STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

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APR 04 2013
SC Court of Appeals

Appellate Case No.: 2012-206406

Nucor Corporation, ... Appellant,

v.

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

FINAL REPLY TO RESPONDENTS' RETURN TO NUCOR CORPORATION'S APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SUMMARY OF ARGUMENT

This case is about a terminated employee attempting to obtain unemployment benefits after failing her former employer's drug test administered by an internationally accredited/certified laboratory.[1] There is no dispute that Omega Laboratories, the subject laboratory in this dispute, had at least three nationally recognized certifications specific to drug testing of hair specimens at the time of the subject test, including (1) an HHS-CLIA certificate [2] (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. (R.p. 661; pp. 662-663; pp. 666-667). Furthermore, the Food and 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

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[1] Nucor believes that it is important to reiterate and address Respondents' assertion that Nucor has/is misrepresenting the certification status of the laboratory at the time of the subject drug tests. To be clear, Nucor has not made any misrepresentations regarding certification. *See*, Footnote 1 of Nucor's Initial Brief (p. 12), explaining the arguments and decisions of the multiple tribunals pertaining to the certification issue.

[2] The Centers for Medicare & Medicaid Services (CMS) is charged with the implementation of CLIA, including laboratory registration. 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 the United States Department of Health and Human Services ("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. 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.

and accepted world-wide." *See*, Submission Of Laboratory Packages By Accredited Laboratories - www.fda.gov › Regulatory Information › Guidances (last visited 11/28/2011). (R.p. 200). Thus, the laboratory used by Nucor is nationally and internationally certified, and certainly, competent to prove Legette's violation of Nucor's Drug and Alcohol Policies.

It is clear that the intent of South Carolina Code Ann. § 41-35-120 ("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. Respondents argue that "If examined under § 41-35-120(2) and (4), the employer's tests are inadmissible because the tests were performed by an uncertified laboratory."[3] However, *there is nothing in the Statute that says Section 120(3)(a)(iii)(B) is a rule of evidence exclusion or the only way to establish the bona fides of a testing facility.* A certified laboratory's tests automatically meet the requirements of reliability because the Statute says so, but it is not the only way to establish the reliability of the test. If the employer can establish that the laboratory followed the correct protocols and processes needed for certification, then why would the results not be admitted? 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.

[3] Initial Brief of Respondents, at p. 31.

Likewise, testimony at all the evidentiary hearings established reliability of the employer's laboratory results, notwithstanding certification issues, including that the laboratory conducted the tests in the same manner as a certified laboratory would have done. (R.p. p. 481, lines 15-22; p.487, lines 15-24; p. 630, line 11-p. 632, line 3; p. 633, lines 9-16; p. 640, line 1-p. 646, line 12). Similarly, the only evidence supporting the alleged "contradictory" results is Legette's independent test, which was administered under an incorrect detection level. (R. pp. 323-324; p. 406, lines 10-22; p. 607, lines 1-21; p. 634, line 14-p. 635, line 4). And even assuming for arguments sake Legette's "contradictory" results would be acceptable as competent evidence, these results would only create an inference of unreliability if the detection levels were the same or lower than the limit of detection criterion utilized by Nucor. However, it is undisputed that they were not, (R.p. 634, line 14- p. 635, line 4; pp. 547-549 and p. 562 *cf.* pp. 323-324; p. 435, lines 9-17; p. 563) and therefore, are not probative of anything except that the passage of time reduced the number at which the THC/marijuana was detected because the evidence degraded over time.

In addition, Nucor has exhausted its administrative remedies, and properly preserved the issues on appeal. (R.p. 181-182; p. 287-288; pp. 366-370; p. 852; pp. 853-856). To assert otherwise is not only an insupportable deviation from the rule of law, but such a position eviscerates Nucor's due process rights because Nucor has consistently challenged the reliance on the outside independent test administered under different detection standards, and has requested that the appellate bodies properly interpret and apply Sections (2), (3)(c), and (4) to this dispute. (R.pp. 41-52; pp. 181-182; pp. 287-288; pp. 366-370; pp. 853-856; p. 858).

I. THE ALC JUDGE'S ORDER MUST BE REVERSED BECAUSE IT IS ERRONEOUS AS A MATTER OF LAW

A. The ALC's Reliance on the outside Independent Test Administered under Different Detection Standards Was Erroneous as a Matter of Law.

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 (R.p. 16), 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. (R.pp. 21-22). However, as asserted by Nucor consistently throughout the life of this case, 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, as basis for reinstating Legette's unemployment benefits. (R.pp. 41-52; pp. 181-182; pp. 337-338; pp. 355-357; pp. 361-363; pp. 366-370). 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.

Respondents assertion that the "independent laboratory [used by Legette] sent samples to Omega with the same cut-off criteria as Nucor used" is incorrect and contradicted by the testimony of Legette's expert. *See*, Initial Brief of Respondents, p. 10. As set forth in Nucor's Initial Brief at pp. 20-21, the record shows clearly that while

Nucor's second drug test, performed at the request of Claimant, was administered as a "level of detection" test (R. pp. 563-564; p. 607, lines 1-16; p. 674; p. 676; p. 702; pp. 712), Legette's independent "negative" test was administered under a different standard (R. p. 562; p. 634, line 14-p. 635, line 4;). More pertinently, both Legette and her expert conceded that the second drug test administered on behalf of Nucor at Legette's request was administered as a "level of detection" test (R.p. 601, line 14-p. 602 line 3; p. 634, line 14-p. 635, line 4; pp. 323-324), while Legette's independent and allegedly "negative" test was administered under a different criterion. (R. p. 306; pp. 323-324; p. 601, line 14-p. 602 line 3). In addition, when questioned directly as to whether the independent test performed outside Nucor's facility by Dr. Bennett was conducted at the same stringent limit of detection level as that utilized by Nucor on April 15, 2012, Legette testified she was not sure what standard Dr. Bennett applied. (R.p. 306; 488, lines 11-14).

Moreover, as set forth in greater detail below and in Nucor's Initial Brief, use of a noncertified laboratory only forecloses the employer from a conclusive presumption that such tests will receive primacy over any other test results. In other words, by using a certified laboratory, the results will automatically be accepted without analyzing and determining whether the laboratory procedure meets the standards of a certified laboratory. On the other and, if the laboratory is not certified, then the employer has to establish reliability and conformity with the statutory requirements. The evidentiary hearings, including testimony establish that Nucor's test results are in conformity with the Statute's requirements. (R.p. 409, line 5- p. 411, line 20; p. 418, lines 10- 23; p. 437, lines 1-17; p. 439, lines 9-10; p. 481, lines 15-22; p. 598, line 17-p. 599, line 13; p. 607, line 7-p. 610, line 12; p. 618, line 1-p. 620, line 3; p. 630, line 15-p. 633, line 21; p. 640, line 13-p. 644, line 8; p. 646, lines 6-9; pp. 673-676; pp. 701-763;). Thus, the only issue

is whether it is permissible to rely on "contradictory" test results from the same laboratory when it is undisputed that the two tests utilized different detection levels and the employer's results were are a lower detection level that was appropriate to use. In that regard, the ALC's decision is not based upon the "substantial evidence on the whole record" and must be reversed.

The only tests at issue are the tests performed in April 2010. Respondents' persistent dredging of the February and March drug test results defies logic at best, particularly in light of Legette's own concession that she was terminated solely on the basis of her failure of the drug tests administered on April 6, 2010 and April 15, 2010,[4] and that she cannot point to anything that was done incorrectly with regard to the collection and processing of her hair specimen, and that she simply assumes there was a mistake because she does not use drugs. (Initial Brief of Respondents, pp. 7-9; R.p. 481, lines 18-24; p. 619, line 1-p. 620, line 3). Further, Legette readily concedes that the hair sample at issue in the April 2010 tests matched her hair color at the time the sample was taken. (R.p. 480, line 16-p. 481, line 2). Nucor has never referenced or relied on the February and March, 2010 test results with regard to Legette's termination. (R.p. 376, lines 11-15; p. 396, lines 12-14; p. 430, lines 3-10; p. 481, lines 12-17; p. 594, lines 16-24; p. 604, lines 1-3; p. 605, lines 12-19; pp. 544-545). Thus, there is no dispute that only the April 6, 2010 and April 15, 2010 drug tests are implicated in this dispute. There is no rational basis for even raising the February and March 2010 drug tests which were not relied upon by Nucor in terminating Legette's employment.

[4] R.p. 323; p. 330; p. 396, lines 10-11; p. 481, lines 4-17; p. 582; p. 594 lines 17-24; p. 604, lines 1-3; p. 605, lines 12-19; Initial Brief of Respondents, pp. 2, 9-11.

B. Nucor Has Consistently Asserted That Termination Was Proper Under Sections (2), (3) and (4) of the Statute, And Respondents Arguments To The Contrary Are Not Supported By the Record.

Respondents' position that Nucor only relied on Section 3 of the Statute as basis for terminating Legette's employment has no record support. The record is replete with briefing by Nucor regarding the propriety of termination under either of the applicable Sections (2), (3) or (4). (R.p. 44-47; pp. 50-51; 77-83; pp. 85-87; pp. 123-126; pp. 156-158; 162-164; pp. 181-182; p. 313; 315-317; pp. 853-856).

Furthermore, the ALC's order specifically relies on, and incorporates the independent test that was the basis of the Agency's "contradictory test results" finding as 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. Stated differently, Nucor argued that termination was proper under all three Sections, but the ALC judge ruled that Nucor's arguments as to Sections (2) and (4) were without merit. (R.p. 16). Thus, Respondents' argument that Nucor has only relied on Section (3) of the Statute as basis for terminating Legette has no merit.

C. Appellate Review Will Not Result in Inconsistent Decisions Because the Appellate Panel's Order Does Not Dispose Of The Issues On Appeal.

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 the specific language of S.C. Code Ann. § 41-35-120 (3)(a)(iii)(B).

However, framing the issue as moot/disposed of by operation of the Appellate Panel's decision 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 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.

Respondents' argument that Section (3)(a) is the *only* provision that can be used to disqualify an employee has no legal support and has far reaching consequences that would actually jeopardize the safety of employees in the state. To adopt Respondents position would mean that even employees that either confess to using illegal drugs while at work, or employees that are caught using illegal drugs at work would 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. 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.

Respondents additionally assert that under the Statute, the *only* way an employer can establish an employee's violation of the prohibition against use of illegal drugs in the workplace is by using *only* a laboratory certified as set forth in the Statute with absolutely *no* deviation from the language of the Statute. Interestingly, however, even the Agency candidly concedes that because NIDA no longer exists, the Agency now accepts results from SAMHSA. (R.p.16; p. 331; Initial Brief of Respondents Brief, pp. 8, 12, 27-28, 32). But, the plain language of the Statute does not provide that a laboratory must be certified by SAMHSA, and the Agency's acceptance of SAMHSA as a successor certifying body shows that what is intended by legislature is accreditation by a nationally recognized certifying body. Clearly then, certification as set forth under Section (3)(a)(iii)(B) simply provides primacy and a presumption of reliability to drug test results from those certified laboratories. In that regard, if the laboratory is certified as set forth under Section (3)(a)(iii)(B), then there is no inquiry about the reliability, methodology and accreditation of the testing laboratory. However, if the laboratory is not so certified, then the employer has to establish that the test results are reliable, which Nucor has done in this case, as conceded by Legette's own expert. (R.p. 630, line 7-p. 633, line 21). Framed another way, the overriding objective and intent of legislature, and the spirit of the Statute is that an employer should, and is allowed to terminate an employee for illegal drug use as long the employer can prove that the statutory standards were properly applied and that the laboratory results would be the same regardless of certification. An employee cannot inject disparate result at different detection level to suggest the initial tests are not accurate. Moreover, Legette's reliance *on the same laboratory* waives any

objection and/or estops her from asserting that Nucor's results should be disregarded for failure to strictly comply with the language of Section (3)(a)(iii)(B) regarding certification of the laboratory. Legette's position that her own test results should be honored while Nucor's test results, performed at the same laboratory, should be disregarded is disingenuous. Legette's position shows she concedes the integrity and reliability of the laboratory testing methods and results when she finds such results favorable. Legette's support of the laboratory at issue cannot properly be disregarded because of an unfavorable test result.

The Appellate Panel *did not* conclude that Section (3)(a) is the *only* provision that can be used to disqualify an employee. (R.pp. 4-7). As a result, this Court's ruling on the issues on appeal issue would not produce inconsistent results. Rather, appellate review is warranted to provide clear guidance as to whether a disgruntled terminated employee can obtain and rely on an independent test administered under different detection standards to challenge an employer's random worksite drug tests. Appellate review is also necessary to provide a uniform and consistent application of the Statute, including whether termination based upon drug use is provable *only* through use of a laboratory certified as set forth under Section 41-35-120(3)(a)(iii)(B), to the exclusion of Sections (2), (3)(c) and (4).

II. THE ORDER ON APPEAL IS FINAL AND RIPE FOR APPELLATE REVIEW

The finality of the order on appeal is not an issue that is subject to legitimate dispute. Although Respondents have now yet again changed courses, and are asserting in their Response Brief that there is no final order that can be appealed, it is clear that this position is contrary to Respondents' prior concessions that the ALC's May 2011 Order

and the Appellate Panel's December 9, 2011 are final with respect to the issues raised and ruled on. There is nothing left to be done in this case except to enforce by execution what has been determined with finality. 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.

The ALC has repeatedly and categorically informed the parties that its May 24, 2011 Order is final and disposes of *all* the issues raised by Nucor. (R.p. 852; p. 858). (emphasis added). Similarly, Respondents fail to identify a single claim, issue or fact that has yet to be resolved with finality. Thus, Respondents' position has no merit and is advanced purely for purposes of avoiding having to address the merits of Nucor's issues on appeal. Of note in this regard is that when this Court initially raised the appealability issue in January 2012, Respondents asserted that the entire controversy had been disposed of by application of both the ALC's May 24, 2011 Order and the December 9, 2011 Appellate Panel Decision (R.p. 92-93; pp. 103). Thus, there is no genuine dispute that the ALC's order 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).

South Carolina law likewise, provides clear guidance with regard to what constitutes a non-final order/judgment. Under established precedent, 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." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't. of Health and Envtl. Control,* 387 S.C. 265, 266, 692, S.E. 2d 894 (2010). 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. In this case, not only has the issue on remand been resolved, but the ALC judge has repeatedly informed the parties that her Order is final and she no longer has jurisdiction over the case. (R.p. 18; p. 852; p. 858).

If the Court dismisses Nucor's appeal, the practical result is a catch-22 situation 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. (R.p. 852). Not only would such a dismissal be contrary to Nucor's substantial rights, but it would also be contrary to the holding in *Charlotte-Mecklenburg* order with regard to what constitutes a final order for purposes of appealing as of right. 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.

Respondents' reliance on this Court's March 23, 2012 Order dismissing Nucor's appeal is misplaced and has no basis in law or fact because there remain no issues to be resolved by the lower courts. It is undisputed that 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. (R.p. 287).[5] 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

[5] Nucor has timely appealed this decision three times. The Respondents' insistence that this decision was not appealed is puzzling and without merit.

explained the history of the case, including how the applicable orders were final under South Carolina law. (R.pp. 24-31; pp. 41-51; pp. 76-87; pp. 113-127; pp. 181-182). The ALC 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. (R.p. 852).

Thus, dismissal of Nucor's appeal would contravene South Carolina law and deny 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.

III. THE ISSUES ON APPEAL WERE RAISED AND RULED ON BY THE ALC, AND ARE THEREFORE PROPERLY PRESERVED FOR THE PRESENT APPEAL

In determining whether an issue is properly before the Appellate Court, the standard is whether such issue was raised and ruled on by the ALC. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207-208 (S.C. 2011); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 19 (S.C. 2010) ("However, it was incumbent upon Hill to show that he had clearly raised the issue to the ALJ and asked for a specific ruling in that regard in order to preserve the issue for review by the circuit court.") citing *Home Med. Sys. v. S.C. Dep't of Revenue,* 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009) (observing issue preservation is required in administrative appeals and a circuit court sitting in an appellate capacity may not consider issues not raised to and ruled upon by the ALC). Here, there is no question that the issues on appeal were raised multiple times by Nucor, and have been ruled on with finality by the ALC. Nucor has consistently and primarily argued that S.C. Code Ann. § 41-35-120 does not permit or otherwise authorize the Agency or the ALC to accept or rely on an employee's off-site independent drug test

administered using different, less sensitive detection levels, and which the employee knew would not be accepted by the employer, as basis for reinstating such employee's unemployment benefits. (R.pp. 41-52; pp. 181-182; pp. 337-338; pp. 355-357; pp. 361-363; pp. 366-370). Nucor has also consistently argued that that an employee's use of illegal drugs at the employer's steel manufacturing plant is basis to terminate the employee for cause or gross misconduct under Sections (2) and (4) of the Statute, thereby disqualifying the employee from receiving unemployment benefits. Upon review of these issues on appeal, the ALC judge incorrectly ruled that Nucor's arguments were without merit and not supported by the evidence. [Id]. Because these issues were raised and ruled on by the ALC, they are properly preserved for appellate review. The single and narrow issue relating to certification of the laboratory as specified under Section 41-35-120 (3)(a)(iii)(B), which was decided on December 11, 2011 *is not* on appeal, and thus Respondents continued reference to that decision is just a red herring that is intended to distract the Court from the actual issues on appeal.

In addition, the legal issues on appeal fall squarely into the category of issues that are "capable of repetition yet constantly evading review." *Sloan v. Department of Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). *See also*, *Turner v. Rogers*, 131 S.Ct. 2507, 2515, 180 L. Ed. 2d 452 (2011). Moreover, a decision on the merits of this case will have a significant impact on private sector employers in South Carolina regarding whether an employee can rely on outside independent drug tests not performed on behalf of the employer, to challenge an employer's onsite random drug test, and the subsequent termination and disqualification from unemployment benefits. *Sloan v. DOT*, 379 S.C. 160, 169 (S.C. 2008).

The quagmire created by the Appellate Panel and the ALC's reliance on an 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. Nucor has a substantial and legal right to have the issues that have always been the backbone of its appeal resolved; namely whether the Agency has authority to reinstate unemployment 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. Nucor additionally is entitled to a legal resolution of the issues on appeal, namely analysis and interpretation of Sections (2), (3) and (4) of the Statute to the facts of this case, including whether each Section is mutually exclusive.

IV. NUCOR HAS EXHAUSTED ITS ADMINISTARTIVE REMEDIES

Nucor has exhausted its administrative remedies, including appealing the 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 S.C. Code Ann. § 1-23-380 and 610. As our Supreme Court observed in *Charlotte-Mecklenburg*,[6] "[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.

Nucor initially filed a Petition for Judicial Review on December 14, 2010 on the basis that the Appellate Panel's reliance on the outside independent test as basis for

[6] 387 S.C. 265, 692 S.E.2d 894 (2010).

reinstating Legette's benefits was erroneous as a matter of law and contrary to the mandate of the Statute. 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." (R.p. 16). The order remanded to the 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)(B) which deals with certification of the testing laboratories. [Id.] 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.*" (R.p. 858). (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 S.C. 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. (R.p. 32). 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). [Id.] 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. § 41-35-120(3). (R.pp. 4-7). Neither party appealed this decision.

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. (R.pp. 181-182). 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 that the applicable orders were final. (R.p. 92-93; pp. 103). 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." (R.pp. 2-3).

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. (R.pp. 853-856). The ALC judge responded stating that since the issue on remand had been 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. (R.p. 852).

Nucor is not, and has not, sought review of the Appellate Panel's decision of December 9, 2011 regarding certification of the laboratory. Nucor's issues on appeal arise out of the May 24, 2011 ALC's judge's erroneous application of the law, namely: (1) Whether 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) Whether the Agency and the ALC are authorized to apply additional or different criteria or exceptions that are not contained in S.C. Code Ann. § 41-35-120 in determining eligibility for unemployment benefits; (3) Whether 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 (4) Whether 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).

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)(B)) (R.p. 17) has been resolved by the Appellate Panel. Significantly, the May 24, 2011 Order accepted and concluded that the Appellate Panel's reliance on the outside independent test administered under different detection level was competent evidence for purposes of affirming the Appellate Panel's reinstatement of benefits under Section (4) of the Statute. Even Respondents concede that the only issue that was

remanded for further fact-finding by the ALC is certification of the laboratory. [Initial Brief of Respondents, p. 3: "Nonetheless, the ALC remanded the matter to SCDEW for further consideration of the issue of whether Legette was disqualified under S.C. Code Ann. § 41-35-120(3), *and specifically whether the drug testing facility used by Nucor was properly certified as required by the statute*."] (emphasis added).

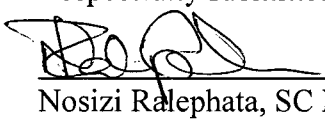
Respondents' argument that Nucor was required to appeal the Appellate Panel's December 2011 decision to the ALC is puzzling at best. Nucor has conceded that further research and discussions with the College of American Pathologists ("CAP") indicate that certification of the laboratory as specified by the language of the Statute was likely available at the time of Legette's tests in April 2010. However, while the Appellate Panel's decision resolved the factual issue relating to certification of the laboratory in compliance with the specific language of the Statute, it is undisputed that this decision did not, and could not have addressed the issues relating to reliance on outside independent tests and proper interpretation and application of Sections (2), (3) and (4). The Appellate Panel did not address these issues because the ALC had already ruled on same with finality, and simply asked the Appellate Panel to conduct a factual finding regarding certification of the laboratory at issue. As a result, once the only outstanding factual issue had been resolved with finality, the ALC's May 2011 order likewise, became final as to all issues raised by Nucor. These issues were preserved, and are ripe for review by this Court.

CONCLUSION

The record is clear, and there is no legitimate dispute that the Order on appeal is final under South Carolina law. In addition, Nucor raised the issues on appeal to the ALC, and the issues were properly preserved for appeal. Further, Nucor has exhausted

its administrative remedies, and the record shows that the ALC's Order improperly allowed the Appellate Panel to create an exception to the Statute, outside of its authority, and its decision is not based on "substantial evidence" and must therefore, be reversed.

Respectfully submitted,



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April 3, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

RECEIVED
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SC Court of Appeals

Appellate Case No.: 2012-206406

Nucor Corporation, ...Appellant,

v.

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

PROOF OF SERVICE

I certify this 3rd day of April, 2013 that I have served copies of the ***Final Reply to Respondents' Return to Nucor Corporation's Appeal*** by United States Mail, postage prepaid, addressed to the following:

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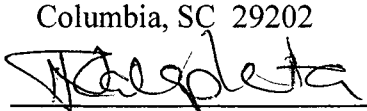

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CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that the Final Brief of Nucor Corporation and the Final Reply to Respondents' Return to Nucor Corporation's Appeal complies with SCACR 211(b)(1) and (2).

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