

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CC-01765-COA

HERRING GAS COMPANY, INC.

APPELLANT

v.

**MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION**

APPELLEE

DATE OF JUDGMENT:	8/19/2004
TRIAL JUDGE:	HON. BILLY JOE LANDRUM
COURT FROM WHICH APPEALED:	JONES COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JOHN L. MAXEY II CHARLES RICHARD SALTZMAN
ATTORNEY FOR APPELLEE:	B. RAY THERRELL
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	AFFIRM DECISION OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION BOARD OF REVIEW
DISPOSITION:	AFFIRMED - 7/18/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MYERS, P.J., FOR THE COURT:

¶1. Herring Gas Company, Inc. appeals the Circuit Court of Jones County's judgment affirming the Mississippi Employment Security Commission's¹ decision that Herring's appeal was untimely pursuant to Mississippi Code Annotated § 71-5-517 (Rev. 2000). Finding that Herring lacked a showing of good cause for the delay beyond the fourteen day appeal deadline, we affirm.

FACTS

¹Effective July 1, 2004, the name of the Mississippi Employment Security Commission changed to the Department of Employment Security, Office of the Governor. Miss. Code Ann. Section 71-5-11(f) (Supp. 2005).

¶2. Patsy A. Kouches was employed for approximately eleven months as a secretary for Herring Gas Company, Inc. Kouches was discharged for suspicion of misappropriation of company property.

¶3. Upon filing for unemployment benefits by Kouches, a claims examiner investigated the facts and circumstances surrounding the dismissal and recommended payment of benefits. The examiner's notice of chargeability was mailed on May 15, 2003 to Herring. The notice informed Herring that there was a fourteen day deadline (including weekends) from the date of mailing to appeal the decision of the claims examiner. This deadline would have been May 30, 2003. Herring did not file an appeal until June 18, 2003, which was eighteen days after the May 30 deadline. Herring asserts that the appeal was based on new evidence received when Kouches confessed to the police that she had indeed been involved in embezzling money from Herring. Herring was informed on June 24, 2003, that the request for reconsideration was untimely.

¶4. Thereafter, a hearing was held by an appeals referee to determine whether the appeal was timely filed. The referee found that pursuant to section 71-5-517, Herring had fourteen days from the claims examiner's May 15, 2003, notice letter to appeal the decision and the appeal was untimely due to the filing on June 18, 2003. The referee further found that Herring had not shown good cause for missing the fourteen-day appeal deadline and as such the referee had no jurisdiction and the claim examiner's decision was final.

¶5. Following the decision of the referee, Herring appealed to the Board of Review. The Board affirmed the referee's decision on September 4, 2003. Upon not receiving the relief desired, Herring appealed to the Circuit Court of Jones County. The circuit court affirmed the decision of the Board on August 19, 2004, holding that Herring had failed to show good cause for untimely appealing the

decision of the claims examiner to the appeals referee. Herring then appealed to this Court raising the following two issues:

I. THE COMMISSION’S FINDINGS WERE NOT BASED UPON SUBSTANTIAL AND CREDIBLE EVIDENCE AND THEREFORE, WERE ARBITRARY AND CAPRICIOUS.

II. THE COMMISSION’S REFUSAL TO CONSIDER NEWLY DISCOVERED EVIDENCE IS UNCONSTITUTIONAL AND VIOLATED DUE PROCESS.

¶6. Finding no merit to these issues, we affirm.

STANDARD OF REVIEW

¶7. The standard of review of administrative agency decisions is “[a]n agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights.” *Maxwell v. Mississippi Employment Sec. Comm’n*, 792 So.2d 1031, 1032 (¶7) (Miss. Ct. App.2001). Upon judicial review the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. *Hoerner Boxes Inc. v. Mississippi Employment Sec. Comm’n*, 693 So.2d 1343,1346-47 (Miss. 1997). With these standards in mind, we look to the issues raised in this appeal.

DISCUSSION

I. THE COMMISSION’S FINDINGS WERE NOT BASED UPON SUBSTANTIAL AND CREDIBLE EVIDENCE AND THEREFORE, WERE ARBITRARY AND CAPRICIOUS.

II. THE COMMISSION’S REFUSAL TO CONSIDER NEWLY DISCOVERED EVIDENCE IS UNCONSTITUTIONAL AND VIOLATED DUE PROCESS.

¶8. Herring asserts that the findings by the Commission were not based on substantial and credible evidence and that the refusal to consider the new evidence violates Herring's right to due process. We do not agree.

¶9. As authority for the assertion that the Commission's decision is not based on substantial and credible evidence, Herring relies on *Caraway v. Mississippi Employment Sec. Comm'n*, 826 So.2d 100 (Miss. Ct. App. 2002). In *Caraway*, the employer was sent a form by the claims examiner to explain why Caraway had been released from his job at A & B Enterprises. A & B failed to return the form and the Claims Examiner determined that Caraway was eligible for unemployment benefits. A & B filed the form and timely appealed within the statutorily required fourteen-day time. The Referee reviewed the record and the untimely filed form and determined that Caraway was not entitled to benefits.

¶10. Caraway contended on appeal that the Commission should not have considered the document as it was untimely filed and A & B did not present good cause for the untimely filing. The notice of chargeability did not indicate that if the document was filed late that good cause would have to be shown in order for the document to be considered. The Commission considered this information when it amended its determination and found that Caraway was not entitled to unemployment benefits. The document in the Caraway case would not have been considered if the employer had not filed a timely appeal. This timely appeal perfected the employer's right to argue the merits of the case.

¶11. The difference in *Caraway* and the case *sub judice* is that in *Caraway* the employer timely filed the notice of appeal within the fourteen-day time frame. Mississippi Code Annotated § 71-5-517 (Rev. 2000) states in part: "The claimant or any party to the initial determination or amended

initial determination may file an appeal from such initial determination or amended initial determination within fourteen(14) days after notification thereof, or after the date such notification was mailed to his last known address.” The notice of chargeability clearly stated the time frame in which an appeal must be filed and the manner in which to file that appeal. The Board’s refusal to consider the new evidence does not violate Herring’s right of due process due to the untimely filing of its appeal. Herring did not file its notice of appeal within the statutorily specified period of fourteen days and therefore its appeal was not perfected. These issues are without merit.

¶12. THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY IS AFFIRMED.

KING, C.J., CHANDLER AND ISHEE, JJ., CONCUR. IRVING, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., GRIFFIS, AND BARNES, JJ. SOUTHWICK, J., JOINS IN PART.

ROBERTS, J., DISSENTING:

¶13. I agree that Mississippi appellate courts have only found “good cause” for an untimely appeal in situations that involved delayed notice. However, as will be shown, statutory provisions fully authorize reconsideration of the claims examiner’s initial determination. Further, a request for reconsideration is a procedural mechanism separate and apart from an appeal. The record is clear that the Mississippi Employment Security Commission (the Commission) treated Herring’s request for reconsideration as an out-of-time appeal. As a result, Patsy Kouches reaps an unjust reward through her manipulation, intentional or not, of the bureaucratic and procedural process involved with the peculiar circumstances of the facts in this case. In my opinion, the claims examiner and the Commission acted arbitrarily and capriciously when it failed to consider the merits of Herring’s request for reconsideration. Accordingly, I respectfully and humbly dissent.

¶14. On April 16, 2003, employees of Herring Gas, Inc.(Herring) in Laurel, Mississippi, audited its company records. It became clear that there were shortages to various accounts and that someone violated Herring's company policy on handling cash receipts. The audit revealed an embezzlement scheme in which customers' full payments were not posted to the appropriate account. Instead, the customers' accounts were shorted and the unposted portions of their payments were being stolen.

¶15. On Thursday, April 17, 2003, Lisa Smith, Herring's office manager, was terminated for suspicion of embezzlement. Herring did not cease its investigation after Smith was terminated. Instead, Herring prepared to mail confirmation letters to its customers in an effort to verify their account balances.

¶16. The next Friday, April 25, 2003, at approximately 6:00 p.m., a gas salesman returned to the Laurel store after he finished a routine sales call. That salesman found Wayne Herrington, Kouches, Lisa Smith, and Lisa's sister, Lynn, all talking inside the store. Lisa had been terminated the previous week. She was not allowed in the store. Lynn did not work at Herring, so she was not allowed in the store after hours.

¶17. Kouches, a company secretary, usually wrote up and posted payment tickets to Herring's accounts receivable. Kouches also shared an apartment with Lisa's sister, Lynn. Kouches was scheduled to work on Saturday, April 26, 2003. Kouches was to complete the billing statements so Herring could mail confirmation letters to customers the following week. Kouches did not show up for work on Saturday, nor did she call Herring. When someone contacted her, she said she would not be coming in to work because she was not feeling well.

¶18. No one was supposed to be in Herring's Laurel store between 6:00 p.m. on Saturday and 6:00 p.m on Sunday. However, when Herring's operations manager checked on the store on Sunday

evening, he found lights on that had been turned off. He also found a strange error message on a computer. The operations manager contacted the office computer serviceman. The serviceman found that someone “trashed” the computer and deleted several files. The Laurel Police Department found no signs of forced entry. Police concluded that someone used a key to enter the store.

¶19. The following morning, employees determined that several of the tickets that were being audited were stolen, as were the check stubs on one of the accounts. That same day, Herring terminated Kouches and Herrington for suspicion of embezzlement. Officers with Herring went to the Laurel Police Department to discuss the misappropriation of company funds. The Laurel Police Department began its investigation. Tuesday, the very next day, Kouches filed her application for unemployment benefits.

¶20. A document in the record indicates that a claims examiner spoke to Kouches and Bob Kimbrough, Vice-President of Herring Gas, on May 6, 2003. When the claims examiner spoke to Kimbrough, Kimbrough told the claims examiner that Kouches was discharged for suspicion of embezzlement, that the situation was under investigation, and that no further information was then available. When the claims examiner spoke to Kouches, she told the claims examiner that she did not know what Kimbrough meant, that the police escorted her out on her last day, and that “no reason [was] given.”

¶21. On May 15, 2003, the Commission mailed Herring a notice by which the Commission notified Herring of the claims examiner’s determination. The claims examiner determined that Herring did not demonstrate that Kouches was discharged for misconduct connected with her employment. As such, the claims examiner found that Kouches would be eligible for unemployment benefits. The notice also stated, “[y]ou may ask for reconsideration or file a Notice of Appeal within

fourteen (14) calendar days of the mail date on the decision. . . . Good cause, a circumstance beyond your control, may be granted for filing after 14 days.” At that time, the Laurel Police Department had not concluded its investigation of Kouches.

¶22. On June 18, 2003, Detective Robert Morris of the Laurel Police Department mailed a letter to Kimbrough. Detective Morris’s letter contained the following:

I AM WRITING YOU THIS LETTER TO INFORM YOU THAT ON 06-02-03 I INTERVIEWED PATSY KOUCHES IN REFERENCE TO A EMBEZZLEMENT COMPLAINT FILED AGAINST HER BY HERRING GAS CO. I RECEIVED A VOLUNTARY STATEMENT FROM PATSY WHERE SHE ADMITTED HER INVOLVEMENT IN THE EMBEZZLEMENT OF MONIES FROM HERRING GAS CO. THIS CASE WILL BE PRESENTED TO THE NEXT AVAILABLE GRAND JURY OF JONES COUNTY.²

The very same day, Kimbrough notified the Commission by letter of Detective Morris’s discovery.

Kimbrough’s letter to the Commission stated:

Today I received the accompanying statement (Exhibit A) from the Laurel Police Department concerning Patsy Kouches. In light of this newly discovered evidence I am requesting that you reconsider Herring Gas Company’s status of responsibility as it relates to this case. There has been no factual basis for an appeal prior to having official facts as represented in the statement from Robert Morris. As I have received this information from the Laurel Police Department, I am providing it promptly to you.

On June 24, 2003, the Commission responded with a short letter. The Commission stated, “In as much as you have not filed your request for a reconsideration in a timely manner, we are taking no action and our decision of May 15, 2003, becomes final according to the Law.”

¶23. On August 6, 2003, the Commission sent Herring a notice of a telephone hearing. According to that notice, the appeals referee would conduct a hearing on one issue; “WHETHER OR NOT

² On November 16, 2004, the Jones County Grand Jury returned an indictment against Kouches for embezzlement. The record contains no information regarding the result of that indictment.

EMPLOYEE'S APPEAL WAS TIMELY FILED TO THE REFEREE." That hearing occurred on August 11, 2003. During that hearing, the appeals referee said:

Now, the Mississippi Employment Security Law provide [sic] that an appeal be filed within 14 calendar days from the mailing date on the Claims Examiner's decision. It will be in order for you to show that you have met this requirement of the Law. It may be in order for you to show that you were not properly notified in order that you may file a timely appeal due to some agency error or for some uncontrollable reason not attributable by you.

¶24. The appeals referee examined Herring's representative. During that examination, the following exchange occurred:

Q. Okay. And on [Herring's reconsideration letter] it appears that the employer was asking for reconsideration in reference to the decision dated May 15, 2003. Was that the purpose of this document, sir?

A. Yes sir, it was and it was to make the Commission aware of some newly discovered evidence in this case.

Q. Alright, okay. And also I have in front of me a 3rd document, it's an agency document, Mississippi Employment Security Commission letterhead at the top center portion, dated June 24, 2003. It's addressed to Herring Gas Company Incorporated. It's advising them that in as much as you have not filed your request for reconsideration in a timely manner, we are not, I'm sorry, we are taking no actions and our decision of May 15, 2003 becomes final. It has the name of Dianne Spears, Chief of Benefit Payment Department. Do you have that document, sir?

A. Yes sir, I do.

Q. Alright so, so basically this letter for June 18, 2003 was, was not accepted as a reconsideration so, because they did not meet the time limit for filing reconsideration appeal so it turned into an appeal. So my question is to you sir, what was the reason for the employer delaying in filing this appeal letter dated June 18, 2003.

Herring's representative directed the appeal referee to Detective Morris's June 18th letter. The appeals referee responded:

I don't mean to cut you off, but seem like you're about to get into more details in reference to the separation. This hearing is designed to discuss the not timely appeal by the employer. And my question, my next question to you is . . . what does this have to do with the delay of the employer filing the appeal in a timely manner?

¶25. Herring's representative explained that the Commission would have made a different determination if it had that information and that Herring could do nothing to acquire Kouches's confession any sooner than the Laurel Police Department. The appeals referee then asked Herring's representative if there was any other reason for Herring's delay in "filing this appeal." Herring's representative mentioned that Herring might have had the evidence sooner, had someone not broken into the building and destroyed evidence. With that, the appeals referee concluded the hearing.

¶26. On August 12, 2003, the appeals referee mailed his decision to Herring. The appeals referee dismissed Herring's appeal because he found that Herring did not appeal in a timely manner. The board of review affirmed the appeals referee's decision and the circuit court affirmed the board of review.

¶27. To be clear, I agree that precedent indicates that an employer unsatisfied with a decision by the MESAC may only appeal out of time based on some insufficient receipt of notice. *See Mississippi Employment Security Comm'n v. Marion County Sheriff's Dept.*, 865 So. 2d 1153 (¶10) (Miss. 2004). I dissent because, in my opinion, the Commission abused its discretion and thereby acted arbitrarily and capriciously when it treated Herring's request for reconsideration of the initial determination of eligibility as an appeal.

¶28. The claims examiner's initial notification stated, "[y]ou may ask for reconsideration *or* file a Notice of Appeal within fourteen (14) calendar days of the mail date on the decision. . . . Good cause, a circumstance beyond your control, may be granted for filing after 14 days." (emphasis

added). That statement is not consistent with the relevant statutory provisions. It is entirely true that an employer would have fourteen days to appeal a claims examiner's decision. Miss. Code Ann. § 71-5-517 (Rev. 2000). However, there is no such deadline for a request for reconsideration. The pertinent part of the statute simply says, “[a]n initial determination may for good cause be reconsidered.” (emphasis added). No deadline regarding a request for reconsideration appears in the statute. Obviously, a request for reconsideration is a different procedural mechanism than an appeal. A request for reconsideration asks the deciding entity to reweigh the merits of its decision. An appeal asks a separate entity to review a final decision made by another.

¶29. When Kimbrough submitted Detective Morris's letter before the Commission, Kimbrough's letter stated, “[i]n light of this newly discovered evidence *I am requesting that you reconsider Herring Gas Company's status of responsibility as it relates to this case.*” The Commission refused to reconsider the merits of the claim. The Commission clearly admitted that Herring requested a reconsideration. The Commission's response letter stated, “In as much as you have not filed your *request for a reconsideration* in a timely manner, we are taking no action and our decision of May 15, 2003, becomes final according to the Law.”

¶30. Herring appealed that decision. Though the issue should have been the appropriateness of the decision to deny Herring's request for reconsideration, the appeals referee restricted the hearing to the issue of the timeliness of Herring's “appeal.” The appeals referee recognized the nature of Herring's June 18th letter. In the appeals referee's own words, “it appears that the employer was asking for reconsideration in reference to the decision dated May 15, 2003.” The appeals referee even noted the Commission's erroneous treatment of Herring's letter when he said, “so basically this letter for June 18, 2003 was, was not accepted as a reconsideration so, because they did not meet the

time limit for filing reconsideration appeal so it turned into an appeal.” There is no statutory provision by which a request for reconsideration “turns into” an appeal. The only qualifier incident to a request for reconsideration is “good cause.”

¶31. Herring fired Kouches based on ample reason to suspect her involvement with an embezzlement scheme. Kouches shared an apartment with a sister of the discharged office manager. Kouches was seen in the store, after hours, engaged in a conference with two people who were not supposed to be in the store. The discharged former office manager was one of those people. The other was the office manager’s sister and Kouches’s roommate. Kouches, scheduled to work, does not show up and does not call in. Shortly afterwards, one or more people covertly enter the store and remove or destroy evidence of the embezzlement scheme.

¶32. Meanwhile, Kouches immediately filed for unemployment benefits. Because the claims examiner conducted his investigation faster than the Laurel Police Department, Kouches managed to receive benefits. Then again, the claims examiner did not have to contend with covert forces and their efforts to destroy evidence. Herring could have filed a timely appeal, but on what grounds? The Laurel Police Department did not acquire Kouches’s confession until after the appeal deadline lapsed. Herring would not have had Kouches’s confession within that time period. As Herring points out, had it appealed at that time, that appeal would have been meritless at best. When Herring acquired word of Kouches’s confession, Herring promptly notified the MESC and requested a reconsideration of the claims examiner’s decision based on newly discovered evidence. Obviously, that newly discovered evidence was not available to Herring on May 6, 2003, and it is evidence which was likely to change the claims examiner’s determination of eligibility.

¶33. Realistically, embezzlement amounts to dischargeable misconduct sufficient to disqualify one from unemployment benefits. Kouches wins because the logistics of her unemployment claim required less time to resolve than the police department’s criminal investigation. As a result, Kouches receives unemployment benefits because her employer, the one from whom she embezzled, discharged her for suspicion – a charge she later admitted. That Kouches won the bureaucratic “footrace” to unemployment benefits should not preclude cessation of those benefits when an official investigation confirms the charge for which she was dismissed. Especially, as here, a significant portion of that delay arises because someone destroyed evidence. The record does not confirm that Kouches took part in the unsanctioned after-hours entry of the Laurel store and the subsequent destruction of evidence, but she certainly benefitted from it. The Laurel Police Department might have concluded its investigation sooner if it had that stolen evidence.

¶34. If an act is punishable in a criminal sense, it should also be reasonable for an employer to discharge someone for that conduct. Otherwise, the result is inequitable and unjust. Admittedly, on May 6, 2003, Herring only had a suspicion of Kouches’s involvement, but no one could say that it was an unreasonable suspicion. Kouches confirmed Herring’s suspicion when she implicated herself.

¶35. Under the majority’s analysis of the law, if this situation arose again, Herring would have two choices: (a) allow the employee to remain until a police investigation confirms its suspicion and vigilantly monitor the employee to prevent further embezzlement, or (b) discharge the employee based on a suspicion and hope that the police department works faster than the Commission, which is unlikely given the Commission’s turnover in this instance.

¶36. “In any judicial proceedings under this section, the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law” Miss. Code Ann. § 71-5-531 (Rev. 2000). Our review “is limited to the findings of the Board of Review, and an order by the Board on the facts is conclusive if supported by substantial evidence; hence, judicial review is limited to questions of law.” *Mississippi Employment Sec. Comm’n v. Jones*, 826 So. 2d 77 (¶8) (Miss. 2002). “If the evidence is sufficient *and no legal error is found*, this Court will affirm the decision of the Board.” *Id.* (emphasis added).

¶37. In my opinion, the Commission acted arbitrarily and capriciously when it failed to consider whether newly discovered evidence amounted to “good cause” for reconsideration of Kouches’s unemployment claim. Therefore, the Commission committed legal error when it treated Herring’s request for reconsideration as an appeal of the initial determination. If the Commission’s decision were proper, there would be no difference between a request for reconsideration and an appeal. Accordingly, there would be no such thing as a request for reconsideration. Because that is inconsistent with the wording and intent of the relevant statutes, I would remand this matter to the Commission for a proper reconsideration of the initial determination.

¶38. An additional comment is appropriate. Reversal is required if the Commission’s decision is based on fraud. Miss. Code Ann. § 71-5-531; *Washington v. Mississippi Employment Sec. Comm’n*, 921 So. 2d 390 (¶4) (Miss. Ct. App. 2005). On May 6, 2003, the claims examiner asked Kouches for the reason Herring terminated her. When asked the reason for her termination, Kouches stated that she did not why she was fired, that the police escorted her out on her last day, and that “no reason [was] given” for her termination and police escort. In his June 18, 2003 letter, Detective

Kimbrough stated that Kouches confessed to the embezzlement. If that is true, Kouches defrauded the Commission as well as Herring. Suffering financial loss due to employee embezzlement is bad enough. Suffering additional financial loss because the Commission charges the employers' account for terminating the embezzler and then denies the employer an opportunity to present their newly discovered evidence is more than I can sanction. Accordingly, I respectfully dissent.

LEE, P.J., GRIFFIS AND BARNES, JJ., JOIN THIS OPINION. SOUTHWICK, J., JOINS THIS OPINION IN PART.