

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kimberly M. Morrow, Respondent,

v.

South Carolina Department of Employment and
Workforce and A Wing and A Prayer, Inc., Defendants,

Of whom South Carolina Department of Employment
and Workforce is the Appellant,

and A Wing and A Prayer, Inc. is also the Respondent.

Appellate Case No. 2012-207406

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5235
Heard February 4, 2014 – Filed May 28, 2014

AFFIRMED

Eugene Belton McLeod, III, and Debra Sherman
Tedeschi, of South Carolina Department of Employment
and Workforce, both of Columbia, for Appellant.

Kimberly M. Morrow, pro se, of Spartanburg.

KONDUROS, J.: The South Carolina Department of Employment and
Workforce (SCDEW) appeals the Administrative Law Court's (ALC) reversal of

the SCDEW Appellate Panel's (Panel) finding that Kimberly Morrow was ineligible for unemployment benefits. The SCDEW argues the ALC exceeded its scope of review when substantial evidence supported the Panel's decision to deny Morrow unemployment benefits and the ALC erred in failing to consider Morrow's controlling interest in her employer as a relevant factor in creating her own unemployment. We affirm.

FACTS/PROCEDURAL HISTORY

A Wing and a Prayer, Inc. (Employer) was incorporated in 2005. Employer issued 10,000 shares of stock with Raymond Hicks owning 6,500 shares and Christopher Morrow, Morrow's husband, owning the remaining 3,500 shares. Employer operated under the trade name "Blue Star BBQ" as a restaurant and catering business in Spartanburg, South Carolina. Morrow testified she worked as the manager of Blue Star BBQ and "basically ran the restaurant." Blue Star BBQ closed on January 23, 2011. In the year and a half before the closing of the restaurant, the business lost \$113,000.

As a result of the closing, Morrow applied for unemployment benefits on January 30, 2011. On her application for unemployment benefits, Morrow listed her position as Vice President and she stated she owned one-third of the business. On the application, Morrow wrote that the President, Vice President, Secretary, and Treasurer made the decision to close the business due to slow business and a lack of revenue. Regarding the future of the business, Morrow stated the business planned to reopen as soon as possible but no reopening date was set. She also provided she was involved in efforts to reopen the business, and she was looking for smaller locations to open a new restaurant. She estimated she spent twenty hours each week looking for a new location. In response to the question, "How much time (per week) will you contribute to the operation of the business during your period of unemployment?" Morrow answered, "None[.] Business is closed." In response to the question, "Do you expect to be reemployed with the business?" Morrow answered, "Yes" and stated her anticipated date of reemployment was "ASAP" as the Vice President.

On March 11, 2011, Morrow was notified that a claims adjustor with the SCDEW determined she was ineligible for unemployment benefits because:

As an officer of a corporation, [Morrow] had control over [her] employment insurance benefits. Since unemployment insurance benefits are meant for those

who are unemployed through no fault of their own, [Morrow is] ineligible for benefits under the South Carolina Code. [Morrow is] ineligible for benefits beginning 01/30/11.

Morrow appealed to the SCDEW Appeal Tribunal (Tribunal), and a hearing was held on April 13, 2011. During the hearing, Morrow testified she had no controlling interest in Employer and Employer was no longer in business and had no plans to reopen. Morrow stated she spent approximately twenty hours per week in an effort to find a location to open a new restaurant. She also testified she attended classes for sixteen hours each week to earn her GED; however, she would be willing to stop going to school if she found full-time employment.

Christopher Morrow appeared at the hearing as an Employer witness. He testified Morrow was not an owner of Employer. He stated he owned one-third of Employer and Hicks owned two-thirds of Employer, while his wife was "only the operating manager and at the time [the restaurant was closed she] was on paper as the vice president just for paperwork." He stated Hicks, as the controlling partner, made the decision to close the restaurant and Morrow "really [had] no say so in that decision."

The Tribunal found Morrow did not have unrestricted exposure to the labor market and was ineligible for unemployment benefits based on her time spent seeking to open a new business and her enrollment in school. Morrow appealed the decision to the Panel, which affirmed the Tribunal's ruling. The Panel held Morrow's intention to open a new business in conjunction with her school attendance restricted her exposure and attachment to the labor market.

Morrow appealed the Panel's decision to the ALC. The ALC found no evidence in the record supported the conclusion that Morrow's GED classes made her unavailable for work. The ALC also stated Morrow had no corporate position within Employer and there was no effort to continue operating the business. Accordingly, the ALC reversed the Panel's decision and found Morrow met the availability requirements to receive unemployment benefits. This appeal followed.

STANDARD OF REVIEW

"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." S.C. Code Ann. § 1-23-380

(Supp. 2013). "The review must be conducted by the court and must be confined to the record." § 1-23-380(4). "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." § 1-23-380(5). "The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" S.C. Code Ann. § 1-23-610(B) (Supp. 2013).

LAW/ANALYSIS

I. Substantial Evidence

The SCDEW argues the ALC exceeded its scope of review by substituting its judgment for that of the Panel in determining that Morrow was eligible for unemployment benefits. We disagree.

The Administrative Procedures Act (APA) provides a party who has exhausted all administrative remedies available within an agency is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2013). The APA defines an agency as "each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases." S.C. Code Ann. § 1-23-310 (Supp. 2013). Under this definition, the SCDEW is an agency. *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding the Employment Security Commission, the predecessor to the SCDEW, was an agency within the APA, based upon its authority to make rules, as well as its ability to hear and decide contested matters).

To receive benefits, an unemployed worker must demonstrate, among other things, the claimant is able to work, available to work, and unemployed through no fault of their own. S.C. Code Ann. § 41-35-110 (Supp. 2013). "The burden is on a claimant to show compliance with benefit eligibility requirements. This includes a duty to show availability for work and a reasonable effort to obtain employment." *Wellington v. S.C. Emp't Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). "[A]vailability implies an applicant's 'unrestricted exposure' to the labor market." *Id.* The Panel determines whether a claimant has an unrestricted exposure to the labor market by looking at the facts and circumstances of each case. *Id.* The ALC "may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact." § 1-23-380(5). "Whether a claimant is available for work is a question of fact for the [Panel]."

Murphy v. S.C. Emp't Sec. Comm'n, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997).

"Review of an administrative agency's factual findings is governed by the 'substantial evidence' test of the [APA]." *Id.* "Substantial evidence under § 1-23-380 . . . is neither a mere scintilla of evidence nor evidence viewed blindly from one side of a case, but rather is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Carroll v. Gaddy*, 295 S.C. 426, 428, 368 S.E.2d 909, 911 (1988). "The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside." *Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

We find the ALC correctly reversed the Panel because the record lacked substantial evidence Morrow was unavailable to work. The fact that Morrow was a student does not automatically make her ineligible to receive unemployment benefits. She was in school to obtain her GED, which is an admirable pursuit in the event of unemployment, but also a pursuit that can be deferred if full-time employment becomes available. She testified she always had her phone with her in class in case prospective employers called. She also stated she would leave school if she were offered full-time employment. We find these facts to be substantial evidence she was available for employment.

Regarding the twenty hours each week she spent looking for a location to open a restaurant, this search exhibited optimism on her part the business could be reopened and did not require specific hours each week. We agree with the ALC her search for a new location and her availability to work under the statute do not conflict. During her hearing, Morrow was not asked when or under what circumstances she searched for a new location. She testified she was submitting employment applications and searched for new restaurant locations in her "free time." Subsequently, we do not find the record contained substantial evidence to support the Panel's decision. Therefore, the ALC did not err in reversing the Panel's ruling.

II. Controlling Interest

The SCDEW argues the ALC erred in failing to consider Morrow's controlling interest in Employer. We disagree.

The ALC determined that "[a]ccording to the Stock certificates placed in evidence at the hearing, Mr. Morrow owns 3500 shares in [Employer], and 6500 shares are owned by Raymond D. Hicks." In a footnote, the ALC found "[Morrow] does not own *any* interest in Employer." Based on these findings, we believe the ALC considered Morrow's interest in Employer. Accordingly, the SCDEW's contention the ALC failed to consider Morrow's controlling interest in Employer is without merit.

CONCLUSION

Based on the foregoing, the ALC's decision is

AFFIRMED.

LOCKEMY, J., concurs.

WILLIAMS, J., dissenting.

I respectfully dissent. In my view, the ALC impermissibly substituted its judgment for that of the Panel's in determining there was no substantial evidence that Morrow was restricted from the general labor market. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2013) ("The court may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact."); *see also* *Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997) ("Whether a claimant is available for work is a question of fact for the [Panel]."). In determining that Morrow was ineligible for unemployment benefits, the Panel reviewed the evidence and found the sixteen hours per week Morrow spent in school and the twenty hours per week she spent looking to open a new restaurant restricted her access to the general labor market. The ALC independently weighed the same evidence and found Morrow had unrestricted access to the general labor market. I believe the ALC impermissibly weighed the evidence and substituted its judgment for that of the Panel's in making this determination. *See* *Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) ("The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside."). Accordingly, I would reverse the ALC's decision awarding Morrow unemployment benefits and reinstate the decision of the Panel to deny Morrow unemployment benefits.