THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE

ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0439-AP

Marcus Wider, Respondent,

v.

South Carolina Department of Employment
and Workforce and K B Enterprises, Inc., Defendants,

Of whom South Carolina Department of Employment
and Workforce is Appellant.

AMENDED INITIAL BRIEF OF APPELLANT

South Carolina Department of Employment and Workforce
E.B. "Trey" McLeod, III, Assistant General Counsel (Bar# 73642)
Office of General Counsel
P.O. Box 8597
Columbia, South Carolina 29202
(T) (803) 737-2666 (F) (803) 737-0124
legal@dew.sc.gov

Jack E. Cohoon
South Carolina Legal Services
2109 Bull Street
Columbia, South Carolina 29201
(803) 744-4166
Attorney for Respondent, Marcus Wider

K B Enterprises, Inc.
2006 Rockland Road
Columbia, South Carolina 29210
(803) 731-7775
Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

ISSUES ON APPEAL

I. **THE ALC'S DECISION IS CONTROLLED BY AN ERROR OF LAW FOR NOT REMANDING THE CASE TO THE DEPARTMENT FOR MORE DEFINITE AND DETAILED FINDINGS OF FACT SUFFICIENT TO ENABLE THE COURT TO DETERMINE WHETHER THE PANEL'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND WHETHER IT HAS PROPERLY APPLIED THE LAW TO THEM.**

II. **THE COURT ERRED IN HOLDING NO SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD AS A WHOLE TO SUPPORT A DISPUTE IN MATERIAL FACTS**

STATEMENT OF THE CASE

Marcus O. Wider (hereinafter "Wider" or "Respondent") worked for KB Enterprises, Inc., (hereinafter "Employer") from August 4, 2011, until May 24, 2012, most recently as a loader. (R. ___.) Respondent's primary job duties required him to move furniture in and out of customers' homes. Prior to his termination, Employer notified Wider his job was in jeopardy due to repeated incidents were he had caused damage to customer property while moving furniture. On or about May 23, 2012, a customer contacted Employer stating that Wider and two other employees had caused significant damage while moving in furniture. Employer terminated Respondent on May 24, 2012, because his actions were costing Employer too much money and damaging the company's reputation as competent movers. (R. ___.)

On May 27, 2012, Wider filed for benefits with the South Carolina Department of Employment and Workforce. (hereinafter "Department," or "Appellant.") (R.__) A Department claims adjudicator determination held Respondent disqualified from receiving benefits, mailed June 25, 2012, upon finding Employer discharged Wider for cause pursuant to S.C. Code Ann. § 41-35-120(2) (R.__.) Respondent appealed the determination to the Appeal Tribunal on July 2, 2012. (R. __.) The Appeal Tribunal conducted an evidentiary hearing on August 6, 2012. Both Employer and Respondent participated in this hearing. (R. __.) A witness for Employer, Mary

Oliver, testified Respondent took responsibility for several prior instances of damage to customers' property, and that the "big damage claim" on May 23, 2012, was the "final straw." Respondent admitted to causing the damage but testified it was not as severe as Employer suggested and that it was others, not him that caused "most" of the damage. (R___.)

The resulting decision issued on August 9, 2012, affirmed the initial determination finding Wider was discharged for cause. (R. __.) Respondent appealed the Appeal Tribunal decision to the Appellate Panel on August 14, 2012. (R. ___.) The Appellate Panel issued the Department's final decision on September 11, 2012, which affirmed the Appeal Tribunal decision finding Wider discharged for cause and imposing a disqualification. (R. __.) Respondent appealed to the Appellate Panel (hereinafter "Panel"), and on September 11, 2012, the Panel affirmed the Appeal Tribunal's determination that Appellant was disqualified from receiving benefits for twenty (20) weeks because Employer discharged Appellant for cause.

On October 12, 2012, Wider filed a Notice of Appeal with the Administrative Law Court (hereineafter "ALC") seeking judicial review of the Department's final administrative decision. On February 27, 2013, the Honorable Deborah Brooks Durden issued a Final Order reversing the Department's final decision holding Respondent eligible to receive benefits without disqualification upon a finding there was no substantial evidence in the record supporting the Department's holding Respondent was discharged for cause. Appellant file a Motion for Rehearing and the Court issued an Order denying that motion on March 25, 2013.

On March 28, 2013, the Department commenced this action seeking judicial review of the ALC's Order which reversed the Department's final administrative decision.

ARGUMENTS
STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610 sets forth the Court of Appeal's standard of review for a decision by the ALC regarding an administrative agency's final decision. The above section states, in relevant part:

> The review of the administrative law judge's order must be confined to the record. The court of appeals may reverse or modify the decision only if substantive rights of the appellant [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion or affected by other error of law.

Id.; see also South Carolina Department of Corrections v. Mitchell, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (S.C.App. 2008).

Respondent is an "agency" within the meaning of the Administrative Procedures Act. See Gibson v. Florence Country Club, 282 S.C. 384, 386, 218 S.E.2d 365, 367 (1984). The ALC is authorized to hear appeals from final decisions of administrative agencies. S.C. Code Ann. § 1–23–380; see also S.C. Code Ann. § 41-35-750 Accordingly, requests for review of the Department's final decision must be taken to the ALC. This Court reviews ALC examinations of the Department's decisions pursuant to the judicial review provisions of the Administrative Procedures Act, S.C. Code Ann.§§ 1-23-610(B). See Gibson, 282 S.C. 384, 386, 318 S. E.2d 365, 367 (1984); McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-647 (Ct. App. 2006).

This Court may reverse or modify the decision of the ALC if the finding, conclusion, or decision reached is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by an error of law. Original Blue Ribbon Taxi Corp. v. S. Carolina Dep't of Motor Vehicles, 380 S.C. 600, 670 S.E.2d 674 (Ct. App. 2008)

I. THE ALC'S DECISION IS CONTROLLED BY AN ERROR OF LAW FOR NOT REMANDING THE CASE TO THE DEPARTMENT FOR MORE DEFINITE AND DETAILED FINDINGS OF FACT SUFFICIENT TO ENABLE THE COURT TO DETERMINE WHETHER THE PANEL'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND WHETHER IT HAS PROPERLY APPLIED THE LAW TO THEM.

Under S.C. Code Ann. § 1-23-380(5):

> the [ALC] may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:(a) in violation of constitutional or statutory provisions;(b) in excess of the statutory authority of the agency;(c) made upon unlawful procedure;(d) affected by other error of law;(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In order for the Court to properly determine if substantial rights of Respondent have been prejudiced under the analysis above, the Department's decision is required to "include findings of fact and conclusions of law, separately stated." S.C. Code Ann. § 1-23-350. Furthermore, those findings of fact made by the Panel must be sufficiently detailed to enable the ALC to determine whether the evidence supports the findings. See Canteen v. McLeod Reg'l Med. Ctr., 400 S.C. 551, 735 S.E.2d 246 (Ct. App. 2012). Implicit findings of fact are not sufficient. Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S. Carolina, 332 S.C. 20, 503 S.E.2d 739 (1998). Furthermore, "when material facts are in dispute, the Department must make specific, express findings of fact." Id. The ALC's Order states "in the present case, the Department's decision fails to address the dispute that exists in the material facts." (R.__) By acknowledging the existence of a factual dispute, the Court should properly have remanded the case back to the Panel because "only the [Panel] is authorized to pass upon the weight of the evidence ...and it is proper to remand a case to it for required findings where the record contains evidence from which such

findings may be made." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967).

In Baldwin v. James River Corp., 304 S.C. 487, 405 S.E.2d 422 (Ct. App. 1991), a case analogous to the present one, the Court of Appeals reversed a circuit court's order reversing the finding of the full Workers' Compensation Commission. In doing so the Court reasoned:

> Rather than reinstate the single commissioner's award after finding the panel's findings of fact conclusory and thus insufficient, the circuit court ***should have remanded the case to the commission*** for the commission to make definite and detailed findings of fact upon the evidence sufficient to enable a reviewing court to determine whether its findings of fact are supported by the evidence and whether it has properly applied the law to them. ***In effect, what the circuit court did here in reinstating the single commissioner's award was to determine the facts from conflicting evidence.*** Only the commission is authorized to do this.*[internal citations omitted]* (emphasis added)

Id., 304 S.C. at 487, 405 S.E.2d at 422 (Ct. App. 1991).

In the present case the ALC held "the Appellate Panel decision only includes a statement of the statutory language requiring a disqualification, but includes no explicit finding of fact to support the finding of a disqualification period." (R.__) Accordingly, the ALC is not permitted to accept such a decision at face value without requiring the Panel to explain its reasoning. See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S. Carolina, 338 S.C. 92, 525 S.E.2d 863 (1999). Furthermore, the ALC cannot sufficiently address the issues on appeal because a "recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." Id.

By holding the Department made no explicit findings as to whether Wider caused the damage, the ALC speculates that the controlling factor for the Panel's decision is Respondent's culpability in damaging customer property. The Court has held a reviewing court cannot sufficiently review an order for error when the reasons underlying the decision are left to

speculation. Able Communications, Inc. v. S. Carolina Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

The ALC improperly relies on Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) in stating "an agency decision may be overturned where an agency fails to 'clearly set forth the underlying facts upon which it relied to support its conclusion...'" Id., 372 S.C. at 203, 641 S.E.2d at 872. In Grant, there was no factual dispute and the issue therefore became of a question of law. Grant, supra, (Where there are no disputed facts, the question of whether an accident is compensable is a question of law.) The Courtin that case explained, "because the full commission's order did not meet the requirements of § 1-23-350 ***and because the full commission's order contained an error of law, the decision of the Court of Appeals is REVERSED.***" Grant, 372 S.C. at 203, 641 S.E.2d at 873 (emphasis added). It is unlikely and contrary to established precedent to extrapolate that the Court would have reversed rather than remanded the case had the only error been insufficient findings of fact regarding disputed factual evidence. See Hamm v. S. Carolina Pub. Serv. Comm'n, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992)("We find this recital of conflicting views followed by a conclusive statement by the Commission inadequate to meet the standards set out in Able. We, therefore, remand this issue for further findings consistent with our holding in Able.")

In contravention of its previous finding regarding the existence of a dispute in the material facts, the ALC impermissibly reevaluated the facts and inferred from the face of the decision that the Panel reached its conclusion based on a speculator finding upon which the ALC then proceeded to find no evidence existed in the record to support such a finding. As was the case in Able, the Court here speculates as to the reasons underlying the decision. See Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Associates of S. Carolina, LLC, 387 S.C. 79, 690 S.E.2d 789 (2010)(The Court citing Able, supra, stated the "Court held that appellate review was

'impossible' because all it could do was speculate as to 'the reasons underlying the decision.'") For these reasons, the Order of the ALC should be vacated and the matter remanded to the Department for compliance with Section 1–23–350. See Hamm v. S. Carolina Pub. Serv. Comm'n, 295 S.C. 429, 431, 368 S.E.2d 911, 913 (1988).

II. THE COURT ERRED IN HOLDING NO SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD AS A WHOLE TO SUPPORT A DISPUTE IN MATERIAL FACTS

Accepting, *in arguendo*, that the ALC was permitted to speculate as to the basis for which the Panel made its decision, it erred in holding "the record does not include evidence to support a finding that the Appellant caused the damage." (R.___)

Under S.C. Code Ann. § 41-35-120(2), an individual is disqualified from benefits if the Department "finds that he has been discharged for cause connected with his most recent work." A person found to have been discharged for cause is disqualified from receiving unemployment benefits for not less than five, nor more than twenty weeks, with a corresponding reduction in the maximum potential benefit amount. The term "cause"[1] has been defined to include:

> (1) The wanton and wilful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employer's interests, duties or obligations.

Lee v. South Carolina Employment Sec. Commission, 277 S.C. 586, 291 S.E.2d 378, 379. (S.C. 1982)(emphasis added.)

As in Lee, the record in this case supports the conclusion that "the direct consequences of [A]ppellant's acts or omissions were causing losses to Employer..." The Court in that case held

[1] The term "cause" was substituted for "misconduct" by 1985 Act No. 154, §6. The terms are synonymous. See Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 135, 406 S.E.2d 363, 368 (1991)

"there was no error in the [Department]'s application of "[cause]." Id, 277 S.C. at 589, 291 S.E.2d at 379. The Court further held:

> An examination of the statute shows '[cause]' includes aggravated misconduct and 'wilful failure or neglect of duty.' Further the statute infers degrees of [cause] by providing for discretionary lengths of ineligibility to be imposed based upon whether or not the "[cause] ... was aggravated." **Thus, we conclude the general assembly did not intend the "[cause]" mandated an aggravated or wilful failure.**
>
> In determining the meaning of the term "[cause]" we must look to the general purpose of the act.
>
> In Stone, supra, we held the term 'fault' is not limited to something that is blameworthy, culpable of wrong and that 'fault' must be construed as meaning failure or volition." [internal citations omitted]

Id, 277 S.C. at 587-88,.291 S.E.2d at 379 (1982)(emphasis added.)

Employer testified that it had received information from its customer that Respondent had caused severe damage to its property for which Employer was liable to repair. Wider testified he did not cause the damage. However, the Court failed to consider the inconsistency in the evidence regarding Respondent's testimony. The ALC failed to consider as evidence contrary testimony where Wider testified:

> And like I stated to Joe, it was impossible that we damaged ***that much*** because we didn't really damage. (R. ___)(emphasis added)

The exhibits properly admitted into the record without objection also provide evidence of a dispute in the facts. Upon an initial request for information regarding his separation, Appellant stated:

> **We damaged a customer's home** on May 24th, but I think the repairs were minor. He did not tell me the cost of the repairs. **We caused a little bit of damage** but not as much as he said. My coworkers and I tried to explain what happened but he took the customer's word over ours. Jose said we scratched a wall, damaged a treadmill, and a couch. He said we messed up the tiles on the floor. **I know we damaged the floor and put a few scratches on the wall** while we were installing the refrigerator. I also tried to explain that the father caused some damages but he would not listen. **The damage we caused may have been more than $50.00**

> **because they may have to replace some tiles on the floor**. Jose thought the entire floor needed to be replaced but I have not talked to him since he fired me. (emphasis added) (R. __)

The dispute is one of witness credibility. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Panel. See Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)(discussing Appellate Panel of the Workers' Compensation Commission having the final decision on witness credibility); See also Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942)(The Unemployment Compensation Commission, in its statutory authority to hear and determine cases arising under the Unemployment Compensation Law, is analogous to the Industrial Commission in its right to hear and determine matters arising under the Compensation Act.)

A material dispute in the evidence exists in the record. The evidence is such that "reasonable minds may differ on the judgment." Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The record when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence. Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995). Therefore the ALC Order dated March 25, 2013, should be vacated and the case remanded to the Panel for compliance with Section 1-23-350. See Able Commc'ns, Inc., 290 S.C. at 409, 351 S.E.2d at 152 (1986).

CONCLUSION

The decision of the ALC is not supported by substantial evidence on the record as a whole and is in violation of applicable law. Therefore the ALC Order dated March 25, 2013, should be vacated and the case remanded to the Panel for compliance with Section 1-23-350.

E.B. "Trey" McLeod, III, Esquire
S.C. Dept. of Employment & Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov

Attorney for Appellant SCDEW

April 24, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE

ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0439-AP

Marcus Wider, Respondent,

v.

South Carolina Department of Employment and Workforce and K B Enterprises, Inc., Defendants,

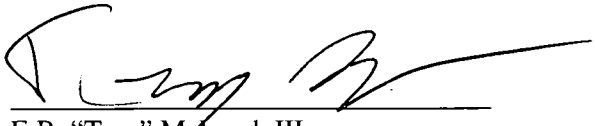
Of whom South Carolina Department of Employment and Workforce is Appellant.

PROOF OF SERVICE

I certify that I have served the *Amended Initial Brief of Appellant* on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on May 1, 2013, to the following addresses:

Jack E. Cohoon
SC Legal Services
2109 Bull Street
Columbia, SC 29201

K B Enterprises, Inc.
2006 Rockland Road
Columbia, SC 29210



E.B. "Trey" McLeod, III
SC Dept of Employment & Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov