

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00103 COA**

**SANDERSON FARMS, INC. AND MISSISSIPPI
EMPLOYMENT SECURITY COMMISSION**

APPELLANT

v.

RICKY MYERS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/05/96
TRIAL JUDGE:	HON. ROBERT L. GOZA
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	R. PEPPER CRUTCHER, JR. JAMES W. CRAIG
ATTORNEY FOR APPELLEE:	NONE LISTED
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES (OTHER THAN WORKER'S COMPENSATION)
TRIAL COURT DISPOSITION:	APPEAL OF EMPLOYMENT TERMINATION REINSTATED SUA SPONTE
DISPOSITION:	REVERSED AND RENDERED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE THOMAS, P.J., DIAZ, HERRING, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Sanderson Farms, Inc. is appealing a judgment by the Rankin County Circuit Court which reversed a determination of the Mississippi Employment Security Commission (MESC) Board of Review. The circuit court reviewed the board's decision and reversed stating that the employer failed to meet its burden of proof and that the employee had good cause to leave his employment. Ricky Myers filed for unemployment and was denied by the referee of the MESC. Myers appealed to the board for a review of the referee's decision. The board upheld the referee's decision, so Myers appealed to the

circuit court who eventually reversed the board's ruling. Aggrieved, Sanderson Farms now appeals to this Court.

Sanderson Farms, Inc. appeals the circuit court's ruling and argues that the judge erred when he reinstated the injured employee's (Ricky Myers) appeal after Myers had let the dismissal of the appeal stand for more than thirty days. Sanderson Farms also appeals on the grounds that the circuit court judge erred when he reversed the MESC Board of Review's decision arguing that (1) the judge misallocated the burden of proof by requiring Sanderson Farms to prove that Myers left his employment without good cause and (2) the board of review's findings and conclusions were supported by substantial evidence. Because we reverse on the first issue, we will not address the remaining issues in this opinion.

FACTS

Ricky Myers was injured on his job at Sanderson Farms on March 21, 1994 and was advised by his doctor not to return to work until August 1, 1994. Myers worked until August 14, when he called in sick with a cold. Myers's doctor's excuse stated that he had bronchitis and that he could return to work on August 24. On August 24, Myers called the personnel manager at Sanderson Farms and although the exact conversation is disputed, the gist of the conversation was that Myers felt that he could no longer perform his job. Neither person mentioned anything about assignment to another job.

Myers applied to the MESC Board of Review after being denied benefits by the MESC referee. On November 7, 1994, the MESC's Board of Review adopted the referee's findings, which were that Myers refused to report to work at Sanderson Farms on August 24, 1994 because of illness. This was in spite of Myers's physician's having released him to return to work. The referee, as well as the Board of Review, also found that Myers left his employment voluntarily, without good cause.

On November 28, 1994, Myers filed his appeal of the board's decision and attached a copy of his letter entitled "Reason for a Rehearing" which was filed by the circuit clerk of Rankin County on the same day. On November 30 the court issued to all parties a notice of the briefing schedule. Myers never filed a brief. On November 2, 1995, the MESC requested that the circuit court dismiss the appeal on grounds that the time allowed for the petitioners to file a brief had expired with neither a brief nor an extension having been filed. The circuit court granted the dismissal on November 28, 1995. Thirty days passed from the time of dismissal and no action was taken by Myers. On January 9, 1996, the circuit court entered a memorandum opinion and judgment reversing the MESC's order denying benefits. Eight days later the circuit clerk filed an order, entered *sua sponte*, by the circuit court vacating its earlier dismissal of Myers's appeal. Sanderson Farms and MESC did not receive proper notice of the dismissal. The order vacating dismissal indicated that the letter entitled "Reason for a Rehearing" was considered the appellant's brief and had been overlooked by the court. However, when the circuit court ruled in favor of Myers before vacating his dismissal of appeal, it effectively prevented Sanderson Farms or the MESC from responding to Myers's brief. Aggrieved, Sanderson Farms now appeals to this Court.

ISSUES

Did the circuit court err in reinstating Myers's appeal after Myers had allowed the order of dismissal to stand for more than thirty days?

Mississippi Rules of Civil Procedure 59 allows a party ten days from the date of entry of judgment to request a new trial. In the case at hand, the request for a new trial should have been made by December 8, 1995 since entry of judgment was on November 28. The M.R.C.P. 4 requires an appeal to be filed with the supreme court within thirty days from the date of entry of judgment. As stated earlier, after the dismissal was entered by the circuit clerk, Myers took no action whatsoever. Therefore, Sanderson Farms believed that the case had been concluded.

"[A] dismissed case cannot be reinstated after the expiration of the term of court within which the dismissal was entered unless the dismissal was defective, or fraud, mistake or accident was involved." *Walker v. Parnell*, 566 So. 2d 1213, 1216 (Miss. 1990); *Mississippi Rice Growers Ass'n v. Pigott*, 191 So. 2d 399, 405-06 (Miss. 1966). In the case *sub judice*, the dismissal order was entered on November 28, 1995. The term of court for Rankin County Circuit Court ran from the fourth Monday in November until December 13, 1995. The order vacating the dismissal was signed by the trial judge on December 29, 1995 and entered by the circuit clerk on January 17, 1996. Both the signing of the order vacating the dismissal and the entry of the order took place after December 13.

In this case the judge found that he had been in error when he dismissed the case originally. The judge was under the erroneous assumption that there had been no brief filed by Myers, when there had in fact been one which was overlooked by the court. Although the judge had the authority to, *sua sponte*, vacate the dismissal due to the prior mistake, the judge did not follow the proper procedures required to review the case. Once the dismissal was vacated, then the judge must give the appellees a chance to be heard. *Bolls v. Harris*, 528 So. 2d 1128, 1129 (Miss. 1988). There was no notice given to Sanderson Farms or to MESC. Neither Sanderson Farms nor MESC had filed a brief with the circuit court. Due to this lack of notice, Sanderson Farms and MESC had no opportunity to present their case to the judge.

Additionally, even had the trial judge given Sanderson Farms or MESC a chance to file a brief and then reversed the Board's findings, we would still reverse the trial judge's ruling. This is because there was sufficient evidence at the original hearing to support the referee's decision to deny benefits to Myers. *Melody Manor, Inc. v. McLeod*, 511 So. 2d 1383, 1385 (Miss. 1987). The court in *Melody Manor* stated that "[t]he principle is well settled that an order of the Board of Review on the facts is conclusive on the lower court, if supported by substantial evidence and in the absence of fraud." *Id.*

The trial judge did not have the appellees' briefs from which to make an informed decision. We do. However, we do not have a brief from Myers. Myers was given an opportunity to submit a brief and chose not to do so. Myers' failure to file a brief with this Court "is tantamount to a confession of error, and will be accepted as such, and the judgment of the court below will be reversed, . . ." *U.S. Fidelity & Guaranty Co. v. State for Use and Benefit of Tompkins*, 204 So. 2d 852, 852-53 (Miss. 1967); *Transcontinental Gas Pipe line Corp. v. Rogers*, 284 So. 2d 304 (Miss. 1973).

Sanderson Farms and MESC were denied their right to be heard at the trial court level. We hold that the trial judge committed reversible error when he issued the order reversing the MESC before giving Sanderson Farms or MESC a chance to present their case. We, therefore reverse on this issue. Based

on this reversal, we find no need to address the remaining issues.

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT VACATING ITS EARLIER DISMISSAL OF THE ABOVE CASE IS REVERSED AND RENDERED AND THE JUDGMENT OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION IS REINSTATED.

BRIDGES, C.J., AND THOMAS, P.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

McMILLIN, P.J., NOT PARTICIPATING.