

IN THE COURT OF APPEALS 01/31/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00887 COA

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

APPELLANT

v.

BRAD JOHNSON

APPELLEE

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

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: SIMPSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALBERT BOZEMAN WHITE

ATTORNEY FOR APPELLEE:

PRO SE

NATURE OF THE CASE: UNEMPLOYMENT BENEFITS

TRIAL COURT DISPOSITION: CIRCUIT COURT REVERSED THE FINDINGS OF
THE COMMISSION AND AWARDED JOHNSON UNEMPLOYMENT BENEFITS

BEFORE FRAISER, C.J., BRIDGES, P.J., BARBER AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

The Appellant, Mississippi Employment Security Commission (MESC), appeals a judgment of the Simpson County Circuit Court reversing the decision of the commission. The circuit court found that the claimant, Brad Johnson (Johnson), was available to work a forty (40) hour week, and therefore should be awarded benefits.

The Appellant argues on appeal that due to the Appellee's college schedule, he was not available for work. Thus, the circuit court erred in reversing the decision of the commission. Finding no merit to this issue, we affirm.

FACTS

Brad Johnson (Johnson) was employed by Professional Auto and Truck Services for over one year before being laid off for lack of work. During this time, Johnson was enrolled as a student at Hinds Community College (Hinds) where he attended classes from 8:00 A.M. to 2:00 P.M. on Tuesday and Thursday. Following the lay-off, the Appellee applied for positions at Nozzle Recon and Days Paint and Body Shop. The Appellee was willing to work a forty (40) hour week at \$5.00 per hour if a position became available which would coincide with his college schedule.

On October 23, 1994, Johnson filed a claim for benefits under the Mississippi Employment Security Law which was initially disallowed. The examiner found that Johnson was not available for work due to the restrictions caused by his attendance at Hinds and also because the Appellee was unwilling to quit college to accept any position made available to him. This decision was affirmed by the MESC appeals referee on December 9, 1994. The board of review adopted the referee's findings of fact and opinion on January 17, 1995. Johnson then appealed the board of review's decision to the Simpson County Circuit Court. The circuit court reversed the board of review and awarded unemployment benefits to Johnson.

DISCUSSION

Our function as an appellate court is to determine whether the findings of the Employment Security Commission are supported by substantial evidence. *MESC v. Gaines*, 580 So. 2d 1230, 1232 (Miss. 1991) (citations omitted). If so, this court, as well as the circuit court, must uphold the commission's findings so long as the findings are supported by substantial evidence.

The Appellant argues that since the Appellee is a college student and unwilling to quit school to accept any position made available to him, he is unavailable as a matter of law. We disagree.

Mississippi Code Section 71-5-511 provides that an unemployed individual is eligible to receive benefits with respect to any week if the commission finds that he is able to work and is available to work. However, availability is to be determined on a case-by-case basis. *MESC v. McLeod*, 419 So. 2d 207, 210 (Miss. 1982).

In the case at bar, Johnson actively sought and was willing to accept employment during hours that his school schedule would allow as he had done during his previous employment. This fact is not

tantamount to statutory unavailability. Other jurisdictions have found that full-time students with certain restrictions on their schedules are eligible for unemployment compensation. *See Glick v. Unemployment Ins. Appeals Bd.*, 591 P. 2d 24, 29 (Cal. 1979) (law student found eligible for unemployment benefits because she was available to a substantial field of employment); *Savage v. Iowa Dept. Of Job Svc.*, 361 N.W.2d 329,331 (Iowa 1984) (student who attends classes from 9:00 A.M. to 1:00 P.M. daily was not unreasonably restricted in his availability and benefits were awarded); *Scardina v. Commonwealth*, 537 A.2d 388, 389 (Penn. 1988) (Board must consider whether full-time student's time limitations would unreasonably reduce the possibility of finding employment within the market). If we were to accept the Commission's findings in this case, full-time students would all but be excluded from entitlement to unemployment benefits. Had the legislature intended not to afford benefits to college students, it could easily have so provided. Johnson's schedule was not sufficiently restrictive to deny him benefits on the grounds that he was "unavailable." We conclude that in this case, the claimant has shown that he is available for work and can balance school attendance with full-time employment. The Claimant's schedule only restricted two days a week for approximately six hours per day. This cannot be viewed as unreasonably restrictive. Furthermore, a requirement that the claimant be willing to quit school is inconsistent with the purposes of unemployment benefits. Johnson's training as an electrical engineer will enable him to alleviate the hardships of involuntary unemployment in the future, furthering the beneficent purposes of the Employment Security Law. Full-time students who in dustriously hold full-time employment while in school should be commended and it would be ridiculous to penalize these students for their efforts to better themselves.

The Mississippi Employment Security Commission concluded that Johnson was unavailable for work within the meaning of section 71-5-511(c). This decision is not supported by substantial evidence and the trial court's reversal of the commission's determination is affirmed.

THE JUDGMENT OF THE SIMPSON COUNTY CIRCUIT COURT IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BARBER, COLEMAN, KING, AND PAYNE, JJ., CONCUR.

FRAISER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES AND THOMAS, P.JJ., MCMILLIN AND SOUTHWICK, JJ.

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FRAISER, C.J., DISSENTING:

I respectfully dissent. While I agree with the majority that students who work to put themselves through College are to be commended, I am of the opinion that we should neither convert the Mississippi unemployment law into a scholarship fund nor should we usurp the Mississippi Unemployment Compensation Commission's rightful function as the finder of fact. Mississippi Unemployment law is meant to protect people who are genuinely attempting and available to find work. Because the majority's recitation of the facts is incomplete, we recite the facts relevant to this case below.

FACTS

In October 1994, Johnson was laid-off from his job washing cars and trucks for Professional Auto and Truck Services. He occasionally worked during the week, but primarily worked weekends. During the week, he attended college. On October 26, 1994, he filed for unemployment benefits.

The Mississippi Employment Security Commission (MESC) Claims Examiner denied Appellee unemployment benefits, because he only looked for work detailing automobiles, and he would not forego school attendance in order to take full-time employment. The claims Examiner denied benefits finding that he was not available for work.

On appeal, the Appeals Referee found that Johnson was unwilling to leave school for a job conflicting with his school schedule, and he was unwilling to accept any job at less than \$5.00 per hour. Thus, the Referee concluded that he did not meet the statutory availability requirements by unduly restricting his employment opportunities.

On January 17, 1995, the Board of Review adopted the Referee's Findings of Fact and Opinion and affirmed the Referee's decision. The Referee's Findings of Fact and opinion

were as follows:

FINDINGS OF FACT

The claimant is enrolled as a student at Hinds Community College and attends classes on Tuesday and Thursday from 8:00 a.m. until 2:00 p.m. The claimant would be unwilling to leave school in order to accept any job that was in conflict with his hours of school attendance. The claimant is pursuing a degree in electrical engineering. The claimant is willing to work five days a week for forty hours at \$5.00 per hour. The claimant would have to secure a job on Tuesday and Thursday working after he gets out of school.

OPINION

Section 71-5-511(c) of the Law provides that an employed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he is able to work and available for work. This means that the individual must be genuinely attached to the labor market, ready and willing to accept suitable work and that his chances of obtaining work must not be unduly restricted.

In this case, the claimant's primary goal is completion of his educational requirements for a potential degree in electrical engineering. It is the opinion of the Referee that the claimant does not meet the availability requirements of the law as he has unduly restricted his chances of obtaining employment because of his unwillingness to accept any job that would be in conflict with his hours of school attendance on Tuesday and Thursday. The decision of the Claims Examiner is in order.

On August 1, 1995, the Simpson County Circuit Judge reversed the Commission's finding of fact that Johnson was unavailable for work and awarded him benefits.

DISCUSSION

Johnson has not filed a brief with this court. "The failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such unless we can with confidence say, after considering the record and brief of appellant, that there was no error." *Snow Lake Shores Property Owners Corp. v. Smith*, 610 So. 2d 357, 361 (Miss. 1992) (quoting *Burt v. Duckworth*, 206 So.2d 850, 853 (Miss.1968)); see also *Queen v. Queen*, 551 So. 2d 197, 199 (Miss. 1989); *Sparkman v. Sparkman*, 441 So. 2d 1361, 1362 (Miss. 1983); *State v. Maples*, 402 So. 2d 350, 353 (Miss. 1981). After reading MESC's brief and the record, I cannot say that the circuit court's decision is free of error.

The circuit court erred in reversing the Commission's finding that Johnson was ineligible to receive unemployment benefits because he was unavailable for work under Mississippi Code, section 71-5-

511(c). The Mississippi Supreme Court has held that "[t]he basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market." *Mississippi Employment Sec. Comm'n v. McLeod*, 419 So. 2d 207, 209 (Miss. 1982). "To be available for work within the meaning of the act, the claimant must be genuinely attached to the labor market." *Id.* The words 'available for work' imply that in order that an unemployed individual be entitled to benefits he must be willing to accept any suitable work which may be offered him without attaching thereto restrictions or conditions . . . which he may desire because of his particular needs or circumstances. *Mississippi Employment Sec. Comm'n v. Swilley*, 408 So. 2d 61, 62 (Miss. 1982) (quoting *Mississippi Employment Sec. Comm'n v. Blasingame*, 237 Miss. 744, 116 So. 2d 213, 215 (1959)).

The Mississippi Supreme Court has upheld the denial of unemployment benefits because a claimant was unattached to the labor market where a claimant was only available for work during certain hours. *See Swilley*, 408 So. 2d at 62. The court also denied benefits to an unemployment claimant where he refused to accept employment paying less than \$10.00 an hour. *See Blasingame*, 237 Miss. 744, 116 So. 2d at 215.

The Mississippi Supreme Court has held that attendance of school may render a claimant unavailable for work under our statute. "Attendance at school may make a claimant unavailable for work, particularly where restrictions and conditions are placed on his availability for employment in order that he may continue his education." *McLeod*, 419 So. 2d at 209. "On the other hand, a claimant may further his education while unemployed and still receive benefits so long as he meets the requirements for eligibility and the tests for availability." *Id. Whether the claimant is available for work is a question of fact which must be considered on a case-by-case basis. Id.* at 210. In *McLeod* the Court's decision centered on whether the claimant would terminate his schooling to accept employment. If as in *McLeod* the claimant were willing to forego some of his school hours or rearrange his class schedule if school time conflicted with employment, then he would be considered attached to the workforce and available for work. *Id.* at 209-210. On the other hand, if the student was unwilling to forego school attendance in order to accept a job in conflict with his school hours, he would be considered unattached to the workforce and unavailable for work under the statute. *Id.*

Because the determination of whether a claimant is available for work is a factual question, an appellate court must affirm the Commission's findings if supported by substantial evidence. *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So. 2d 901, 902 (Miss. 1994). The circuit court sitting as an appellate court cannot make its own findings of fact from the record but must determine whether there is substantial evidence to support the Commission's findings. *Id.* In the case sub judice, the circuit court erred in failing to apply the proper standard of review.

The Commission findings of fact are based on substantial evidence. Johnson was not sufficiently attached to the labor market to be considered available for work and receive unemployment benefits. Johnson testified that he was looking for part-time work. He would not work at a job that conflicted with his school schedule, and he would not accept a job that paid less than \$5.00 an hour. In *McLeod*, the Mississippi Supreme Court stated that where a claimant is unwilling to adjust his educational schedule in order to accommodate potential employment there is substantial evidence that the claimant is not attached to the work force. The court also held that where a claimant was only

available for work during certain hours there was sufficient evidence that he was not available for work within the meaning of the statute. *Swilley*, 408 So. 2d at 62. Finally, the supreme court has held that there was sufficient evidence that a claimant was not available for work where he refused to look for employment that paid less than a certain amount. *Blasingame*, 116 So. 2d at 215. Considering Johnson's testimony and the controlling precedent we can only conclude that the Commission's decision is supported by substantial evidence.

In support of its position that we should award Johnson unemployment benefits, the majority cites *Glick v. Unemployment Ins. Appeals Bd.*, 591 P.2d 24, 29 (Cal. 1979); *Savage v. Iowa Dept. of Job Serv.*, 361 N.W.2d 329, 321 (Iowa 1984); *Scardina v. Unemployment Compensation Bd of Review*, 537 A.2d 388, 389 Pa. (Commw. 1988). These cases are distinguishable and do not support granting unemployment benefits to Johnson under the facts of this case.

In *Glick*, the Supreme Court of California affirmed the Administrative Board's finding that the Claimant student was available for work. *Glick*, 591 P.2d at 29. The court held that "[o]ur function here is to determine whether, under applicable principles of law, substantial evidence supports the trial court's findings." Once the court determined that the finder of fact had substantial evidence on which to base its finding, the court was compelled to affirm. *Id.* Further, California's Second District Court of Appeal affirmed the Administrative Board's finding that a student was not available for work. *Sanchez v. v. Unemployment Ins. Appeals Bd.*, 131 Cal. Rptr. 354, 358 (Cal. 2d 1976) (review denied).

In *Savage*, 361 N.W.2d at 329. The Court of Appeals of Iowa reversed the hearing officer and trial court's legal conclusion that claimant was unavailable for work because they based this determination on an erroneous administrative regulation. That regulation stated that all full-time students were considered unavailable for work. Such a determination is a question of fact. *Id.* The Commission's decision in our case was not based on such a regulation. Thus, *Savage* is not helpful in determining Johnson's case.

In *Scardina*, a Pennsylvania trial court held that insufficient findings of fact had been made to deny the claimant benefits and remanded the case for further findings of fact. *Scardina*, 537 A.2d at 389. The majority fails to note that the Pennsylvania Supreme Court has spoken to the issue of whether a student is available for work. The court held that whether a student is available for work is a question of fact. *Gulbin v. Unemployment Compensation Board*, 159 A.2d 37, 38 (Pa. Super. 1960). In *Gulbin*, the court affirmed the commission's finding that Gulbin was unavailable for work. *Id.*; see also *Sickafuse v. Unemployment Compensation Board*, 464 A.2d 689, 692 (Pa. Commw. 1983).

Further, the majority argues "[i]f we were to accept the Commission's findings in this case, full time students would all but be excluded from entitlement to unemployment." I disagree. The Mississippi Code, section 71-5-511(c) allows a case by case determination of whether a claimant is available for work. *McLeod*, 419 So. 2d at 209. If the Commission finds a student is available for work and that finding is supported by substantial evidence, we are obliged under our scope of review to affirm the Commission's decision. The legislature has charged the Commission with the fact finding responsibility of deciding whether a claimant is available for work. Miss. Code Ann. 71-5-511 (1972). No matter how well intentioned, we cannot usurp that function.

Finally, the Commission's decision is independently supported by Johnson's decision not to apply for

jobs that pay less than \$5.00 an hour. This finding alone constitutes substantial evidence for affirmance. *Blasingame*, 116 So. 2d at 215.

I would reverse the judgment of the Circuit Court of Simpson County and reinstate the decision of the Mississippi Employment Security Commission Board of Review.

BRIDGES AND THOMAS, P.JJ., MCMILLIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.