 644 (1951). In *Stone*, the South Carolina Supreme Court held that the term "fault" is not limited to something that is blameworthy, culpable of wrong and that "'fault' must be construed as meaning failure or volition." *Lee*, at 588, 291 S.E.2d at 379, citing *Stone* 219 S.C. at 246-247, 64 S.E.2d 644. The court in *Lee* found that "it was clearly the intent of the

legislature that persons unemployed due to their own fault be penalized in some manner from receiving benefits.” *Id.* The court looked to other cases, which have generally indicated that “misconduct” includes (1) the wanton and willful disregard of the employer’s interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee’s interests, duties or obligations. *Id.* (internal citations omitted). Certainly, violation of a drug control policy would constitute fault and gross misconduct under any interpretation of the law. The general purpose of the unemployment statutes – to grant benefits to eligible and deserving claimants – is served by denying benefits to individuals who not only violate workplace policies, but also violate the law by using illegal drugs.

Further, the majority of states define illegal drug use as willful misconduct in the area of unemployment benefits. *See generally*, 78 ALR4th 180 § 5-7, “*Drugs-Unemployment Compensation.*” (Citing cases). The prevailing case law establishes that where an individual is terminated due to her failure to comply with company substance abuse policies, she is precluded from receiving state unemployment benefits. *Id.* Thus, Claimant would be disqualified from unemployment benefits for gross misconduct based on her positive drug test results, even if Section 41-35-120(4) was the applicable statute.

In sum, it was an error of law for the Appellate Panel to reverse the Appeal Tribunal’s decision disqualifying Claimant from unemployment benefits based on § 41-35-120(4) because another directly applicable section of the statute governs the issue. Regardless, it was error to reverse based on § 41-35-120(4) because Claimant’s illegal

drug would meet the standard of “gross misconduct” under the plain meaning and intent of the statute. Accordingly, the Appellate Panel’s decision should be overturned.

II. THE APPELLATE PANEL’S RELIANCE ON AN INDEPENDENT DRUG TEST NOT PERFORMED ON BEHALF OF THE EMPLOYER, WITHOUT THE REQUIRED EVIDENCE OF RELIABILITY WAS IN ERROR AND IN VIOLATION OF S.C. ANN. § 41-35-120(3).

The legislature specifically enacted Section 41-35-120(3) to govern in instances where a Claimant is discharged for illegal drug use. The Appellate Panel erred as a matter of law by failing to apply the proper statute, as discussed above, and/or in its application of the statute. Indeed, the Appellate Panel failed to abide by the specific requirements of subsection 41-35-120(3) by accepting a phantom, independent drug test as controlling, with no evidence that it comported with the statute, nor even evidence of its existence or results. Just as in its application of a different statute above, the Appellate Panel had no authority to apply additional or different criteria or exceptions to the plain mandates of the statute.

The case of *Milliken & Co. v. SC Emp. Comm’n.*, 315 SC 492, 445 SE2d 640 (1994) (*reversed on other grounds*) is instructive on this point. In *Milliken*, the Commission denied benefits to claimant Gantt under Section 41-35-120(2) finding that acts committed *in the break area* did not qualify as “cause connected with his most recent work.” *Id.* at 496. The S.C. Court of Appeals disagreed and reversed the decision, emphasizing the necessity of deciding cases based on the language of the statute as written by the legislature:

The Commission concluded the alleged disruptive behavior occurred, if at all, in the break area while Gantt was off duty. In our view, the legislature declined to designate the proximity in which the conduct must occur. Instead, the statute only requires the cause of discharge to be connected to Gantt’s employment. The legislature shows no intent to limit where the

“cause” for discharge occurred. We, therefore, disagree with the circuit court’s reading of the Commission’s findings. We find the Commission erred, as a matter of law, in its application of the statute by failing to consider conduct in the break area sufficient to warrant discharge.

Id. at 498, 644.

Similarly here, the legislature did not make an exception to Section 41-35-120(3) with regard to instances where an employee obtains an independent drug test after failing a statutorily-compliant company drug test. Indeed, the legislature did not provide *any* exception under which the Commission can disregard the mandate of Section 41-35-120(3). Rather, the legislature sets forth specific criteria for an employer to satisfy in the case of disqualification for benefits upon discharge for illegal drug use, all of which were satisfied here.

First, Section 41-35-120(3)(a)(iii) specifically requires that the drug test be administered on behalf of the employer:

“(iii) insured worker provides a blood, hair, or urine specimen *during a drug test administered on behalf of the employer*, which tests positive for illegal drugs or legal drugs used unlawfully, ...”

S.C. Code Ann. § 41-35-120(3)(iii) (emphasis added). Thus, Claimant’s alleged independent drug test is not allowed and has no bearing on whether Claimant was eligible for benefits under Section 41-35-120(3).

Additionally, Section 41-35-120(3) enumerates specific criteria that must be satisfied to establish a drug test’s reliability and allow its use as a basis for disqualification for benefits. Nucor’s drug tests indisputably complied with the statute and Claimant clearly failed two drug tests which were confirmed positive in compliance with South Carolina law. The statute requires that the sample be procured by a health care professional; that the drug test be performed by a certified laboratory; and mandates

that the results be confirmed positive using the gas chromatography/mass spectrometry method. The legislature imposed these requirements to ensure consistency, uniformity and reliability of the drug testing systems utilized by employers in South Carolina. There is no dispute that Nucor complied with each of these requirements and Claimant failed both tests. [ROA 19-84; Exhibit 2, ROA 89-96; Exhibit 4, ROA 98-101; Exhibit 5, ROA 102-105; Exhibit 6, ROA 106-135; Exhibit 7, ROA 136-271].

On the other hand, there is absolutely no documentary evidence in the record that would show the criteria utilized in processing Claimant's alleged "independent drug test" or whether such "independent test" complied with any of the statutory requirements for reliability. Indeed, there is no documentary evidence that the absent independent drug test was in fact "negative" or that it even exists. Again, the Appellate Panel applied an exception to Section 41-35-120(3) not intended or allowed by the legislature: that the criteria of Section 41-35-120(3)(a)(iii) do not have to be satisfied by a test administered on behalf of the employer.

Claimant's alleged "independent drug test" is irrelevant because it was not performed *on behalf of the employer*, as required by Section 41-35-120(3)(a)(iii). Thus, the Appellate Panel's reliance on the independent test was outside the mandate of the statute and clearly erroneous as a matter of law. Claimant is therefore ineligible for benefits based on discharge for illegal drug use under Section 41-35-120(3) and the Appellate Panel decision must be overturned.

III. A POSITIVE DRUG TEST RESULT BASED ON A TEST PERFORMED BY THE EMPLOYER IN COMPLIANCE WITH STATE REGULATIONS AND STATUTES PRECLUDES A TERMINATED EMPLOYEE FROM RECEIVING UNEMPLOYMENT BENEFITS AS A MATTER OF LAW UNDER THE CORRECT AND APPLICABLE STATUTE.

Pursuant to the correct and applicable statute - S.C. Code Ann. § 41-35-120(3), Claimant is ineligible for benefits as a matter of law. Section 41-35-120(3) provides that where an employer establishes that it discharged an employee for failing a drug test based on a program implemented to promote safety in the employer's workplace, and which was a condition of employment, the terminated employee is disqualified from receiving unemployment benefits as a matter of law. *See also, Milliken & Co. v. SC Emp. Comm'n., and Lee v. SC Employment Sec. Comm'n., supra. Milliken & Co. v. SC Emp. Comm'n., and Lee v. SC Employment Sec. Comm'n., supra.*

In this case, the testimony at the Appeals Tribunal hearing and the documents offered as evidence conclusively establish that Nucor terminated Claimant for failing a drug test administered to promote the safety of all Nucor employees; that the testing was a condition of Claimant's employment; and that Claimant's test was administered in compliance with the strict requirements of South Carolina law. These facts are undisputed. Further, Claimant executed the Custody Form verifying that the proper chain of custody had been complied with, and her expert confirmed that the test was performed properly. [ROA 42-43, 48-49, 60-61]. At no point did Claimant object to the manner in which the sample was collected, and she admitted that Nucor's nurse was "professional about [collecting the sample]." [ROA 39]. Claimant could not fault the manner in which the sample was collected or the chain of custody followed. [ROA 57].

Despite this overwhelming and undisputed evidence establishing that Nucor complied with the requirements of Section 41-35-120(3), the Appellate Panel accepted Claimant's appeal based on "contradictory results." This was clear error. There were no "contradictory results" in the record, nor would there be if Claimant actually produced

her supposed “negative test” results. Rather, the alleged “contradictory results” argument is a red herring that Claimant uses as a last resort to obtain benefits that she is disqualified from receiving. There is no dispute that Nucor’s second drug test, performed at the request of Claimant, was administered as a “level of detection” test [ROA 30, 30; Exhibit 5, ROA 105; Exhibit 7, ROA 136], while Claimant’s alleged independent “negative” test was administered under a different criterion. [ROA 30, 63-64]. The reason for using “level of detection” cut-offs for second tests is to detect trace amounts of illegal drugs that may otherwise escape detection because of the passage of time between tests. Claimant’s alleged test would not detect trace amounts and thus is not comparable, nor “contradictory”, to Nucor’s second test. Had Claimant’s independent test been performed using the same criteria, there likely would not have been a different or “contradictory” result. It would have shown the presence of marijuana found in the two previous and admittedly valid tests. And since there is no evidence regarding when it was taken, how it was taken, or whether it was taken at all, it is wholly unreliable. Nucor established an uninterrupted chain of custody, and Claimant verified same. [ROA 43-44, 48-49, 57, 60-62; Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137]. Thus, there were no “contradictory results” and Claimant was properly terminated for violating Nucor’s Drug and Alcohol policy, and she is disqualified from unemployment benefits under the correct and applicable statute.

Other jurisdictions have rejected similar arguments and attempts to avoid positive drug test results that led to disqualification for unemployment benefits. For example, in *Curtis v. Mississippi Employment Sec. Com’n*, 878 So. 2d 1094 (Miss. Ct. App. 2004), a claimant’s positive test for marijuana following a random drug test was found to

constitute misconduct disqualifying him from receipt of unemployment benefits. The court found that nothing in the record suggested that claimant was singled out or treated differently from any other employees, and nothing in the record supported claimant's assertion that he was "set up" or that his urine was switched. *Id.* Similarly, in *Stewart v. Duke Mfg. Co.*, 292 S.W.3d 495 (Mo. Ct. App. E.D. 2009), an unemployment compensation claimant was disqualified from receiving benefits after being discharged after testing positive for cocaine. The claimant had previously been notified of employer's alcohol and controlled substances policy, and the claimant's test sample was collected and tested in accordance with Department of Transportation (DOT) procedures. *Id.* Likewise, in *Farm Fresh Dairy, Inc. v Blackburn*, 841 P.2d 1150, (Okla. 1992), the employer fired an employee for failing a drug test that was part of program to promote safety in employer's workplace, and which was an agreed to condition of employment. There, the court held that the employee was disqualified from receiving unemployment benefits and observed that under such circumstances, the Employment Security Commission may not require employer to make a further showing, such as impairment or strange conduct on job. *Id.*

Additionally, in *Overstreet v. Dept. of Employment Sec.*, 168 Ill. App. 3d 24, 27, 522 N.E.2d 185, 187 (1988), the court held that a police officer was ineligible for unemployment benefits after being terminated following a positive drug test result. The court considered the police officer's abuse of cocaine "willful misconduct" under the applicable state unemployment statute. *Id.* The court in *McNabb v. Department of Revenue*, 2005 WL 1604923, 3 (Or. Tax Magistrate Div., 2005), also reached the same result and held that violation of the employer's drug policy disqualified the employee

from unemployment benefits. In *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990), the Court of Appeals of Arkansas held that Grace's former employee's failure to pass a drug test, without more, was a willful violation of Grace's rules, and disqualified the former employee from unemployment benefits. The Grace Drilling court observed: "Such a result is particularly appropriate where, as here, passing such a test was an agreed condition of employment." *Id.*

The authority from this and other jurisdictions makes it clear that employees who fail properly administered company drug tests rarely, if ever, qualify for unemployment benefits. If an employer's drug testing policy and procedure complies with the guidelines and statutes provided by the state, ineligibility is all but presumed in a case of a failed test. The authority establishes that the burden of rebutting that presumption is significant and rarely met. Here, it certainly was not met with Claimant's undocumented, unreliable test and an unsupported claim of "contradictory results". Accordingly, the Appellate Panel's decision, which ignores the clear dictates of Section 41-35-120(3), contradicts the overwhelming authority of this and other jurisdictions, and is against the weight of the undisputed evidence in the record, was error requiring reversal.

IV. THE APPELLATE PANEL'S DECISION TO REINSTATE CLAIMANT'S UNEMPLOYMENT BENEFITS WAS CLEARLY ERRONEOUS IN VIEW OF THE TESTIMONY, EVIDENCE AND RECORD AS A WHOLE AND IS AGAINST PUBLIC POLICY.

The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site, unreliable, independent drug test where there was undisputed documentary evidence that Claimant had failed two drug tests administered on behalf of Nucor, in full compliance with South Carolina law and Nucor's drug testing policy. Indeed, the

Appellate Panel's application of an irrelevant statute and creation of an exception to the correct and applicable statute were clear errors of law. Further, blind acceptance of Claimant's unsupported theory of "contradictory results" went against the great weight of evidence in the record and was also error.

In addition to being procedurally and legally incorrect, the Appellate Panel's decision violates public policy. Indeed, the decision significantly constrains employers' ability to enforce drug-free workplace policies and renders Section 41-35-120(3) a nullity. The Appellate Panel's Decision arguably requires every employer in South Carolina to accept and consider outside drug test results proffered by employees who fail company drug tests, without regard to validity, accuracy, reliability or legitimacy, even if the outside test directly contradicts their own tests administered according the rules set forth by statute. Further, the decision suggests that a discharged employee *need not even produce the independent drug test nor prove its results, much less its compliance with statutory testing requirements.* Rather, an employer's overwhelming evidence establishing a test's accuracy, validity and compliance with statutory requirements can be overcome with a simple plea of "I didn't do it." In sum, the Appellate Panel's decision basically and unjustifiably eviscerates Nucor's and every other South Carolina employers' drug control policies that are in full compliance with the law.

Further, the mandates of Section 41-35-120(3) are rendered impotent if a claimant is able to side-step them with an independent test. The requirements of Section 41-35-120(3) are designed to promote uniformity and reliability in drug testing standards, and provide specific guidelines for employers to follow. It is clear that the legislature had the bigger picture in mind when enacting Section 41-35-120(3). Indeed, the legislature also

intended to give teeth to an overriding policy promoting safety and drug-free workplaces by unequivocally denying benefits to those who test positive for illegal drugs at work. It is doubtful that the legislature envisioned that the policy could be circumvented by an outside, independent drug test with no indicia of reliability. Outside, independent drug tests are completely out of an employer's control, and there is no way to verify whether results are obtained by an employee through valid means. Likewise, independent drug tests, accepted in lieu of valid workplace tests, allow for the very real possibility that an employee can work under the influence of illegal drugs without recourse. In short, they fly in the face of what the legislature intended by enacting Section 41-35-120(3).

In this case, Claimant's expert toxicologist testified that the procedure followed by Nucor's nurse was proper and correct, [ROA 61-62] and that he did not doubt that Omega had tested the hair sample using the GC/MS/MS process, and that such testing was typically accurate. [ROA 62]. Based on Claimant's expert witness' testimony, it is also clear that the independent test did not conform to the criterion utilized by Nucor in instances where an employee who has already had a confirmed positive drug test, and requests a second test to prove that she is drug free. [ROA 62-63]. Similarly, Claimant admitted under oath that the chain of custody was strictly adhered to. [ROA 43-44, 48-49, 57, Exhibit 4, ROA 99; Exhibit 5, ROA 103; Exhibit 6, ROA 111; Exhibit 7, ROA 137].

The Appellate Panel erred in disregarding this evidence undisputed and compelling evidence. Therefore, the Appellate Panel erred in reversing the Appeal Tribunal and public policy demands that the Appellate Panel's decision be overturned.

CONCLUSION

Nucor complied with employment laws of this State and terminated Claimant for cause, and Claimant is disqualified from unemployment benefits as a matter of law. The Appellate Panel's Decision is not supported by the facts or evidence, and is contrary to the mandate of S.C. Code Ann. § 41-35-120(3) and public policy, and should be overturned pursuant to subsections (a), (c) – (e) of S.C. Code Ann. § 1-23-380(A)(6).

Respectfully submitted,



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ATTORNEYS FOR NUCOR CORPORATION

February 17, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nucor Corporation,

Appellant,

vs.

South Carolina Department of Employment
and Work Force and Kim A. Legette,

Respondents.

Docket Number: 10-ALJ-22-0938-AP

I hereby certify that on February 17, 2011, a copy of the *Initial Brief of Nucor Corporation* has been served upon the following parties via overnight delivery, in the United States Mail, postage prepaid, to:

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FILED

FEB 17 2011

SC ADMIN. LAW COURT

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December 14, 2010

Ms. Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Petition for Judicial Review
In the Matter of Kim A. Legette v. Nucor Corporation and S.C. Department of
Employment and Workforce
Order of Appellate Panel Decision, dated November 19, 2010
Decision No. 2010-C-2253
Appeal No. 10377-11778
Our Client – Nucor Corporation

Dear Ms. Shealy:

Please accept this letter as a **Petition for Judicial Review** pursuant to S.C. Code Ann. § 41-35-750 and Rule 33 of the Rules of Procedure for the Administrative Law Court, and our check for filing fee in the amount of \$100.00. Consequently, on behalf of our client, Nucor Corporation, we hereby request an administrative review of the above-identified Appellate Panel Decision. We have enclosed a copy of the questioned decision for your convenience, and copies of our Hearing Transcript Request and Certificate of Service. A copy of the decision was mailed on November 19, 2010 and received by Nucor Corporation ("Nucor") on November 22, 2010, which is, of course, less than 30 days prior to date of the Petition for Judicial Review. Nucor Corporation's Human Resources contact and representative is Ms. Meleah B. Reynolds, at P.O. Box 2259, Mount Pleasant, SC, 29465; telephone number: (843) 336-6668. The undersigned is attorney for Nucor Corporation and can be contacted using the above information.

On November 17, 2010, the Appellate Panel reversed the Appeal Tribunal's decision, and determined that the Claimant, Ms. Kim A. Legette ("Claimant") was eligible for benefits effective April 18, 2010, for having been separated under non-disqualifying circumstances. For the reasons set forth in detail below, it is evident that the Appellate Panel's Decision is erroneous

TPGL 3559438v1

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Ms. Jana E. Shealy
December 14, 2010
Page 2

and unsupported by the facts and the law, and has potential far-reaching consequences for substantially all South Carolina employers.

Nucor's steel manufacturing plant is a heavy industrial facility that employs approximately 900 hundred employees. In order to create as safe a work environment as possible, Nucor implemented a zero tolerance policy with regard to illegal drug and substance use. Pursuant to its Drug & Alcohol Policy, Nucor regularly conducts random drug tests weekly on all employees, including the Plant Manager. The disciplinary action for violation of the policy concerning illegal drugs is set forth in Nucor's Policy E-3-6, which provides: "Employees who violate this Policy regarding illegal drugs will be immediately terminated." At the beginning of the employment relationship, each employee is provided with an Employee Handbook that contains Nucor's Drug & Alcohol Policy. Claimant was provided with a copy of the Employee Handbook, and she acknowledged receipt of the Handbook in writing. Claimant was at all relevant times, aware of the Drug & Alcohol Policy, and had been subject to random drug tests at Nucor on previous occasions.

In compliance with its Drug & Alcohol Policy and the South Carolina Workforce/Employment Rules and Regulations, Nucor partnered with AccuDiagnostics, a national provider of diagnostic testing, to process its employees' drug test samples. AccuDiagnostics is SAMHSA-certified and reports results which have been confirmed positive using the gas chromatography/mass spectrometry (GC/MS) or gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) process. Accudiagnosics randomly selects 15 employees each week from the Nucor Master list and provides this short list to the Safety Office. The Safety office then notifies those selected for testing, and provides them with 24 hours to report to the Safety Office for testing.

On April 6, 2010, Claimant was tested for drugs randomly pursuant to Nucor's periodic random drug testing policy. Hair samples were collected at the plant from the 15 employees that had been selected for testing that week. Claimant's samples were taken by a certified Nurse Practitioner employed by Nucor, and the samples were sent to Accudiagnosics' testing laboratory in Mogadore, Ohio. Further, Claimant completed Step 5 of the Drug Testing Custody and Control Form, certifying that she provided her specimen to the collector; that "the specimen used was sealed with a tamper evident seal in my presence;" and that the information provided on the form and affixed to the Specimen Hair Pouch was correct. That hair sample taken from Claimant tested positive for 1.25 picograms per milligram of marijuana.

Once an employee tests positive for drugs, that employee meets with the Plant Manager to discuss and determine whether the employee prefers to resign voluntarily in lieu of termination. However, if during that meeting with the Plant Manager, the employee is adamant

TPGL 3559438v1

Ms. Jana E. Shealy
December 14, 2010
Page 3

that they did not use any illegal drugs or substances, the Plant Manager offers them the opportunity to undergo a second drug test. The Plant Manager also explains that if an employee opts to undergo a second test, that second test will not be subject to a "limit of detection" minimum cut-off amount, but that the results will be based on any detectable amount above .10 picograms per milligram of marijuana. In other words, any amount of marijuana that is above .10 picograms per milligram of marijuana would be a positive result. Claimant opted to undergo a second test on April 15, 2010, and the results of that second test were .78 picograms per milligram of marijuana. Because the results were above .10 picograms per milligram of marijuana, the second test was also positive for marijuana, and thus, basis for immediately terminating Claimant for cause pursuant to Nucor's Drug & Alcohol Policy.

However, prior to her termination, on April 15, 2010, after testing positive for marijuana twice at Nucor, through a system that she verified herself as having followed the chain of command, Claimant, later the same day, sought an additional independent drug test outside Nucor, which allegedly came back negative for drugs. Based on this independent negative test result, the Appellate Panel determined that the disparate testing results were of concern, and found that "while an employer may not accept an off-site drug test, we cannot ignore a drug test result taken the same day as the employer's exam, processed by the same laboratory, indicating the claimant was drug free."

Even assuming for purposes of argument that Claimant did indeed obtain a negative drug test result outside the Nucor facility, there is no question that Claimant was tested at Nucor, according to its drug testing policies and procedures, in compliance with South Carolina laws, and was positive for marijuana on two separate occasions. Nucor, like any employer, is entitled to rely upon drug tests conducted by an outside, certified laboratory for the safety of all employees. The Appellate Panel's Decision is premised on two faulty assumptions: (1) That the independent test that Claimant sought was administered using the same administrative minimum requirement for detecting any amount above .10 picograms per milligram of marijuana; and (2) Nucor should have somehow ignored the two positive drug test results in favor of Claimant's independent test results obtained outside of Nucor, and under unknown conditions. Both assumptions have no legal support, are contrary to South Carolina law and Nucor's policies and procedures, and would significantly jeopardize the health and safety of hundreds of employees at its facility.

Pursuant to S.C. Code Ann. § 41-35-120, an employee is disqualified for benefits if she is terminated for cause as follows:

Disqualification for benefits.

TPGL 3559438v1

Ms. Jana E. Shealy
December 14, 2010
Page 4

(2) Discharge for cause connected with the employment.

(b) An insured worker is considered to have been discharged for cause pursuant to this item, and is ineligible for benefits if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division; and

(C) any initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or more accurate scientifically accepted methods approved by the National Institute on Drug Abuse

See, S.C. Code Ann. § 41-35-120

Both of the drug tests leading to Claimant's termination were conducted by an outside laboratory, and in compliance with S.C. Code Ann. § 41-35-120. The samples were obtained by a Certified Nurse Practitioner. Both Claimant and the Nurse Practitioner acknowledged in writing that the chain of custody had been complied with. The samples were tested by a national laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division, and were confirmed positive in compliance with S.C. Code Ann. § 41-35-120(2).

TPGL 3559438v1

TURNER PADGET

Ms. Jana E. Shealy
December 14, 2010
Page 5

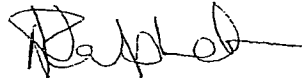
The Appellate Panel had no authority to reinstate Claimant's benefits based on an off-site independent drug test where there was evidence that Claimant had failed two drug tests administered in compliance with South Carolina law and with Nucor's drug policy. Further, the Appellate Panel's Decision is of great importance and warrants Judicial Review because of its far reaching consequences on South Carolina employers. Based on the Appellate Panel's Decision, arguably, virtually every employer in South Carolina will be required to accept outside drug test results proffered by disgruntled employees and will owe them unemployment benefits in spite of their violation of the employer's drug and alcohol policies. Outside drug tests are completely out of an employer's control, and there is no way to verify whether the alleged negative results were obtained by an employee through valid means. The Appellate Panel's Decision must therefore be struck down to ensure that every employer's legal right to enforce drug and alcohol policies designed for the protection of its employees is preserved.

As a result, we submit this Petition for Judicial Review on the grounds that Claimant was terminated for cause after failing two drug tests administered by an independent laboratory at the Nucor facility. The Appellate Panel's decision basically and unjustifiably eviscerates Nucor's drug policies, which Claimant was aware of while she was an employee, and instead, imposes an obligation on Nucor to accept off-site independent drug results, without justification or legal authority.

The evidence presented to the Appellate Panel indisputably establishes that Nucor Corporation complied with employment laws of this State and terminated Claimant for cause. As noted by the Appellate Panel, there is no requirement that Nucor Corporation accept off-site independently administered drug tests, and the Appellate Panel's Decision is not supported by the law and the evidence.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



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NR/kmm
Enclosures

cc: Ms. Kim A. Legette
Legal Department – S.C. Department of Employment and Workforce
Mr. Cary Farris

TPGL 3559438v1