

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CC-00429 COA**

**MISSISSIPPI EMPLOYMENT SECURITY COMMISSION**

**APPELLANT**

**v.**

**BARBARA P. NICK**

**APPELLEE**

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

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

FRED J. LOTTERHOS

ATTORNEY FOR APPELLEE:

STEPHEN NICK

NATURE OF THE CASE: STATE BOARD AND AGENCY (OTHER THAN WORK COMP)--  
MESC

TRIAL COURT DISPOSITION: UNEMPLOYMENT BENEFITS ALLOWED

BEFORE McMILLIN, P.J., PAYNE AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

This case comes before the Court on an appeal by the Mississippi Employment Security Commission of a decision rendered by the Circuit Court of Washington County. The matter before the circuit court was Barbara P. Nick's appeal under section 71-5-531 of the Mississippi Code of 1972 of the Commission's decision that her weekly unemployment benefits be reduced in an amount equal to the portion of her social security retirement benefits attributable to her prior employment. The circuit court reversed the decision of the Commission, finding that Nick was entitled to full benefits under the State's statutory unemployment program.

We conclude that the circuit court decision is not supported by the applicable law and must be set aside. However, under the doctrine of plain error, we further conclude that the Commission committed an error of law when it computed Nick's entitlement to benefits and that Nick is, in fact, entitled to no benefits rather than the reduced amount allowed by the Commission.

Nick became eligible for social security retirement benefits in 1990. The Social Security Administration computed the amount of her monthly benefit based upon her work history and contributions to the program and, alternatively, as the eligible wife of her retired husband. *See* 42 U.S.C. § 402(b)(1) (1988). The monthly benefit was higher under her husband's account (\$360 per month as opposed to \$303 per month), and she, therefore, began drawing on that basis. *See id.*

Nick subsequently returned to work. Her earnings were not high enough to affect her monthly social security benefits. Thereafter, Nick's employment ended, and she became eligible for benefits under Mississippi's unemployment insurance program. *See* Miss. Code Ann. § 71-5-511 (1972). By virtue of intervening cost of living raises, Nick was receiving a monthly benefit from social security of \$405 per month at the time she applied for unemployment benefits.

Nick's claim for unemployment benefits was initially disallowed by the claims examiner based upon section 71-5-513(A)(6) of the Mississippi Code, which provides, in part:

An individual shall be disqualified for benefits . . . [f]or any week with respect to which he is receiving or has received remuneration in the form of payments under any governmental . . . retirement or pension plan, system or policy which a base-period employer is . . . contributing to or has . . . contributed to on behalf of the individual . . . .

Miss. Code. Ann. § 71-5-513(A)(6) (1972).

The section goes on to provide that, if the pension benefit is less than the unemployment entitlement, the claimant will not be totally disqualified, but that, instead, the unemployment benefits will be decreased by the pension amount. The claims examiner determined that the \$405 monthly social security benefit, translated to its weekly equivalent of \$93.56, exceeded Nick's calculated unemployment benefit of \$87.00 per week, thereby totally disqualifying her.

Nick requested a review of this decision under section 71-5-519 of the Mississippi Code, and the

matter was referred to a referee for hearing and decision as permitted by the statute. *See* Miss. Code Ann §§ 71-5-519, -521 (1972). The referee, apparently reaching a conclusion that social security benefits paid to Nick based upon her husband's earnings would not be subject to the provisions of 71-5-513(A)(6), performed a mathematical analysis to determine what portion of Nick's present social security benefit was attributable to her husband's earnings. He seems to have accomplished this by determining that Nick's original entitlement of \$303 per month based on her own earnings equaled 84.167 percent of the total amount of \$360 per month she actually received. He then applied that percentage to Nick's present monthly benefit of \$405.00 to conclude that \$340.88 of that amount was attributable to her own earnings. He then converted the monthly amount of \$340.88 to a corresponding weekly amount of \$79.00 (the actual mathematical calculation being \$78.66). The referee, therefore, applied the alternate provisions of 71-5-513(A)(6) to conclude that, rather than being totally disqualified, Nick was entitled to a reduced benefit of \$8.00 per week. The full board of review subsequently affirmed this determination, prompting Nick's appeal to the circuit court. Having seen its decision reversed by the circuit court, the Commission perfected this appeal under section 71-5-531 of the Mississippi Code of 1972.

## I.

### Preliminary Discussion

The issue before the Court today is purely a question of law. The essential facts upon which the proper decision in this case turns are not in dispute. Our duty is to review the action of the administrative body itself to determine if it was in accordance with the statutory mandates. *See Mississippi State Bd. of Pub. Accountancy v. Gray*, 674 So. 2d 1251, 1253 (Miss. 1996) (citations omitted); *Mississippi Employment Sec. Comm'n v. Harris*, 672 So. 2d 739, 741 (Miss. 1996). We are not required to give any deference to the decision of the circuit court, acting in this instance as a purely intermediate appellate court. *Mississippi Employment Sec. Comm'n v. PDN, Inc.*, 586 So. 2d 838, 840 (Miss. 1991).

This Court has concluded that both parties to this appeal have misapprehended pertinent parts of the law applicable to this case, and that the claimant in this case is disqualified from the unemployment program based on the total amount of her social security benefits.

## II.

### Background

The restriction on unemployment benefits set out in section 71-5-513(A)(6) did not arise in a vacuum. Its intended purpose is to ensure that this State's unemployment compensation law meets certain certification criteria under the federal Internal Revenue Code. Section 3301 of Title 26 of the Code of the United States imposes on an employer a federal employment tax of 6.2 percent of gross wages paid. 26 U.S.C. § 3301 (1988). However, section 3302 provides a credit against that federal

employment tax in an amount equal to the employer's contribution to a state unemployment fund, so long as that state's unemployment law has been certified by the Secretary of Labor as meeting the requirements of section 3304. 26 U.S.C. §§ 3301, 3304 (1988). Numbered among the requirements is section 3304(a)(15), which requires that the state law provide:

the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week . . . [followed by certain defined permissible exception which are not relevant to our consideration.]

26 U.S.C. § 3304(a)(15) (1988).

The error committed by both parties to this appeal is the assumption that the State restriction as enacted by the legislature is, or is intended to be, a mirror image of the provision of the federal law. That is not the case. In the first place, it must be remembered that there is no legal requirement that this state's unemployment entitlement laws conform at all to the federal requirements. There are very real consequences that attach to a determination by the Secretary of Labor that a state's laws are not certifiable, but the direct impact is on those employers who make contributions to the state's unemployment fund, since they lose an otherwise existing tax credit. Thus, the pressure on the states to enact laws certifiable under section 3304, though undoubtedly very real, are nonetheless political and not legal.

There is a further consideration that must be realized. The federal legislation, especially section 3304(a)(15), only lists certain restrictions on benefits that must be in place in order to make the state law eligible for federal certification. *See* 26 U.S.C. § 3304(a)(15) (1988). It does not provide, directly or by implication, that it is beyond the authority of the various states to draft restrictions on benefits that are more stringent than might be required by section 3304. Therefore, simply because a state's scheme of compensating claimants *may* permit eligibility in a certain situation without running afoul of the federal requirements does not mean that this permissible option is *required* by federal law.

Both the Commission and Nick seem to be of the opinion that the language of the federal statute limiting its mandatory applicability to benefits "based on the previous work of such individual" applies with equal force to the state statute. This interpretation explains the Commission's adoption of the mathematical computations performed by the referee to separate the part of Nick's monthly check attributable to her earnings from those paid as wife's benefits. Nick carries the argument a step further and contends that the Commission, though correct on the principle that only benefits based on the claimant's earnings are relevant, has misunderstood social security law. Nick argues that her monthly check is based entirely on her eligibility for wife's benefits under her husband's account. She says that social security benefits in these circumstances are an "all or nothing" proposition; that is, a

claimant such as Nick has two distinct claims for benefits and is awarded the one which produces the highest income. The resulting benefit is not, according to Nick, a blend of the two potential claims. Since all of her monthly social security check is based on her husband's earnings, she suggests, the Commission has acted arbitrarily and capriciously and contrary to law in its hypothetical division of what is an indivisible entitlement.

The short answer to this is that the legislature, in enacting section 71-5-513(6) did not (though it could have) limit the disqualification to benefits based on the previous earnings of the claimant. The language of the statute is clear and unequivocal. In such a case, the governing laws of statutory interpretation do not permit an analysis based upon our understanding of the legislative purpose. *Mississippi State Tax Comm'n v. Trailways Lines, Inc.*, 567 So. 2d 228, 232 (Miss. 1990) (citations omitted); *Weeks Dredging & Contracting, Inc. v. Mississippi State Tax Comm'n*, 521 So. 2d 884, 886-87 (Miss. 1988) (citations omitted). We must enforce the statute as its plain language requires. *Mississippi State Dep't of Human Servs. v. Forrest County Youth Ct.*, 663 So. 2d 580, 581 (Miss. 1995); *Weeks Dredging & Contracting, Inc.*, 521 So. 2d at 886-87.

We have no doubt that Nick's social security benefits constituted "remuneration in the form of payments under [a] governmental retirement or pension . . . system." Miss. Code Ann § 71-5-513(6) (1972). We also are of the opinion that her employer was "contributing to" the system on Nick's behalf at the time her claim for unemployment compensation arose. *Id.* There is nothing in this state's statute to require that the social security benefits be based upon the previous earnings of the claimant at the base employer or even that they be based on previous earnings of the claimant at all. It may be that such a scheme would produce a more equitable result, and it may be the case that such a scheme could have been enacted by the legislature without jeopardizing the ability of the state to obtain the Secretary of Labor's certification. Those are matters addressed to the sound discretion of the legislature, not to this Court, not to the Circuit Court of Washington County, and not to the Mississippi Unemployment Security Commission. Our job is to apply the clear letter of the law to the facts. *Weeks Dredging & Contracting, Inc.*, 521 So. 2d at 886-87.

While there is authority to the effect that an administrative body's interpretation of the laws under which it operates is entitled to deference on appeal, *see Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586, 592 (Miss. 1990) (citations omitted), nevertheless, we conclude that there is no arguable basis to interpret the clear pronouncement of the statute as supporting the proposition that some portion of Nick's social security benefit would be excluded when computing her disqualification under section 71-5-513(A)(6).

Because we conclude that the Commission has improperly grafted language from the federal statute onto our state law, we are of the opinion that the apportionment of Nick's benefits between what was mathematically attributable to her own earnings and what was derived from her status as an eligible spouse was manifestly in error. Under the plain language of our statute, all of Nick's benefits under social security were available to determine her eligibility for unemployment compensation. Since the monthly benefit of \$405, when translated to its corresponding weekly amount, exceeded her unemployment benefit, the Commission erred as a matter of law in granting partial benefits.

Though it is not necessary to the decision we reach today, we observe that Nick seems to have been correct in her assertion that her benefit is due entirely to her husband's social security account. Social

security law provides that an otherwise-eligible wife is entitled to a "wife's benefit" equal to one-half the primary insurance benefit of her husband. *See* 42 U.S.C. § 402(b)(2) (1988). She is eligible for such a benefit, however, only if she "is not entitled to . . . benefits, or is entitled to . . . benefits based on a primary insurance amount which is less than one-half the primary insurance amount" of her husband. *See id.* § 402(b)(1)(D). In this case, Nick's own "primary insurance amount" was less than one-half her husband's "primary insurance amount." Therefore, her entire benefit was based upon her husband's entitlement and would have been exactly the same had she not had any work history under the social security program. Though the apportionment made by the referee may seem equitable, it has no basis under federal or state law.

There being nothing further to be accomplished in this case on remand, we hereby reverse and render.

**THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS REVERSED AND FINAL JUDGMENT IS RENDERED IN THIS COURT DISQUALIFYING THE APPELLEE, BARBARA P. NICK, FROM ANY ENTITLEMENT TO UNEMPLOYMENT COMPENSATION BENEFITS FOR ANY PERIOD DURING WHICH SHE WAS RECEIVING SOCIAL SECURITY BENEFITS. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE, BARBARA P. NICK.**

**BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., AND KING, J., NOT PARTICIPATING.**