THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Durden, Administrative Law Judge

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

Nucor Corp.,

Appellant,

v.

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

Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This unemployment benefits case has a tortured procedural history.

Respondent Kim Legette filed a claim for unemployment benefits on April 23, 2010, with Respondent, the South Carolina Department of Employment and Workforce (SCDEW), after being discharged by Appellant Nucor Corporation (Nucor) for failing a random on-site drug test. (R. p. 575). The claims adjudicator's initial determination, mailed May 27, 2010, found Legette had been discharged for cause. Thus, SCDEW disqualified Legette from receiving benefits for 26 weeks pursuant to S.C. Code Ann. § 41-35-120(2). (R. p. 584).

Legette appealed the initial determination to the Appeal Tribunal on June 2, 2010. (R. p. 585). The Appeal Tribunal conducted a *de novo* evidentiary hearing, and both parties participated. (R. pp. 590-654). The resulting decision issued by the Appeal Tribunal on July 19, 2010, modified the determination and found that Legette had been discharged for illegal drug use. As a result, the Appeal Tribunal held Legette indefinitely disqualified from receiving benefits, pursuant to S.C. Code Ann. § 41-35-120(3). (R. pp. 846-847).

Legette appealed the Appeal Tribunal decision to the Appellate Panel on July 22, 2010. (R. p. 848). The Appellate Panel scheduled oral arguments from the parties for November 17, 2010. (R. p. 850). The Appellate Panel issued its decision on November 19, 2010, and **reversed** the Appeal Tribunal decision, finding that Nucor had not shown Legette had been discharged for cause. Therefore, the Appellate Panel held Legette eligible for benefits. (R. pp. 21-22)

Nucor appealed the SCDEW Appellate Panel decision to the Administrative Law Court (ALC) on December 14, 2010. (R. pp. 366-370). Following submission of Briefs

by all parties, the ALC issued an Order finding the Appellate Panel's decision that Nucor failed to prove Legette had been discharged for cause was supported by the evidence in the record. (R. pp. 13-19) 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. Because this issue required additional fact finding, the ALC ordered that SCDEW conduct another evidentiary hearing. (R. pp.16-18).

The ALC's Order also specifically stated that should Nucor "desire review of [SCDEW's] decision on remand," a separate notice of appeal from that determination would need to be filed.

Nucor filed a Motion for Hearing/Oral Argument with the ALC. (R. pp. 300-301). SCDEW filed a return arguing that because a remand had been ordered, no further hearing at the ALC was warranted.[1] (R. pp. 296-297). The ALC advised the parties in an email that because of the ALC's remand, the ALC no longer had jurisdiction over the matter. (R. p. 858).

Nucor then filed a Notice of Appeal from the ALC's May 24, 2011 Order to the South Carolina Court of Appeals. (R. pp. 278-279, pp. 287-288). Legette and SCDEW filed a Motion to Dismiss Nucor's appeal on the grounds the Order of remand was interlocutory and not appealable. (R. p. 241, pp. 259-263). The parties submitted memoranda on the appealability issue, and the Court issued an Order dismissing Nucor's appeal as not ripe for appeal on October 13, 2011. (R. pp. 8-9).

[1] SCDEW also sent a letter advising Nucor that because of the ALC's remand, the case would be re-opened for additional testimony and evidence. The letter specifically stated that 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." (R. p. 859).

In accordance with the ALC May 24, 2011, Order of remand, the SCDEW Appeal Tribunal conducted a *de novo* hearing on August 15, 2011. (R. pp. 371-505). The Appeal Tribunal issued its decision on August 18, 2011, holding Legette indefinitely disqualified from benefits pursuant to S.C. Code Ann. § 41-35-120(3), upon finding the testing laboratory was certified as required under the statute. (R. pp. 11-12).

Legette timely appealed to the Appellate Panel, asserting that the Appeal Tribunal erred as a matter of law in finding the testing laboratory properly certified. (R. pp. 276-277). On November 30, 2011, the parties presented oral arguments and briefs to the Appellate Panel in support of their respective positions. (R. pp. 190-210). The Appellate Panel reversed the Appeal Tribunal's decision, finding the drug testing laboratory was **not** certified as required by the statute and holding Legette eligible for benefits. (R. pp. 4-7).

Nucor did not appeal this Appellate Panel decision to the Administrative Law Court.

Instead, Nucor filed a Notice of Appeal to the South Carolina Court of Appeals **from the ALC's earlier Order**, asserting the ALC's Order of remand on May 24, 2011, was now 'final' and appealable. (R. pp. 181-182). Both parties submitted Memoranda requested by the Court on the issue of appealability of the ALC May 24, 2011 Order. The Court issued an order on March 23, 2012, dismissing Nucor's appeal as not appealable. (R. pp. 2-3). Nucor filed a Petition for Rehearing on April 9, 2012. (R. pp. 41-52). Legette and SCDEW filed Opposition to Nucor's Petition. (R. pp. 35-39). Nucor filed a Reply to the Opposition for Rehearing on April 23, 2012. (R. pp. 24-31). By Order dated June 6, 2012, the Court of Appeals reinstated the appeal; however, the Order provided that the parties could argue the appealability issue in their Briefs. (R. p. 1).

FACTS

1. Overview

The facts of this this unemployment benefits case involve an employee – Legette – being terminated by her employer – Nucor – for testing positive on a workplace drug test. However, Legette has consistently maintained that the initial drug test on her hair was improperly collected and handled which resulted in an incorrect high measurement of THC (marijuana). (*See, e.g.,* R. pp. 582, 585, 848). Legette has steadfastly stated she does not smoke marijuana, and that the subsequent negative drug tests, done by both Nucor and on her own, contradict the initial drug test. Therefore, Nucor did not have cause to terminate her employment and she is not subject to any disqualification for unemployment benefits under S.C. Code Ann. § 41-35-120.

The Appellate Panel, SCDEW's final fact-finder for the Agency, has twice ruled that Legette is eligible for benefits. In other words, SCDEW has found Nucor failed to meet its burden of proving that Legette was terminated for cause or using illegal drugs.

In addition to the facts related to the merits of this case, the circumstances surrounding the convoluted procedural history are crucially important because Nucor has failed to: preserve substantive issues for appeal after remand; and properly exhaust administrative remedies by seeking review from the ALC after remand. Nucor's arguments on appeal relate inextricably to the merits of the second Appellate Panel decision, which resulted from a second *de novo* evidentiary hearing. However, Nucor never sought judicial review from the ALC on the Appellate Panel's second decision. Moreover, Nucor raises issues to this Court which it failed to preserve after remand from the ALC. **Put simply, because Nucor failed to appeal to the ALC from the Appellate Panel's second decision, this appeal should be dismissed.**

2. The Inconsistent Drug Tests and Legette's Termination

Legette was hired by Nucor in 1998. At the time of her termination almost 12 years later in 2010, she was employed as a cold mill scheduler. (R. p. 594, lines 9-13). Legette had negative results on every one of the numerous random and plant-wide workplace drug tests throughout her career at Nucor right up until the tests at issue in this matter, beginning on February 25, 2010. (R. p. 440, lines 1-7).

Legette reported to the Nucor Safety Office on February 25, 2010 for a random drug test, as directed by management. (R. p. 615, lines 9-13). The Safety Manager Mike Berg instructed Dave English to "go practice" on Legette, telling English: "you've seen me do the drug test several times here I need you to go practice on Kim." (R. p. 615, lines 13-19). English cut Legette's hair for a sample, but once he packaged the hair into the sampling kit, he realized that he forgot to have Legette sign the chain of custody seals, so he dumped her hair sample back out on the table. (R. p. 617, lines 14-20; p. 453, line 19-p. 454, line 20). Finding that he had no more kits, English and Legette went to another room to search for new bags. They returned to re-bag her hair sample. However, when Legette left the office, her sample was still sitting on the counter. (R. p. 465, lines 6-7).

Legette informed her supervisors about the circumstances surrounding that hair test (R. p. 456, line 23-p.457, line 4). Legette, however, was not concerned about the test because she did not use any illegal drugs and had always passed her workplace drug tests.[2]

Nucor forwarded the hair sample to Omega Laboratories. (R. p. 596, lines 8-10; p. 677). When the drug tests were taken in the instant case, Omega Laboratories was not

[2] In addition to passing drug tests at Nucor, Legette had passed drug tests during her 13 years of employment at the City of Charleston prior to 1998. (R. p. 440, lines 1-7)

certified by either the National Institute of Drug Abuse (NIDA - SAMSHA), the College of American Pathologists (CAP), or the State Law Enforcement Division (SLED). (R. pp. 4-7; pp. 517-523).

On March 5, 2010, Legette was informed that the February 25, 2010, drug test was positive for THC metabolite (marijuana) at a level of 6.21 pg/mg; Legette was suspended for ten days. (R. pp. 677, 681, 455, lines 5-31). However, her supervisor Al Smith told Legette not to worry about the false positive test, because it had happened several times to other people. (R. p. 455, lines 31-34). Legette asked for a second test pursuant to company policy, and that sample was also forwarded to Omega for testing. (R. p. 616, lines 7-10).

Concerned about the false positive from her February test, Legette arranged for her own test, i.e., to have yet another hair sample taken at an independent laboratory. Legette telephoned her Nucor supervisor Al Smith from that laboratory, told him she was getting an independent test, and requested information regarding the testing criteria and testing laboratory used by Nucor. (R. p. 446, lines 20-28). Smith provided the information, including the cutoff levels of a retest, and that all samples were sent to Omega Laboratories. (R. p. 461, line 23-p.462, line 9).

Both the Nucor sample and Legette's own independent sample (both taken on March 5, 2010) tested **negative** for all drugs on the "NIDA-5 panel." (R. pp. 626-628; p. 446, lines 24-27; pp. 534-538). A "negative" for THC metabolite means that there is no THC metabolite detectable above the cut-off levels listed on the form. (*See e.g.* R. p. 691).

Because this second round of drug testing came back negative, Legette was permitted to return to work. Legette honestly explained to her co-workers that her initial

positive drug test was incorrectly positive, and after a negative test, she was reinstated. (R. p. 455, lines 25-31).

However, approximately one month later, Legette was "randomly selected" for another drug test on April 6, 2010; this hair sample was also submitted to Omega Laboratories. (R. p. 594, lines 17-24). The hair sample was left in a box for FedEx that sits in an unsecured, open office in the Safety Office until it is picked up in the evening by FedEx. (R. p. 465, line 7-p.466, line 21.) Nucor claimed those test results showed that she was "positive" for marijuana at a level of 1.25 pg/mg, and as a result, Nucor had Legette escorted off the property. (R. p. 623, lines 1-6; p.700).

Legette again requested a retest, and a new hair sample was taken by Nucor on April 15, 2010. (R. p. 471, lines 14-18; p. 472, lines 6-11; p. 607, lines 1-9). However, for this test, Nucor requested a "limit of detection" test from Omega, where it asks the testing laboratory to ignore its standard cut-offs for which their machines are calibrated, and instead provide **any numerical result**, including any value above 0.000. (R. p. 431, lines 8-20).[3]

Legette once again wanted to have her own test done, so on April 15, 2010, she went to the independent laboratory immediately after leaving work and had a new hair sample, as well as a urine sample, taken and sent to Omega Laboratories. (R. p. 622, line 14-p. 625, line 2). Legette testified as to the reason she requested the offsite tests:

> I went to Dr. Bennett's office and the same area cut because I was really getting upset that all these kept coming back so random here. A 6.25, then a negative, then the 1.25 so I was really upset about the whole thing because I know that I don't participate in any of that and I didn't have any reason for these tests to be coming back like this so I was very upset so I was going off-site getting tests done also.

[3] 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.

(R. p. 619, lines 12-17).

The independent laboratory sent the samples to Omega with the same cutoff criteria as Nucor used. (R. p. 446, lines 20-28). The results from the independent laboratory were negative for all drugs in both the urine and the hair tests. The sample sent by Nucor was also negative according to Omega Laboratories' calibration cut-off; however, because Nucor insisted, Omega reported a level of 0.78 pg/mg, which is below the standard 1.00 pg/mg cut-off level for which Omega's equipment is calibrated. (*Compare* R. p. 676 *with* p. 691).

Legette was terminated on April 22, 2010, despite her efforts to inform the Nucor General Manager about issues with the hair sampling and drug tests. (R. p. 629, lines 23-25; p. 447, lines 14-19).

Nucor's sole reason for Legette's discharge was a positive drug test:

HEARING OFFICER: Was she discharged?

EMPLOYER WITNESS-1: Yes.

HEARING OFFICER: And why was she discharged?

> EMPLOYER WITNESS-1: She submitted a random ... she was randomly ... selected (sic) for a drug test on April the 6th, 2010. The sample tested positive for marijuana with an amount of 1.25 picograms per milligram. She was given the opportunity at that time in a meeting with our General Manager, [UNCLEAR], to then resign. She chose to stay and test...to take a second test. That sample then was taken on April the 15th, 2010. It also tested positive with a reading of .78 picograms per milligram and again marijuana. At that point then on the 22nd of April she was discharged for cause.

(R. p. 594, lines 14-24).

After her termination, Legette learned Omega had informed Nucor, and/or its agent Accudiagnostics, that the hair samples from the February 25, 2010, test were different than subsequent hair samples. (R. p. 629, lines 1-18). Legette's hair is blonde,

but the hair color from her original test (which tested at THC level 6.25) was red and black. (R. p. 441, lines 4-20).

3. Nucor's Failure to Properly Preserve Issues and Appeal After Remand

The first Appellate Panel decision found that Nucor had separated Legette under "non-disqualifying circumstances," and therefore, Legette was eligible for benefits. (R. p. 21). Specifically, the Appellate Panel stated the following:

> 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 the 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.

(R. p. 22).

As required by S.C. Code Ann. § 41-35-750, Nucor filed for judicial review with the ALC, and full briefing ensued. Significantly, Nucor argued in its Initial Brief that the Appellate Panel had erred by applying S.C. Code Ann. § 41-35-120(4), and for failing to apply S.C. Code Ann. § 41-35-120(3). (R. pp. 355-361). In response, SCDEW argued the drug tests relied on by Nucor failed to meet the statutory requirements of S.C. Code Ann. § 41-35-120(3). (R. pp. 329-334). In its Reply Brief, Nucor then argued that Legette should be disqualified from unemployment benefits pursuant to S.C. Code Ann. §§ 41-35-120(2), (3) and (4). (R. pp. 307-318).

The ALC issued an Order finding the Appellate Panel's decision that Nucor failed to prove Legette had been discharged **for cause** was supported by the evidence in the record.[4] (R. p. 16). Nonetheless, the ALC remanded the matter to SCDEW for further consideration of the issue of whether Legette was disqualified under S.C. Code Ann. §

[4] The ALC referenced Sections 41-35-120(2) and (4) in this holding.

41-35-120(3), and specifically whether the drug testing facility used by Nucor was properly certified as required by the statute. Because this issue required additional fact finding, the ALC ordered that SCDEW conduct a *de novo* evidentiary hearing. (R. pp. 16-18).

After the remand by the ALC and a second evidentiary hearing, Nucor argued that certifications from other organizations were equivalent to NIDA certification.[5] The Appellate Panel, however, found that Omega Laboratories was not certified by the National Institute of Drug Abuse (NIDA - SAMSHA), the College of American Pathologists (CAP), or SLED at the time of the drug tests performed from February 25, 2010 through April 15, 2010. (R. p. 6). Therefore, the Appellate Panel found that Nucor had failed to meet the statutory requirements of Section 41-35-120(3).

The Appellate Panel's second decision also specifically held that Legette is "eligible for benefits without disqualification effective April 18, 2010, upon finding [she] was discharged without cause." (R. p. 4).

At this point in time – December 9, 2011 – the date the second Appellate Panel decision was mailed, the procedural posture was that the SCDEW had issued its decision. Pursuant to S.C. Code Ann. § 41-35-750, Nucor was required to seek judicial review of the decision by filing an action in the ALC within 30 days. Without filing an appeal in the ALC, the SCDEW Appellate Panel decision would become final after ten (10) days. *See* S.C. Code Ann. § 41-35-740.

Nucor **never** filed an appeal in the ALC from the Appellate Panel's second decision, dated December 9, 2011. Curiously, Nucor filed a Notice of Appeal directly to the South Carolina Court of Appeals on January 9, 2012. (R. pp. 181-182). Nucor's

[5] NIDA was dissolved during reorganizations in the DHHS. (R. pp 4-7; pp. 202-211).

Notice of Appeal was not from the Appellate Panel's December 9, 2011, decision, **but instead was from the ALC's earlier Order of remand dated May 24, 2011**.

Recognizing that the ALC's May 24, 2011, Order issued a remand, the Court requested that the parties provide memoranda on the issue of appealability. (R. p. 857). Respondents argued the Order was not the final order in this case. The Court issued an order on March 23, 2012, dismissing Nucor's appeal as not appealable. (R. pp. 2-3). This Court correctly cited S.C. Code § Ann 1-23-610 for the proposition that judicial review may only be sought from a final ALC decision.

Nonetheless, Nucor filed a Petition for Rehearing on April 9, 2012. (R. pp. 41-52). In response to Nucor's petition, Respondents argued that the final decision in this matter was the December 9, 2011, decision of the Appellate Panel which had not been appealed by Nucor, and therefore, there was no final order from the ALC. (R. pp. 35-39). Nucor filed a Reply to the Opposition for Rehearing on April 23, 2012. (R. pp. 24-31).

By Order dated June 6, 2012, the Court of Appeals reinstated the appeal. **However, the Order specifically provided that the parties could argue the appealability issue of in their Briefs**. (R. p. 1)

STANDARD OF REVIEW

Judicial review of a SCDEW decision is governed by S.C. Code Ann. §§ 41-35-740 & 750 (Supp. 2012). If a party seeks judicial review, a petition must be filed within to the ALC; if no petition is filed, the SCDEW decision becomes final after 10 days. *Id.* Only when the ALC has issued a **final** order in an appeal from a SCDEW decision is the ALC's Order then reviewable by this Court. *See* S.C. Code Ann. § 1-23-610(A)(1) ("For judicial review of **a final decision of an administrative law judge**, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party **receives the final decision and order of the administrative law judge**.") (emphasis added).

SCDEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding SCDEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

> [A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S.C. Emp. Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." *Id.* at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

> [S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its

> action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency").

Furthermore, the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp. 2012). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

ARGUMENT

I. The Court must dismiss this appeal because there has been no final ALC order issued in this case since Nucor failed to appeal from SCDEW's second decision which was issued after the ALC's remand and another *de novo* evidentiary hearing.

a. Nucor failed to follow the required statutory procedures for judicial review.

Judicial review of a SCDEW decision is governed by S.C. Code Ann. §§ 41-35-740 & 41-35-750 (Supp. 2012). If a party seeks judicial review, a petition must be filed within 30 days to the ALC; if no petition is filed, the SCDEW decision becomes final after 10 days.[6] *Id.* A petition filed pursuant Section 41-35-750 gives the ALC appellate jurisdiction and permits ALC review of the SCDEW administrative decision. The appeals procedure in Title 41 is the exclusive method for appealing SCDEW decisions, and the only way to appeal a decision from the Appellate Panel is to file for judicial review in the ALC pursuant to Section 41-35-750. S.C. Code Ann. §§ 41-29-300(C) & 41-35-690 (Supp. 2012).

Only when the ALC has issued a **final** order in an appeal from a SCDEW decision is the ALC's Order then reviewable by this Court. *See* S.C. Code Ann. § 1-23-610(A)(1) ("For judicial review of **a final decision of an administrative law judge**, a notice of appeal by an aggrieved party must be served and filed with the court of appeals

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[6] The procedure to obtain judicial review is provided as follows, in pertinent part:

> Within thirty days from the date of mailing the department's decision, a party to the proceeding whose benefit rights or whose employer account may be affected by the department's decision may initiate an action **in the administrative law court** against the department for the review of its decision, in which action every other party to the proceeding before the department must be made a defendant. ... **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 (emphasis added). Section 1-23-610 provides for appeal to the Court of Appeals. *See* § 1-23-610(A)(1). In the absence of an appeal to the ALC, SCDEW's decision becomes final ten days after it is mailed. § 41-35-740.

as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party **receives the final decision and order of the administrative law judge.**") (emphasis added).

In the instant case, Nucor failed to file in the ALC for judicial review of the Appellate Panel's December 2011 decision, which was the final agency decision in this case. Instead, Nucor skipped the ALC level completely, and has sought review of an **earlier** ALC Order – the May 24, 2011 Remand Order – which this Court has already ruled was an interlocutory order.

In attempting, for a second time, to appeal the ALC's May 24, 2011 Order, Nucor attempts to circumvent the entire statutory process, and improperly asks this Court to consider an appeal of the interlocutory order which ordered a new evidentiary hearing. This Court has already held that the May 24, 2011, Order was not the **final** ALC order in this case. (R. pp. 8-9). Nor is it the final order now. Therefore, because there is no final ALC order, there is nothing for this Court to review. *See* § 1-23-610.

The only decision in this entire matter that could have been subject to any judicial review after remand was the SCDEW Appellate Panel's December 9, 2011 decision, which held Legette eligible for unemployment benefits. However, the December 9, 2011, decision **became the final judgment disposing of the entire matter** when Nucor did not file a request for judicial review to the ALC as required by statute. *See* §§ 41-35-740 & 750.

Nucor's attempt to have this Court review a non-final ALC decision and have no review of the actual final SCDEW agency decision flies in the face of the judicial review

process prescribed by the statutes covering unemployment benefits and the Administrative Procedures Act itself.

Accordingly, this Court should dismiss this appeal with prejudice.

b. Because Nucor failed to appeal the SCDEW Appellate Panel's December 9, 2011, decision to the ALC as required by S.C. Code Ann. § 41-35-750, there is no final ALC Order for this Court to review.

The only decision in this entire case that has become "final" is the Appellate Panel's December 9, 2011, decision. The current appeal, however, is not from the ALC's review of that decision. It is instead from an earlier decision of the ALC which reviewed a 2010 decision by the Appellate Panel, and remanded for a new evidentiary hearing.

The jurisdiction of the SCDEW under § 41, Chapter 35 is limited to determining whether an employee is entitled to unemployment benefits. *Shelton v. Oscar Meyer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). Therefore, the only controversy in this case is whether Legette is eligible for benefits under § 41-35-120.[7]

S.C. Code Ann. § 41-35-690 establishes that the sole and exclusive appeal procedure in order to seek review of a determination regarding eligibility for benefits is statutorily prescribed. As discussed above, under Section 41-35-750, the party seeking appeal of an SCDEW decision must file with the Administrative Law Court within 30 days of the decision at issue. From there, appeal to the Court of Appeals can occur only after the ALC has issued a final order disposing of the entire matter. *See* § 1-23-610.

The South Carolina Supreme Court has clearly stated that Section 1-23-610 "limits review to final decisions of the ALC." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010).

[7] Contrary to the issues as stated by Nucor, the administrative process under Section 41-35-120 makes no determination as to whether or not an employer "can terminate an employee." *See* Nucor Br. p. i (Subheading B).

If, however, "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" and not appealable. *Id.* at 267, 692 S.E.2d at 894.

This same analysis was confirmed recently in *Bone v. U.S. Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012). In *Bone*, the Court explained as follows:

> [A]ppeals in administrative agency matters are handled differently than appeals in other cases. The South Carolina General Assembly enacted the APA's mechanisms for review to provide uniform procedures after the exhaustion of administrative remedies; the APA's provisions are controlling in these agency matters and supersede any conflicting provisions.

Id. at 574, 733 S.E.2d at 204. The *Bone* Court further stated that for an order to be considered "final," and therefore appealable to the Court of Appeals, "the order must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what has already been determined." *Id.* at 575, 733 S.E.2d at 205; *see also Charlotte-Mecklenburg Hosp.*, 387 S.C. at 267, 692 S.E.2d at 894 ("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.").

Significantly, the Court in *Bone* clarified that in an administrative agency case where Court of Appeals review is governed by the Administrative Procedures Act, an "involves the merits" analysis will be "rejected." *Bone v. U.S. Food Serv.*, 399 S.C. at 575, 733 S.E.2d at 204 ("the 'involves the merits' analysis did not survive the enactment of the APA").

Yet, clearly Nucor attempts to justify its appeal of the ALC's May 2011 Order by engaging in just the sort of "merits" analysis that both *Bone* and *Charlotte-Mecklenburg Hosp.* have expressly rejected. The question is not whether the ALC decided any issue on its "merits" in the May 24, 2011 Order, but rather which decision disposed the whole

subject matter of the action, leaving nothing to be done but to enforce what has already been determined. That decision, in this case, is clearly the December 9, 2011 Appellate Panel decision which found Legette eligible for unemployment benefits.

Nucor, however, has never appealed from this agency decision. Because of Nucor's failure to appeal from the December 2001 decision, to the ALC, there is simply no final ALC Order that this Court is permitted to review. *See Bone*, *supra*.

c. To permit the appeal of a non-final ALC Order would result in two decisions on Legette's eligibility for unemployment benefits that could potentially conflict with one another.

Nucor's attempt to appeal the ALC's May 2011 order would result in two decisions on Legette's eligibility for unemployment benefits that could end up being irreconcilable: (1) the Appellate Panel's second decision (dated December 9, 2011) that found Legette was terminated for non-disqualifying reasons and therefore was eligible for benefits; and (2) a judicially reviewed decision by this Court based on the May 24, 2011, ALC Order which affirmed the Appellate Panel's first decision finding Legette eligible for benefits. Currently, both decisions allow Legette to receive full benefits. However, if this Court allows Nucor to appeal the interlocutory May 24, 2011 decision separately from the entire administrative and judicial review process required to appeal an agency decision, the result would be the exact "piecemeal" issue that the Supreme Court sought to prevent in *Bone*.

Even more worrisome, allowing this appeal would lead into a legal quagmire of multiple, potentially conflicting, final "execution[s] of what has been determined" in unemployment cases. If hypothetically, this Court were to consider and reverse the May

24, 2011 interlocutory findings regarding disqualification,[8] there would be two decisions regarding Legette's eligibility for benefits: one final agency decision which allows full benefits, and one Court of Appeals decision which might not. This would result not only in the "piecemeal litigation" that is disfavored under South Carolina law, but also in potentially conflicting decisions regarding the same issue.

There can be only one final decision when determining benefits eligibility, and under Section 41-35-750, it must be the unappealed December 9, 2011 Appellate Panel decision.

Accordingly, the instant case should be dismissed.

[8] As will be further discussed *infra*, Respondents take the position that the primary decision in the ALC's May 24, 2011, Order was to remand for additional fact finding related to drug testing and Section 41-35-120(3). The ALC's findings in that Order related to Sections 41-35-120(2) and (4) effectively became moot upon remand because of the second *de novo* evidentiary hearing, and the Appellate Panel's subsequent decision finding that Nucor failed to show that Legette should be disqualified.

II. All of Nucor's issues on appeal are unpreserved for this Court's review.

Issue preservation is required in administrative appeals, and an appellate court may not consider issues that were not raised to and ruled upon by the ALC. *See, e.g., Hill v. S.C. Dep't of Health & Envtl. Control,* 389 S.C. 1, 19, 698 S.E.2d 612, 622 (2010); *Home Med. Sys. v. S.C. Dep't of Revenue,* 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009). Indeed, it is incumbent upon Appellant to show it had clearly raised the issue to the ALC and asked for a specific ruling in that regard to preserve the issue for appellate review. *See Hill v. S.C. Dep't of Health & Envtl. Control,* 389 S.C. at 19, 698 S.E.2d at 622.

Moreover, an unchallenged ruling, whether correct or not, is the law of the case. *E.g., ML–Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 489 S.E.2d 470 (1997); *see also Town of Mt. Pleasant v. Jones,* 335 S.C. 295, 516 S.E.2d 468 (Ct.App.1999) (holding an unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). In addition, the failure to appeal an alternative ground of judgment below will result in affirmance. *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.,* 316 S.C. 163, 447 S.E.2d 843 (1994).

Nucor raises four issues on appeal. The first issue relates to whether SCDEW was authorized to rely on Legette's own independent drug tests. Nucor apparently is arguing that because the ALC relied on the fact-findings of the Appellate Panel's **first** decision, which in turn was based on evidence that included Legette's independent drug tests, the ALC erred. First, Respondents point out that the issue of whether independent drug tests can be considered in determining eligibility has no bearing on this case where it was not a basis for determining Respondent Legette's eligibility in the December 9, 2011 final decision. Thus, because it was not ruled upon by the Appellate Panel after

remand, it is not preserved for appellate review. *See Hill v. S.C. Dep't of Health & Envtl. Control, supra*; *Home Med. Sys. v. S.C. Dep't of Revenue, supra.*

To the extent Nucor argues that it raised the issue to the ALC when it appealed the Appellate Panel's first decision, Respondents point out there was no specific ruling by the ALC on the issue. Therefore, the Court is procedurally barred from reviewing this question for this reason as well. *Hill v. S.C. Dep't of Health & Envtl. Control, supra.* (an issue must be clearly raised to, and specifically ruled upon by, the ALC in order to preserve for appellate review).

The second issue raised by Nucor is as follows: "The ALC Judge incorrectly determined that 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." First, Respondents point out that this is not a correct characterization of the ALC's Order. Respondents further argue this issue is inextricably intertwined with the Appellate Panel's ruling **after remand** that Nucor's drug tests failed to comply with Section 41-35-120(3). **It is undisputed that Nucor failed to appeal from the Appellate Panel's decision.** Therefore, the Appellate Panel's ruling on this issue is the law of the case. *See ML–Lee Acquisition Fund, supra; Town of Mt. Pleasant v. Jones, supra.* Nucor cannot restate the issue in a slightly different way, evade review of the issue by the ALC, and skip to this Court for review of an issue that was never specifically ruled upon in this case. *Cf. S.C. Tax Comm'n v. Gaston Copper Recycling Corp.,* 316 S.C. 163, 447 S.E.2d 843 (1994) (failure to appeal an alternative ground of judgment below will result in affirmance).

Moreover, Respondents note Nucor itself argued (in its brief to the ALC) that "[t]he legislature specifically enacted Section 41-35-120(3) to govern in instances where

a Claimant is discharged for illegal drug use." Now, on appeal to this Court, Nucor appears to be backing away from the argument it made consistently throughout this case – until the issue was resolved adversely to Nucor. However, a party may not present one argument to the lower court and an alternative one on appeal. *E.g., Crawford v. Henderson,* 356 S.C. 389, 409, 589 S.E.2d 204, 215 (Ct. App. 2003). This is yet another procedural bar to this issue.

Finally, Nucor's third and fourth issues arguments relate to disqualification under Sections 41-35-120(2) and (4). These issues are also unpreserved for the Court's review because Nucor failed to argue these issues on remand, and therefore, the Appellate Panel did not rule on them. *See Hill v. S.C. Dep't of Health & Envtl. Control, supra*; *Home Med. Sys. v. S.C. Dep't of Revenue, supra.*

While Nucor couches these issues as part of the ALC's ruling in the May 2011 Order, Respondents call attention to yet another reason these issues are procedurally barred: Nucor raised these issues to the ALC only in its Reply Brief on appeal. It is well-settled that an appellant may not raise an issue on appeal in a reply brief. *See Glasscock, Inc. v. United States Fidelity & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct.App.2001) (finding that appellant could not raise additional arguments in reply brief because it was not addressed in initial brief); *Lister v. NationsBank,* 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct.App.1997) (stating a point raised for the first time in a reply brief will not be considered by appellate court).

For these reasons, all of the issues raised by Nucor are not properly reviewable by this Court.

III. Given that illegal drug use based on a workplace drug test was the only cause for termination presented by Nucor, and where Section 41-35-120(3) sets forth specific standards that apply to workplace drug testing, Nucor improperly argues that subsection 41-35-120(2) & (4) should support disqualification based on a positive drug test.

Nucor asks this Court to allow an employer to choose any basis of disqualification it sees fit whenever it fails to properly perform workplace drug testing in compliance with the criteria in Section 41-35-120(3), even though the employer listed illegal drug use based on a positive drug test as the only reason for termination. However, it is clear from the legislative history, and the rules of statutory construction, that if an employee is discharged based upon a test showing illegal drug use, that employee is ineligible for benefits only if the requirements of Section 41-35-120(3) are strictly met.

When the Legislature amended Section 41-35-120 in 2005, it added a specific section specifically related to disqualification for illegal drug use within the same section as "Discharge for cause." *See* 2005 S.C. Act No. 50, § 3. In 2010, the Legislature completely rewrote Section 41-35-120; subsection 41-35-120(2) related to "Discharge for Cause" and the language formerly under Section 41-35-120(2)(b) became Section 41-35-120(3), covering "Discharge for illegal drug use." *See* 2010 S.C. Act No. 146, § 77.

It is well settled that: "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 372, 688 S.E. 2d 844, 852 (2010), *citing Wilder v. South Carolina Hwy. Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955); *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one).

The Legislature's intention is clear: unemployment benefit eligibility determinations related to an employee's discharge for illegal drug use based upon a positive drug test can be made only under the current Section 41-35-120(3). These statutory amendments not only added specific requirements under "discharge for cause" in 2005, but then further amended the whole section to have "discharge for illegal drug use" as its own separate subsection. This interpretation complies with well-settled South Carolina law that the specific statute Section 41-35-120(3) should prevail over the general, e.g., Sections 41-35-120(2) and (4).

Furthermore, Nucor's interpretation – that an employer can choose to have an employee discharged under any "cause" subsection, including (2) and/or (4) – is contrary to law, because it would both render Section 41-35-120(3) surplusage and require this Court to interpret the statute in a way that would lead to an absurd result. *See, e.g., 16 Jade St., LLC v. R. Design Constr. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450-51 (2012) (a statute must be construed "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'" and "any interpretation which would lead to a result so absurd that the General Assembly could not have intended it" must be rejected). (internal citation omitted).

To accept Nucor's interpretation would render 41-35-120(3) surplusage. No employer would bother with the increased requirements and expense of sending samples off by FedEx to commercial testing laboratories for gas chromatography/mass spectrometry of samples if instead they can circumvent all of that by ordering a "Five-Panel Drug" dipstick test from Amazon.com for $5.42, and present the dipstick as evidence of illegal drug use under "for cause" or for "gross misconduct." This is exactly

the "absurd result" that the General Assembly could not have intended in amending Section 41-35-120 to add the specific requirements of subsection (3).

Nucor raises false alarms in its scenarios in its Brief. (Nucor Br., pp. 26-27). First, the unemployment statutes do not govern whether an employer "is precluded from terminating" an employee. The statutes are concerned **only with eligibility for benefits**. *Shelton*, 325 S.C. at 252, 481 S.E.2d at 708. Second, Nucor raises the specter that under Section 41-35-120(3), an employer could not "legitimately discharge" an employee where there are witnesses to their drug use. (Nucor "Scenario B," p. 26). However, there is no other evidence of potential illegal drug use in this case; testimony from Nucor employees is that Legette was called in for a random drug test, and that its sole reason for discharge is based on the workplace drug tests at issue. Thus, where a workplace drug test is the only given reason, disqualification can only occur when the employer complies strictly with Section 41-35-120(3)(a). There is no tension between the subsections of 41-35-120(3).

Clearly, in enacting such a draconian penalty of total disqualification, the Legislature enacted specific requirements to provide some safeguards against poorly administered, inaccurate drug sampling and testing by employers seeking to disqualify their employees from receiving benefits.

In addition, Appellant again attempts to mislead the Court regarding the drug testing company's certification. Appellant states "the Adjudicator confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory." (Nucor Br. pp 30-31). Omega is not, and has never been SAMHSA certified. (R. pp. 4-7; pp. 211-234). The original claims adjudicator made this erroneous finding based on false information provided by the Employer:

HEARING OFFICER: Okay, and so the Omega Laboratory . . . they are certified laboratory by the College of American Pathologists with the U.S. Department of Health and Human Services, is that correct?

EMPLOYER WITNESS-1: Correct.

(R. p. 598, lines 17-20). Omega was not CAP, SLED, nor SAMHSA (NIDA) certified at the time of the tests at issue in the instant case. (R. p. 6).

Finally, Nucor's argument regarding other states' reliance on more than one ground is not applicable to the case at bar. Aside from the obvious issue that determinations of disqualification for unemployment benefits is purely a matter of South Carolina state law, the cases cited by Nucor are all cases where the employer raised multiple bases for discharge at the initial fact finding level. (*See, e.g.*, Nucor Brief p. 25 citing *Adm'r, Unemployment Comp. Act v. Sides*, 200 WL 1682508 (Conn. Super. Ct. Oct. 10, 2000), where substance abuse and absenteeism were raised as grounds for discharge,).

Here, Nucor has only raised one ground for termination – illegal drug use based on a positive workplace drug test. (R. p. 529; p. 594, lines 14-24; Nucor Br. p. 6). Therefore, given the specific facts of this case, the focus should be on whether Nucor met the requirements of Section 41-35-120(3), not on whether the Court should consider grounds for disqualification under Section 41-35-120(2) or (4).

IV. Assuming *arguendo* that the issue is proper for appellate review, the ALC correctly found in the May 24, 2011, Order that the evidence in the record supported the Department's finding that Legette was discharged under non-disqualifying circumstances.

Assuming *arguendo* this Court decides the ALC's May 24, 2011, Order is appealable, and that an employee can be disqualified under Section 41-35-120(2) or (4) for illegal drug use based only on a workplace drug test, this Court must nevertheless affirm the ALC's Order regarding the Department's initial finding that Legette should be eligible for benefits under the substantial evidence standard. *McEachern v. S.C. Emp. Sec. Comm'n*, 370 S.C. at 557, 635 S.E.2d at 646-47 (agency's decision must be upheld unless it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record).

Here, it is the employer that wants to have it both ways. If the employer wants this Court to examine the evidence under Section 41-35-120(2) or (4), then the Agency was free to examine any evidence in the record and is not restricted to Nucor's drug testing results.

If examined under § 41-35-120(3), the employer's tests are inadmissible because the tests were performed by an uncertified laboratory. If the under the facts of this case, eligibility were to be considered under § 41-35-120(2) or (4), then the fact finder and this Court must consider and weigh all of the evidence, including independent tests, which were negative for drug use. (R. p. 557; p. 562; p. 567). While Appellant makes frequent reference to reliance on "uncontrolled tests," (*see, e.g.*, Nucor Br., p. 7), the ALC in fact relied on serious issues with tests given by Nucor and as reflected in the facts above. There is no doubt that the testing lab, Omega, was not certified, and there were serious issues with the testing procedures, as indicated in the facts, *supra*.

More importantly, SCDEW and the Court can consider the credibility of the parties. The Appellant Employer's lack of credibility is a matter of record. Initially, Appellant/Employer claimed that it used a certified laboratory, a claim that turned out to be false. Then the Appellant/Employer claimed that compliance with § 41-35-120(3) was impossible, and testified that CAP did not certify hair testing. (R. pp. 198-199). That too turned out to be false – CAP does indeed certify hair testing. (R. pp. 6-7). Therefore, Nucor could have sought a CAP certified laboratory for testing. (*Id.*)

Even more disturbing, as discussed above, the Appellant/Employer persists in basing one its arguments in § II(C) on a fact that it knows to be untrue: "Adjudicator confirmed that Claimant had tested positive for drugs pursuant to a test conducted by a SAMHSA certified laboratory." (Nucor Br., p. 30). The record is clear, and Appellant/Employer should now be well aware, that **Omega was not SAMSHA certified when these tests were done**, and that the Adjudicator made that statement in May 26, 2010, based on false information provided by Nucor.

In sum, there is substantial evidence in the record supporting the Appellate Panel's rulings that Nucor failed to carry its burden of showing discharge for cause or gross misconduct. *Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C.at 258, 315 S.E.2d at 375 ("Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.").

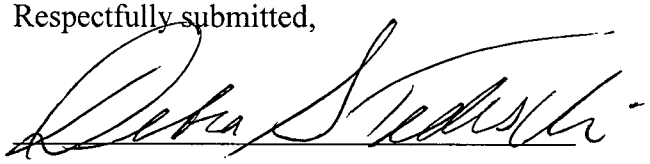
Thus, the decision that Legette is eligible for unemployment benefits should be affirmed.

CONCLUSION

Because Nucor failed to appeal to the ALC from the second Appellate Panel opinion, there is no final ALC Order in this case. Therefore, the Court should dismiss this appeal.

In the alternative, for all the reasons argued above, the SCDEW decision that Legette is eligible for benefits should be affirmed.

Respectfully submitted,



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March 27, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Nucor Corp.,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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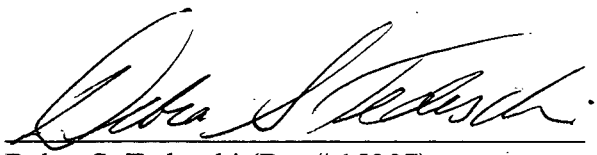

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March 27, 2013

THE STATE OF SOUTH CAROLINA
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South Carolina Department of Employment and Workforce and Kim A. Legette,

Respondent.

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I certify that I have served the Respondents Final Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2013, addressed to the Attorneys for the parties at their addresses of record:

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