IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2021-CC-00576-COA

VECTOR TRANSPORTATION CO. **APPELLANT**

v.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND ANNA K. RENFROE **APPELLEES**

DATE OF JUDGMENT:	04/26/2021
TRIAL JUDGE:	HON. KELLY LEE MIMS
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MARGARET SAMS GRATZ
ATTORNEY FOR APPELLEES:	ALBERT B. WHITE
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
DISPOSITION:	REVERSED AND RENDERED - 11/01/2022
MOTION FOR REHEARING FILED:	

EN BANC.

EMFINGER, J., FOR THE COURT:

¶1. Vector Transportation Co. appeals from the Lee County Circuit Court's judgment affirming the ruling of the Mississippi Department of Employment Security's Board of Review that Anna K. Renfroe was entitled to unemployment benefits. The Board of Review adopted the "Findings of Facts and Opinion" of the administrative law judge (ALJ), which found that Vector "failed to provide substantial, clear, and convincing evidence proving the claimant was discharged for misconduct as that term is defined under the Law."

FACTS AND PROCEDURAL HISTORY

¶2. Vector hired Renfroe for its carrier-support division on December 19, 2011. According to its brief, Vector is "a freight brokerage company that offers freight services to

businesses throughout the United States and Canada" and as such "acts as a middle man in the transportation process and uniquely matches the transportation needs of various shippers and manufacturers with the abilities and capacities of available carriers." Leigh Buntin, Vector's human resources director, explained that employees in the shipper-support division contact customers with goods that need to be shipped and that employees in carrier support focus on finding trucks to ship the loads the shipper-support division secures.

¶3. At the time of hire, employees in carrier support are given an employee handbook that, among other things, sets forth the expectation that those employees are to be on the phone speaking with carriers for a minimum of twenty hours per week. The employee must acknowledge receipt of the handbook in writing and acknowledge that he or she understands the terms.[1] While warnings are not required, Renfroe did receive warnings regarding her failure to meet the telephone time requirement. The first warning was issued orally on January 14, 2020, by Josh Taylor, Renfroe's team leader at the time. Taylor addressed Renfroe's lack of effort in meeting the minimum phone requirement and asked her if there was some problem that prevented her from meeting the requirement. She advised Taylor that at that time, "bids"[2] were keeping her busy. On January 21, 2020, Brian Estes, a co-owner

[1] In its appellate brief, Vector explains that the handbook was created for this very situation because in previous years they had "issues" regarding employees failing to meet the telephone requirement. Employees would be terminated for failure to meet the requirement and then collect unemployment, penalizing Vector for requiring employees to do what they were hired to do.

[2] Buntin explained that "bids" refers to a process where a carrier gives a price to carry a load, and then the shipper would have to be contacted to see if the price quoted by the

of Vector, sent Renfroe a message through Vector's interoffice messaging system asking why her call time for the entire previous week was only two hours and forty-four minutes. Renfroe agreed she needed to be on the phone more, admitted that there was no excuse, and would work on it. When questioned by the ALJ, Buntin indicated that Renfroe had consistently met the twenty-hour phone requirement a "long time ago" but that there had been problems with her meeting the requirement prior to January 2020. On January 24, 2020, Brian and Joe Estes, another co-owner, along with Buntin, met with Renfroe to address concerns over her job performance. At that meeting, Renfroe was put on a sixty-day probationary period with the understanding that if there was no improvement during that period, her job would be in jeopardy. Renfroe was also included in a meeting with several employees on February 17, 2020, regarding their failure to complete job duties. Renfroe's job performance did not improve during the probationary period, and Joe and Brian met with her again on March 20, 2020. According to Buntin, Renfroe's employment was not terminated at that time because she was a long-time employee, and "they hated to let her go." At that meeting, Joe and Brian told her they would re-evaluate her performance in thirty days. Buntin testified she was not aware of whether there was a re-evaluation, but Renfroe's employment was terminated by Susan Zewicke, her team leader at that time, on June 5, 2020.[3]

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carrier would be acceptable.

[3] Susan Zewicke was the successor to Josh Taylor.

¶4. Renfroe filed a claim for unemployment benefits. The Mississippi Department of Employment Security (MDES) notified Vector of its determination that Vector had not shown Renfroe was discharged for misconduct and that Renfroe was eligible for benefits. Vector appealed that decision, and a hearing was conducted telephonically by the ALJ. Buntin, Lee Durrett, general counsel for Vector, and Zewicke participated in the hearing, during which the above facts were developed. Renfroe did not participate in the hearing.

¶5. The ALJ rendered her opinion, finding:

> The employer discharged the claimant for poor job performance. The claimant was not able to meet the employer's expectations with the time she spent on the telephone. The claimant was warned about her behavior. *However, the claimant never demonstrated the ability to meet the employer's expectations on a consistent basis*. The employer has failed to provide substantial, clear, and convincing evidence proving the claimant was discharged for misconduct as that term is defined under the Law.

(Emphasis added). Vector appealed the decision of the ALJ to the MDES Board of Review. The Board of Review adopted the ALJ's findings of fact and opinion and affirmed the ALJ's decision. Vector filed its petition for appeal and review of the decision of the Board of Review to the Lee County Circuit Court. The circuit court affirmed the decision of the Board of Review, finding it was "supported by substantial evidence," "not arbitrary," and "contained no error of law." It is from this judgment that Vector appeals.

STANDARD OF REVIEW

¶6. In *Mississippi Department of Employment Security v. Jackson County*, 166 So. 3d 556, 558 (¶10) (Miss. Ct. App. 2015), our standard of review on appeal is described:

> We employ an abuse-of-discretion standard when reviewing a trial court's decision to affirm or reverse an administrative agency's findings. *McGee v. Miss. Emp't Sec. Comm'n*, 876 So. 2d 425, 427 (¶5) (Miss. Ct. App. 2004) (citation omitted). We must "review the record to determine whether there is substantial evidence to support the Board['s] . . . findings of fact, and further, whether, as a matter of law, the employee's actions constituted misconduct disqualifying him from eligibility for unemployment compensation." *Miss. Emp't Sec. Comm'n v. Berry*, 811 So. 2d 298, 301 (¶8) (Miss. Ct. App. 2001) (citing *City of Clarksdale v. Miss. Emp't Sec. Comm'n*, 699 So. 2d 578, 580 (¶15) (Miss. 1997)).

¶7. The dissent argues that abuse of discretion is not the proper standard here. We disagree. The dissent claims that the abuse-of-discretion standard began with *Brandon v. Mississippi Employment Security Commission*, 768 So. 2d 341, 343 (¶7) (Miss. Ct. App. 2000). The dissent correctly points out that Mississippi Code Annotated section 71-5-531 (Rev. 2021) governs the standard of review for the appeal of a decision of the MDES. Section 71-5-531 provides that "[i]n any judicial proceedings under this section, the findings of the [Board] as to the facts, **if supported by evidence** and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." (Emphasis added). It appears that the dissent interprets the statute to require this Court to adopt the Board's findings of fact and completely confine its analysis to questions of law. As a result, the dissent claims that "all mentions of an abuse-of-discretion standard should be retired from future opinions."

¶8. *Brandon* recognizes the statute as the governing authority for standard of review of an administrative agency's determination. *Brandon*, 768 So. 2d at 343 (¶8) ("Our standard for reviewing the findings and decisions of an administrative agency such as the MESC is

found in Miss. Code Ann. § 71-5-531.").[4] *Brandon* elaborates:

> Apart from the statute, this Court has spoken to **the standard of review of MESC proceedings**: "The denial of benefits may be disturbed only if (1) **unsupported by substantial evidence**, (2) arbitrary or capricious, (3) beyond the scope of power granted to the agency, or (4) in violation of the employee's constitutional rights." *Mississippi Employment Sec. Comm'n v. Noel*, 712 So. 2d 728, 730 (Miss. Ct. App. 1998) (citing *Mississippi Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993)). The MESC's decision is rebuttably presumed to be correct. *Id*.

Brandon, 768 So. 2d at 344 (¶9) (emphasis added).

¶9. We obviously are dealing with two standards of review in this case: one for the trial court and another for the Board's findings. "When an appellate court reviews a **trial court's decision** to affirm or deny an administrative agency's findings and decisions, the appropriate standard of review is abuse of discretion." *McGee*, 876 So. 2d at 427 (¶5) (emphasis added) (citing *Brandon*, 768 So. 2d at 343 (¶7)). The **standard for reviewing the findings and decisions of an administrative agency, such as the MDES,** is found in Mississippi Code Annotated section 71-5-531. As discussed below, we find that the ALJ's factual findings, which were adopted by the Board, were not supported by substantial evidence. Accordingly, we find that the circuit court abused its discretion by affirming the decision of the Board.

ANALYSIS

¶10. An employee shall be disqualified from receiving unemployment benefits if he is

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[4] "Wherever the term '[Mississippi] Employment Security Commission [(MESC)]' appears in any law, the same shall mean the Mississippi Department of Employment Security [(MDES)]." Miss. Code Ann. § 71-5-101 (Rev. 2021).

discharged for misconduct connected to his work. Miss. Code Ann. § 71-5-513(A)(1)(b). The burden of proof to show misconduct is on the employer. *Id.*; § 71-5-513(A)(1)(c). The employer must prove misconduct connected to the work by substantial, clear, and convincing evidence. *City of Grenada v. Miss. Dep't of Emp. Sec.*, 320 So. 3d 523, 526 (¶16) (Miss. 2021). In *City of Grenada*, 320 So. 3d at 525-26 (¶14), the court repeated the longstanding definition of misconduct connected to the work as follows:

> In *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982), this Court defined misconduct connected with work as follows:
>
> > **conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee**. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent[,] or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, [come] within the term. (emphasis added).
>
> *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982) (citing *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941) (addressing the meaning of the term under a similar unemployment compensation statute)).
>
> *Wheeler* further provides that
>
> > [m]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered "misconduct" within the meaning of the statute.
>
> *Id*. (citing *Neubeck*, 296 N.W. 636).

(Emphasis added). After the Mississippi Supreme Court's 1982 decision in *Wheeler*, the

MDES adopted Wheeler's definition of misconduct and produced the definition of misconduct in what is now MDES Regulation 308.00, 20 Miss. Admin. Code Pt. 101, R. 308.00 (2012).[5] This Court recognized this connection in *Buller v. Mississippi Department of Employment Security*, 111 So. 3d 1276, 1279-80 (¶12) (Miss. Ct. App. 2013):

> After *Wheeler*, MDES adopted the *Wheeler* definition of misconduct and produced the following definition of misconduct in section 308 of its Unemployment Insurance Regulations:
>
> A. For purposes of . . . [s]ection 71-5-513, misconduct shall be defined as including but not limited to:
>
> 1. The failure to obey orders, rules or instructions, or failure to discharge the duties for which an individual was employed;
>
> a. An individual found guilty of employee misconduct for the violation of an employer rule only under the following conditions:
>
> i. the employee knew or should have known of the rule;
>
> ii. the rule was lawful and reasonably related to the job environment and performance; and
>
> iii. the rule is fairly and consistently enforced.
>
> 2. A substantial disregard of the employer's interests or of the employee's duties and obligations to the employer;

[5] It is important to note that the definition in regulation 308.00 was never meant to supplant the definition announced in *Wheeler*, which has been repeated in many cases since *Wheeler*. In fact, both *Wheeler* and regulation 308.00 are quoted in most appellate cases concerning misconduct connected to the work in unemployment compensation cases.

> 3. Conduct which shows intentional disregard—or if not intentional disregard, utter indifference—of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of the employee; or
>
> 4. Carelessness or negligence of such degree or recurrence as to demonstrate wrongful intent.
>
> However, mere inefficiency, unsatisfactory conduct, failure to perform as the result of inability or incapacity, a good faith error in judgment or discretion, or conduct mandated by a religious belief or the law is not misconduct. Conduct mandated by the law does not include court ordered conduct resulting from claimant's illegal activity; this may be considered misconduct.

The issue presented here is whether Vector proved by substantial, clear, and convincing evidence that Renfroe's employment was terminated as a result of misconduct connected to the work she was hired to perform.

¶11. Vector's position is clear. As noted above, the company has faced this exact issue before. In its initial appellate brief, Vector states, in part:

> ***Over a decade ago, there were issues at Vector whereby employees would not do what they were hired to do. They would be terminated and then collect unemployment, thereby penalizing Vector for requiring employees to do what they were hired to do***. Consequently, Vector created its Employee Handbook and included the "Minimum Phone and Work Requirement" policy so there would be no ambiguity that 20 hours on the phone per week was a requirement of employment– not a goal, wish or expectation–but a requirement of employment. Vector intentionally created the "Minimum Phone and Work Requirement" policy and published the "Minimum Phone and Work Requirement" policy in the Employee Handbook. The Employee Handbook is provided to every employee and every employee is expressly made aware of the "Minimum Phone and Work Requirement" policy.

(Emphasis added). Vector admittedly created its employee handbook, which included the

"Minimum Phone and Work Requirement," in an effort to correct what it believed to be an unfair result when faced with claims for unemployment benefits. Accordingly, during the telephonic hearing, Vector put on proof that

1. Renfroe was informed of the requirements at the time she was hired,

2. Renfroe was warned that she was not in compliance with the requirements,

3. Renfroe was given an opportunity to come into compliance, and

4. Renfroe continued to fail to meet the twenty hour requirement and was terminated.

Vector contends this was clear and convincing evidence of Renfroe's misconduct connected to the work she was hired to do, pursuant to the provisions of MDES Regulation 308.00(A)(1)(a), and thus Renfroe should not be eligible for unemployment benefits. Vector argues that there was no need for the circuit court, Board of Review, or ALJ to further consider *Wheeler* and its definition of misconduct. However, Vector fails to recognize that the concluding paragraph of regulation 308.00(A) still applies the *Wheeler* definition to any determination of misconduct made pursuant to regulation 308.00(A).

¶12. Renfroe did not participate in the telephonic hearing conducted by the ALJ. Therefore, we do not have any explanation from her as to why she was able to consistently meet the twenty-hour requirement for several years, but, in the first five months of 2020, she never came close to meeting the requirement. During 2020, according to the exhibit admitted by Vector, Renfroe never exceeded seven hours of phone time in any week, and, for two

separate weeks, she logged less than one hour of phone time for the entire week.

¶13. The ALJ found that Renfroe "was not able to meet the employer's expectations with the time she spent on the telephone" and that "[Renfroe] never demonstrated the ability to meet the employer's expectations on a consistent basis." Those findings are not supported by the record. As indicated, Renfroe did not testify at the telephonic hearing. The testimony from Buntin, as a representative of Vector, and the documents admitted into evidence during the hearing are all we have before us on this point. The following exchange occurred during the hearing:

> ALJ: Okay. Now, she was hired in 2011. Is that correct?
>
> Buntin: Yes ma'am.
>
> ALJ: Now prior to January the 14th, 2020 had there been any problems with her call time?
>
> Buntin: Yes ma'am.
>
> ALJ: Okay. So, **did she ever fully meet the expectations in the call time or that was required?**
>
> Buntin; **She did**.
>
> ALJ: Okay. **Was it on a consistent basis?**
>
> Buntin: **Long time ago. Yes ma'am**.
>
> ALJ: Okay. So, when did the call time or the amount of time she spent, when did it start declining?
>
> Buntin: Let's see. Um, I only have in front of me records starting from January 2020, and it was like 3 hours and then basically it just went down from there to like once in an hour.

(Emphasis added). Buntin's testimony shows that Renfroe ***had demonstrated the ability to meet the employer's expectations on a consistent basis***. There is no evidence in the record to oppose this testimony.

¶14. In *Jackson-George Regional Library System (JGRLS) v. Mississippi Department of Employment Security*, 226 So. 3d 133, 135 (¶4) (Miss. Ct. App. 2017), an employee of the library was terminated for misconduct after posting a compromising photograph of a library patron on Facebook. Because this was a violation of the library's confidentiality policy, the employee was terminated for misconduct. *Id*. at 135 (¶4). The employee applied for unemployment benefits. The initial claims examiner found the employee ineligible for unemployment benefits and the employee appealed. *Id* at (¶5). At the hearing conducted by an ALJ on appeal, the employee testified that while she was aware of the library's policy, she did not believe the particular photo was in violation of the policy. *Id*. at 138 (¶14). She testified that other employees had previously posted similar photos and had not been disciplined. *Id*. at (¶15). The employee admitted during the hearing that she did not divulge the name of those employees to the director when she was confronted on this issue. *Id*. Further, the employee admitted that she had no personal knowledge of those employees' disciplinary records. *Id*.

¶15. The library director, however, testified that she had personal knowledge of the employees' disciplinary records. *Id*. at 137 (¶13). She testified that the policies, rules, and regulations were consistently enforced and that past employees had been subject to

immediate termination for confidentiality-policy violations. *Id*. She testified that if other employees were to post similar photos, they would have faced similar penalties. *Id*.

¶16. The ALJ in *JGRLS* found the testimony of the employee to be more credible and found that the policy was not consistently enforced. *Id.* at 136 (¶5). Based upon that factual finding, the ALJ found that the library "did not meet its burden of proving misconduct by substantial, clear, and convincing evidence." *Id*. at 138 (¶16). This decision was affirmed by the Board of Review and by the circuit court. *Id*. at 136 (¶6).

¶17. On appeal, this Court found that the employee's "uncorroborated hearsay not based upon any personal knowledge" did not rise to the level of substantial evidence. *Id*. at 138 (¶17). Thus, this Court found that the Board's adoption of the ALJ's findings was arbitrary and capricious, reversed and rendered the judgment of the circuit court affirming the decision, and reinstated the claims examiner's ruling denying the employee benefits. *Id*. at 139 (¶21).

¶18. In the present case, the ALJ found that because Renfroe had never demonstrated the ability to meet the employer's expectations on a consistent basis, Vector failed to meet its burden of proof. We find the ALJ's factual findings, which were adopted by the Board of Review, are not supported by substantial evidence and are, therefore, arbitrary and capricious. As a result, the trial court abused its discretion by affirming that decision.

¶19. Based upon the proof submitted by Vector, we find that Renfroe ***had*** previously demonstrated the ability to meet Vector's work requirements. Further, Renfroe's extended

period of extreme noncompliance, after having been given multiple opportunities to comply, constitutes "*conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee*." *Wheeler*, 408 So. 2d at 1383.

CONCLUSION

¶20. We find that Vector met its burden of proof to show that Renfroe's employment was terminated for misconduct, as that term is defined by *Wheeler*, and is, therefore, disqualified from receiving unemployment benefits.

¶21. **REVERSED AND RENDERED.**

CARLTON, P.J., GREENLEE, LAWRENCE, McCARTY AND SMITH, JJ., CONCUR. McDONALD, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. WESTBROOKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY WILSON, P.J.; McDONALD, J., JOINS IN PART. BARNES, C.J., NOT PARTICIPATING.

WESTBROOKS, J., DISSENTING:

¶22. I believe the Lee County Circuit Court correctly affirmed the Mississippi Department of Employment Security's Board of Review's determination that Anna K. Renfroe was entitled to unemployment benefits. It is reasonable to believe that the Administrative Law Judge's original factual finding was based on substantial credible evidence, and thus, by statute, neither this Court nor the circuit court has the power to overturn that finding. Therefore, I respectfully dissent.

¶23. Renfroe was an employee of Vector Transportation Co. for eight and a half years,

from December 19, 2011, until her employment was terminated on June 5, 2020. She held the same position the entire time she was employed for Vector in the carrier-support division. At the beginning of her employment, Renfroe received and signed Vector's employee handbook, which stated that "employees are expected to be on the phone for a minimum of twenty (20) hours per week either speaking with or attempting to speak with customers, carriers, shippers, etc.," with the exception of those with "a higher volume of confirmed sales."[6]

¶24. In January 2020, six months before Renfroe's employment was terminated, she received her first warning that she was not maintaining the mandatory twenty-hour-per-week phone time that her position required. She received three additional individual warnings regarding the same issue. Renfroe also participated in one group meeting where the company president met with "shipper support" staff to discuss call times, among other issues. At the meeting, the president told his staff "that the average call time was 4.5 hours" with the "average talk time per shipper rep was 4 hours a week." Renfroe was ultimately discharged for "refusal to do her job" in June 2020. A performance chart provided by Vector that covered dates from January 3, 2020, to May 22, 2020, showed that during this time period, Renfroe never met the twenty-hour-per-week goal that her position mandated.

¶25. After her employment was terminated, Renfroe filed for unemployment benefits with

[6] These employees were given a "volume exclusion" from the rule at the discretion of the company. There is no indication in the record that Renfroe was one of these employees.

the Mississippi Department of Employment Security (MDES). An initial investigation by the MDES officer found that Renfroe was eligible for benefits, as she was not discharged for misconduct. Vector appealed, and a de novo telephonic hearing took place before an Administrative Law Judge (ALJ) on September 11, 2020. Renfroe could not be reached for the telephonic hearing, so all the evidence provided was from Vector. Leigh Buntin, from Vector's human resources department, gave the following testimony regarding Renfroe's ability to meet the twenty-hour-per-week goal Vector set forth:

ALJ: Okay. Now, she was hired in 2011. Is that correct?

BUNTIN: Yes ma'am.

ALJ: Now prior to January the 14th, 2020 had there been any problems with her call time?

BUNTIN: Yes ma'am.

ALJ: Okay. So, did she ever fully meet the expectations in the call time or [what] was required?

BUNTIN: She did.

ALJ: Okay. Was it on a consistent basis?

BUNTIN: Long time ago. Yes ma'am.

ALJ: Okay. So, when did the call time or the amount of time she spent, when did it start declining?

BUNTIN: Let's see. Um, I only have in front of me records starting from January 2020, and it was like 3 hours and then basically it just went down from there to like once in an hour.

ALJ: What I'm asking you, prior to January 2020 were there problems

with the amount of time she was spending on the call or on the phone?

BUNTIN: Yes ma'am.

ALJ: Okay. Was she warned about those issues?

BUNTIN: Not that I'm aware of.

¶26. Based on this testimony and other evidence produced at the hearing, the ALJ rendered a decision entitling Renfroe to the receipt of benefits. In the findings of fact, the ALJ determined that Renfroe had four warnings regarding her not meeting the minimum requirements of phone time, as well as attending an additional group meeting that addressed many employees' inability to meet phone times (including Renfroe). Finally, the ALJ found, "[T]he claimant's continued failure to show improvement resulted in the decision to terminate her employment on 6/5/2020. [Renfroe] never met the employer's expectations on a consistent basis." The ALJ's conclusion was that "[t]he employer has failed to provide substantial clear, and convincing evidence proving the claimant was discharged for misconduct as that term is defined under the [l]aw." The ALJ concluded that Renfroe was entitled to benefits.

¶27. Vector appealed this decision to the Board of Review, which affirmed the ALJ's ruling and adopted its "Findings of Fact and Opinion" on October 9, 2020. Vector next appealed the decision to the Lee County Circuit Court, which affirmed the decision of the Board of Review by substantial evidence, not arbitrary, and containing no errors of law. Vector then appealed from the circuit court's judgment.

¶28. The standard of review in this case bears repeating, as it is determinative of the correct outcome in this case. "Mississippi Code Annotated section 71-5-531 (Rev. 2021) . . . governs the standard of review for appealing a Mississippi Employment Security Commission Board of Review decision to the circuit court and to the [appellate courts]." *Shavers v. Miss. Emp. Sec. Comm'n*, 763 So. 2d 183, 184-85 (¶7) (Miss. Ct. App. 2000). This statute provides that "[i]n any judicial proceedings under this section, the findings of the [Board] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." *City of Grenada v. Miss. Dep't of Emp. Sec.*, 320 So. 3d 523, 525 (¶12) (Miss. 2021) (quoting Miss. Code Ann. § 71-5-531).

¶29. I will take the opportunity here to address a minor discrepancy regarding the standards of review for administrative agency cases. Some appellate cases have cited the concept that "[t]he standard of review in cases where this Court examines the circuit court's judgment affirming the Board's decision is abuse of discretion." *Windham v. Miss. Dep't of Emp. Sec.*, 207 So. 3d 1249, 1251 (¶8) (Miss. Ct. App. 2017); *see, e.g.*, *Miss. Dep't of Emp. Sec. v. Clark*, 13 So. 3d 866, 870 (¶8) (Miss. Ct. App. 2009); *Howell v. Miss. Emp. Sec. Comm'n*, 906 So. 2d 766, 769 (¶7) (Miss. Ct. App. 2004); *McGee v. Miss. Emp. Sec. Comm'n*, 876 So. 2d 425, 427 (¶5) (Miss. Ct. App. 2004) (citing *Brandon v. Miss. Emp. Sec. Comm'n*, 768 So. 2d 341, 343 (¶7) (Miss. Ct. App. 2000)). The majority cites the abuse-of-discretion standard as well. *Ante* at ¶6. A brief investigation of the concept shows that this statement comes

from *Brandon v. Mississippi Employment Security Commission*, 768 So. 2d 341, 343 (¶7) (Miss. Ct. App. 2000). But *Brandon* fails to cite any authority for the use of abuse of discretion as a standard of review, and it is unclear where the premise springs from. Furthermore, an abuse-of-discretion standard of review contradicts the Supreme Court's edict in *Jackson County Board of Supervisors v. Mississippi Employment Security Commission*, 129 So. 3d 178 (Miss. 2013), which cites the statute above to confirm that "**[a]ll levels of judicial review focus on the decision of the MESC Board of Review, as that is the final decision of the agency.**" *Id*. at 183 (¶13) (emphasis added) (citing Miss. Code Ann. § 71-5-531). Thus, the appropriate standard of review for this case is the statutorily proscribed standard, and all mentions of an abuse-of-discretion standard should be retired from future opinions.

¶30. This Court has also stated "[a]n administrative agency's conclusions will remain undisturbed unless the agency's order is: (1) unsupported by substantial evidence, (2) arbitrary and capricious, (3) beyond the scope or power granted to the agency, or (4) in violation of the employee's statutory or constitutional rights." *Alston v. Miss. Dep't of Emp. Sec*., 247 So. 3d 303, 308 (¶18) (Miss. Ct. App. 2017) (citing *Miss. Dep't of Emp. Sec. v. Good Samaritan Pers. Servs*., 996 So. 2d 809, 812 (¶6) (Miss. Ct. App. 2008)). If the Board's findings are supported by substantial evidence and the relevant law is properly applied, then the reviewing court must affirm. *Id*. (citing *Barnett v. Miss. Emp. Sec. Comm'n*, 583 So. 2d 193, 195 (Miss. 1991)). But "if an agency's decision is not based on

substantial evidence, . . . it will be deemed arbitrary and capricious." *Jackson-George Reg'l Libr. Sys. v. Miss. Dep't of Emp. Sec*., 226 So. 3d 133, 136 (¶8) (Miss. Ct. App. 2017) (quoting *EMC Enter. Inc. v. Miss. Dep't of Emp. Sec*., 11 So. 3d 146, 150 (¶9) (Miss. Ct. App. 2009)).

¶31. "A rebuttable presumption exists in favor of the administrative agency's decision and findings, and the challenging party has the burden of proving otherwise." *Id*. Furthermore, "[a] court sitting in an appellate role may not reweigh the evidence to determine where it believes the preponderance of the evidence to lie, nor may it substitute its judgment for that of the agency." *Miss. Emp. Sec. Comm'n v. Berry*, 811 So. 2d 298, 301 (¶8) (Miss. Ct. App. 2001) (citing *Allen v. Miss. Emp. Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994)).

A. Applicable Law

¶32. "Under Mississippi's Unemployment Compensation Law, a person is disqualified from receiving benefits if he is discharged from employment for misconduct connected with his work." *Brandon*, 768 So. 2d at 344 (¶10) (citing Miss. Code Ann. § 71-5-513(A)(1)(b)). At the same time, our Legislature has explicitly determined that "the burden of proof of misconduct shall be on the employer." Miss. Code Ann. § 71-5-513(A)(1)(c). The employer must show "by 'substantial, clear, and convincing evidence' that the former employee's conduct warrants disqualification from eligibility for benefits." *Foster v. Miss. Emp. Sec. Comm'n*, 632 So. 2d 926, 927 (Miss. 1994) (citing *Westbrook v. Greenville Council on Aging*, 599 So. 2d 948, 949 (Miss. 1992); *Miss. Emp't Sec. Comm'n v. Flanagan*, 585 So.

2d 783, 785 (Miss. 1991); *Miss. Emp't Sec. Comm'n v. Bell*, 584 So. 2d 1270, 1272 (Miss. 1991); *Shannon Eng'g & Const. Inc. v. Miss. Emp. Sec. Comm'n*, 549 So. 2d 446, 450 (Miss. 1989)). Clear and convincing evidence is proof that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Hosp. Housekeeping Sys. Inc. v. Townsend*, 993 So. 2d 418, 426 (¶30) (Miss. Ct. App. 2008).

¶33. The Supreme Court has defined misconduct in *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982), as the majority states in its opinion. *Ante* at ¶10. I, along with the majority, also recognize the implementation of *Wheeler* into the MDES regulatory scheme. *Id*. I would also add to these definitions of misconduct that the Supreme Court has clarified that "[m]isconduct imports conduct that reasonable and fair-minded external observers would consider a wanton disregard of the employer's legitimate interests. Something more than mere negligence must be shown, although repeated neglect of an employer's interests may rise to the dignity of misconduct." *City of Vicksburg v. Miss. Dep't of Emp. Sec*., 178 So. 3d 737, 739 (¶8) (Miss. Ct. App. 2012) (quoting *Shavers*, 763 So. 2d at 185 (¶8)).

B. Substantial Credible Evidence to Support Factual Findings by ALJ

¶34. With this background in mind, we turn to the present case. By statute, "the findings of the [Board] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." *City of*

Grenada, 320 So. 3d at 525 (¶12). Because no question of law is before us, the only issue we can determine, by statute, is whether substantial, clear, and convincing evidence supports the ALJ's finding that "[Renfroe] never met the employer's expectations on a consistent basis" and subsequent conclusion granting Renfroe benefits. *Id*. (quoting Miss. Code Ann. § 71-5-531; *Jackson-George Reg'l Libr. Sys*., 226 So. 3d at 136 (¶8)). Because of the deferential standard of review that must be given to an agency's decision, in addition to the rebuttable presumption that exists in an agency's favor, I believe that the circuit court correctly affirmed the Board's decision.

¶35. Even though Renfroe did not meet her required phone time, the ALJ concluded that Vector "failed to provide substantial, clear, and convincing evidence proving the claimant was discharged for misconduct as that term is defined under the law." Vector had to show that the conduct was "such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee." *Wheeler*, 408 So. 2d at 1383. In other words, Vector was required to show by clear and convincing evidence that Renfroe's behavior was more than mere ineptitude or inefficiency. *Foster*, 632 So. 2d at 926-27, 929 (holding mere ineptitude, without more, cannot disqualify employee from receiving benefits); *Allen*, 639 So. 2d at 905 (holding that ordinary negligence that was neither willful or wanton or culpably negligent does not constitute misconduct); *Wheeler*, 408 So. 2d at 1383 (holding that "inefficiency, unsatisfactory conduct, failure in good performance as the result of inability

or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion" are not misconduct per the statute).

¶36. Furthermore, MDES Regulation 308.00 (A)(1)(a) is the only portion that Vector acknowledges in its brief to be applicable to Renfroe's case. According to the regulation, one requirement to find misconduct for the violation of an employer's rule is that "the rule is fairly and consistently enforced." 20 Miss. Admin. Code Pt. 101, R. 308.00(A)(1)(a)(i)-(iii) (2012). Here, Vector's own evidence shows that this was not the case. Renfroe was employed for eight and a half years. Yet her first reprimand for failing to meet her phone time goal was in January 2020. Buntin testified that a "[l]ong time ago" Renfroe met her phone goal. Next, in response to the ALJ's question regarding whether Renfroe was warned about her phone time in the eight years prior to January 2020, Buntin replied, "[N]ot that I'm aware of." Thus, the record shows that Vector did not consistently apply its mandatory phone time rule to Renfroe herself.

¶37. Vector points to its group meeting with all the employees in the shipper-support division as evidence that the rule was "fairly and consistently enforced." But while it is clear that a group meeting took place and that many employees were not meeting their call time goal, Vector has failed to produce any evidence that points to the *enforcement* of the rule by terminations or sanctions for any of these many employees. It has only provided evidence of *Renfroe's* subsequent termination. Thus, Vector also failed to produce evidence to show that it applied the rule consistently to other employees.

¶38. Vector also finds fault with the ALJ's finding and conclusion that "[Renfroe] never demonstrated the ability to meet the employer's expectations on a consistent basis." Note, however, the ALJ did not state that Renfroe *never* met the expectations; Buntin testified she did a "long time ago." The ALJ found that the expectations were never *consistently* met. After a thorough review of the record, I can state that the record is devoid of proof that over the course of eight years Renfroe's call-time goal was consistently met. In contrast, Buntin's testimony that Renfroe only met her goal a "long time ago" coupled with Vector's own five month call log (showing Renfroe never met her goal during that time period) support the fact that the goal was not consistently met. Vector had the burden of proving its claims by clear and convincing evidence. It is reasonable to believe that Vector's proof was insufficient to create "a firm belief or conviction as to the truth of the allegations" in the ALJ's mind that Renfroe was ineligible for benefits. *Hosp. Housekeeping Sys. Inc.*, 993 So. 2d at 426 (¶30). In fact, substantial credible evidence points to the opposite determination.

¶39. In the present case, I believe that the ALJ's original facts, findings, and conclusion that Renfroe was entitled to benefits are supported by substantial evidence. The decision was not arbitrary and capricious and contained no errors of law. The ALJ did not believe Vector proved by clear and convincing evidence that Renfroe's behavior rose to the required definition of misconduct that would have prevented her from receiving benefits. Since the ALJ's determination was based on substantial credible evidence, the circuit court's affirmation of the Board of Review's adoption of those facts, findings, and conclusions was

statutorily required. Given our statutory standard of review, I believe the circuit court's judgment should be affirmed. Accordingly, I must respectfully dissent.

WILSON, P.J., JOINS THIS OPINION. McDONALD, J., JOINS THIS OPINION IN PART.