

**IN THE COURT OF APPEALS 12/29/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CC-00231 COA**

**EDDIE WINSTON**

**APPELLANT**

**v.**

**MISSISSIPPI EMPLOYMENT SECURITY COMMISSION AND THE CITY OF  
MADISON, MISSISSIPPI**

**APPELLEES**

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

TRIAL JUDGE: HON. JOHN B. TONEY

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

MARY ELIZABETH HALL AND ROSS F. BASS, JR.

ATTORNEYS FOR APPELLEES:

FRED J. LOTTERHOS AND JOHN HEDGLIN

NATURE OF THE CASE: CIVIL: UNEMPLOYMENT COMPENSATION

TRIAL COURT DISPOSITION: AFFIRMED MISSISSIPPI EMPLOYMENT SECURITY  
COMMISSION'S DECISION TO DENY EDDIE WINSTON UNEMPLOYMENT BENEFITS

BEFORE BRIDGES, P.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Eddie Winston was denied unemployment benefits by the Mississippi Employment Security Commission. The commission denied the benefits because it found that Winston was discharged for misconduct by failing to provide his employer, the City of Madison, with medical verification of his inability to return to work. On appeal, Winston contends that the commission's findings were not supported by substantial evidence, and that his conduct did not constitute misconduct as a matter of law. We agree with Winston's position and we reverse and remand this case to the Mississippi Employment Security Commission for a determination of benefits.

## FACTS

Eddie Winston was employed by the City of Madison as a laborer. He was injured while working as a crew leader on August 4, 1993. Twelve days later Winston began a five-month medical leave of absence. On February 4, 1994, the city formally terminated Winston's employment with the city. The city explained in a letter to Winston that the reason for his termination was his failure to provide the city with any meaningful medical reports after the city had "repeatedly requested medical verification of [his] inability to return to work."

On April 14, 1994, Winston filed a claim for unemployment benefits with the Mississippi Employment Security Commission. The commission's claims examiner denied the claim because he found that Winston was discharged for misconduct connected with his work. The commission's decision to deny Winston benefits was later approved by an appeals referee and affirmed by both the commission's Board of Review and the Circuit Court of Madison County.

## DISCUSSION

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. Miss. Code Ann. § 71-5-513(A)(1)(b) (1972). The Mississippi Supreme Court has defined the term "misconduct" as: "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 v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). Conversely, "misconduct" does not include: "[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 . . . ." *Id.* The Commission found that there was substantial evidence to support a finding that Winston was guilty of willful misconduct.

Our scope of review is limited by section 71-5-531 of the Mississippi Code of 1972 which provides that: "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 the court shall be confined to questions of law." The Mississippi Supreme Court has long interpreted the term "evidence" to mean "substantial evidence." *Mississippi Employment Sec. Comm'n v. Flanagan*, 585 So. 2d 783, 784 (Miss. 1991). We must therefore determine whether there is substantial evidence to support the commission's decision that Winston was guilty of misconduct because he failed to keep the city informed of his physical condition and, even if there was substantial evidence, whether the alleged failure to keep the city advised of his medical condition amounted to misconduct as a matter of law. *Richardson v.*

*Mississippi Employment Sec. Comm'n*, 593 So. 2d 31, 33-34 (Miss. 1992); *Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 425-26 (Miss. 1991). The city bears the burden of proving misconduct by substantial, clear, and convincing evidence. *Flanagan*, 585 So. 2d at 784 (citation omitted). The commission found that the city "made several attempts to obtain medical verification from Winston regarding his ability to return to work" and that Winston failed to provide medical information to the city. The following is the only evidence to support that conclusion.

At some time on or after November 1, 1993, Winston's supervisor received a certificate from Winston's doctor that stated Winston would be able to return to work on November 15. When Winston was not able to return to work at that time, either the city wrote Winston a letter asking for "repeated medical verification," or a city representative talked with a nurse in Winston's doctor's office regarding that necessity. No such letter from the city was introduced into evidence. This is the earliest date for the city's request that appears in the record. In either case, one of Winston's doctors, Dr. William Truly, sent a letter to Winston's supervisor dated December 22, 1993. The letter begins with the phrase, "[p]ursuant to our conversation of last week," indicating that Winston's supervisor and Dr. Truly spoke about the matter at some point during the week prior to December 22, or around December 15. In this letter, Dr. Truly updated the city on Winston's medical problem and informed the city that he recommended that Winston remain off work until after his evaluation with another doctor, which was scheduled for January 12, 1994.

There is no evidence in the record which indicates what happened in the period after Winston's appointment on January 12 and before his termination on February 4. There is a statement by Winston's supervisor contained in the investigation report, that the city wrote numerous letters during this period and that no reply was received. The investigation report is uncorroborated hearsay. The city does not allege the investigation report was substantive evidence, and in fact it was not. The only hearsay exception that pertains to investigation reports is Mississippi Rule of Evidence 803(8) (C). This rule provides the judge with discretion to consider reports setting forth *factual findings* resulting from an investigation which was conducted pursuant to lawful authority. The report here did not contain factual findings on this point. Rather, the document merely reports what Winston and his supervisor told the investigator. And even though the report is admissible in an administrative proceeding, it is not "evidence" that adds to the quantum necessary for "substantial evidence." *Flanagan*, 585 So. 2d at 784.

Notwithstanding the communication between Winston's doctor and the supervisor within approximately one month after the supervisor asked Winston for medical verification, the city discharged Winston on February 4, 1994. Because the city waited approximately six weeks after the receipt of Dr. Truly's letter of December 22 to terminate Winston, it is hard to conclude that the timeliness of the December 22 response was a concern to the city. In fact, during this six week period, there is no evidence in the record which indicates that the city complained of the frequency or timeliness of the December 22 response. Furthermore, there is no evidence which shows further requests for medical verification or any result of the new doctor's examination on January 12.

Winston testified that he kept the city informed on a regular basis, but the commission did not have to accept that evidence. Our reversal is not based on Winston's evidence, but on the absence of evidence from the city. All that is supported by the evidence is that on November 15, 1993 Winston was told to provide frequent medical reports, and that on or soon after December 15 he did so. There

is no other evidence in the record regarding complaints about delay, inadequate information, or other defects. Perhaps many requests were made, and perhaps Winston ignored them. We can only measure the substantial nature of evidence before the commission. This case was not proved.

We therefore find that the city failed to meet its burden of proving by substantial, clear, and convincing evidence that it repeatedly requested medical verification from Winston and that Winston failed to comply with such requests. The decision is hereby reversed and the cause is remanded for a determination of benefits.

**THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS REVERSED AND THE CAUSE REMANDED TO THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO APPELLEES.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.**