

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2003-CC-00051-COA**

**MISSISSIPPI EMPLOYMENT SECURITY  
COMMISSION AND DARNELL WILLIAMS**

**APPELLANTS**

**v.**

**PENN'S FISH HOUSE INC.**

**APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	11/15/2002
TRIAL JUDGE:	HON. SAMAC S. RICHARDSON
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DARNELL WILLIAMS (PRO SE)
ATTORNEY FOR APPELLEE:	JAMES L. MARTIN
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	TRIAL COURT REVERSED MISSISSIPPI EMPLOYMENT SECURITY COMMISSION, REINSTATING THE ORDER OF THE APPEALS REFEREE DISQUALIFYING APPELLANT FOR BENEFITS.
DISPOSITION:	REVERSED AND REMANDED: 2/24/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

**EN BANC.**

**KING, P.J., FOR THE COURT:**

- ¶1. Darnell Williams, acting *pro se*, has appealed the Madison County Circuit Court's reversal of the Mississippi Employment Security Commission's grant of unemployment compensation benefits.
- ¶2. Williams alleges that the Madison County Circuit Court's reversal of unemployment compensation benefits was arbitrary and capricious and an abuse of discretion.
- ¶3. Finding error in this decision, we reverse and remand.

## FACTS

¶4. Darnell Williams had been employed by Penn's Fish House for five years as a cook. On May 13, 2002, Shirley Robbins, the restaurant manager, called Williams and told her not to come to work that day or the next day. No reason was given to Williams for this directive.

¶5. After speaking with Robbins, Williams called the owner and requested a reason for these actions. The owner told Williams that he would check on the matter and inform her when she could return to work. The owner never called Williams to tell her when to report to work and Williams never returned to work at Penn's Fish House.

¶6. Williams then filed for unemployment compensation benefits, which were granted by the Mississippi Employment Security Commission. The grant of benefits was reversed by the Madison County Circuit Court.

¶7. Aggrieved by the circuit court's decision, Williams appealed, filed a three paragraph letter brief, in which she succinctly sets forth her issue and arguments as follows:

### Attention Board of Review:

I am appealing the decision denying me of my unemployment benefit, because I have provided you with hard evidence confirming that I was termination. Also, it was stated that the review is basis on the overall testimony of both parties. In the *Finding of Fact* statement of the decision Appeals Referee document states that I contacted my employer, the owner, Mr. Penn when I was informed by the manager, Shirley Robbins not to come to work without any reasoning.

I have been employed with Penn's Fish House for over five years and I have always reported on schedule or informed them if, I couldn't report on schedule. So, my employer should be obligated to inform me, after I had contacted him twice as to when I was to report back to work. I feel that it is not fair, when I made two attempts to find out what was going on with my job. I was willing and ready to work. I was terminated, I did not quite, I went through the channels and it was management responsibility to get back in contact with me.

In addition, I have enclosed a copy of my Mississippi Regional Housing Authority NO. VI. This document was completed by my manager, Shirley Robbins. Ms. Robbins indicated on this form that her for termination was *Lack of work*

I am requesting that my unemployment be reinstated for the months I didn't receive them and that I am not require to repayment of my benefits.

## DISCUSSION

¶8. In reviewing decisions of the Mississippi Employment Security Commission to grant or deny unemployment compensation benefits, this Court applies a deferential standard of review. If the decision of the Mississippi Employment Security Commission is not arbitrary or capricious and is supported by substantial evidence, then this Court is obligated to affirm that decision. *Routt v. Miss. Employment Sec. Comm'n*, 753 So. 2d 486 (¶5) (Miss. Ct. App. 1999). The particular decision which is given deferential review is that of the Board of Review, rather than the appeals referee. *Joseph v. Miss. Employment Sec. Comm'n*, 771 So. 2d 410, 411 (¶ 4) (Miss. Ct. App. 2000); see also *Mississippi Employment Sec. Comm'n. v. Universal Wearparts, Inc.*, 766 So.2d 104, 108 (¶ 13) (Miss. Ct. App. 2000) (Lee, J., concurring).

¶9. The Mississippi Employment Security Commission is the finder of fact, and determines issues of weight and credibility. *Page v. Zurich Am. Ins. Co. of Ill.*, 825 So. 2d 721 (¶ 3) (Miss. Ct. App. 2002). Where those findings are supported by substantial evidence, this Court is bound by them. *Id.*

¶10. In reaching its conclusion, the Mississippi Employment Security Commission resolved the question of credibility in favor of Williams, as was its right. *Attala County Nursing Ctr. v. Moore*, 760 So. 2d 784 (¶¶7-8) (Miss. Ct. App. 2000). Its findings are supported by substantial evidence and are therefore binding upon appellate review. *Id.* at (¶8).

¶11. In its factual findings, and opinion Mississippi Employment Security Commission stated:

The Board of Review agrees with the Findings of Facts as stated by the Appeals Referee. These facts show that the claimant was called at home by the employer and advised not to report for work for the next two days. The claimant then contacted the employer to inquire as to why she should not report to work and the claimant was advised

by the employer that he would get back with her. The claimant was never contacted again by the employer. Under these circumstances it is the opinion of the Board of review that the claimant did not voluntarily leave work but that she was laid off by the employer. The claimant was advised by the employer that he would contact the claimant as to when she should report for work and the employer did not thereafter contact the claimant. It can not be said, therefore, that the claimant voluntarily left work.

¶12. The action of the Madison County Circuit Court in reversing the award of benefits to Williams was an abuse of discretion.

¶13. The entirety of the circuit court order reads as follows:

This cause was heard on the appeal of Penn's Fish House, Inc., from an Order of the Mississippi Employment Security Commission entered on September 19, 2002, reversing the decision of the Appeals Referee Denying employment security benefits and adopting that order as the final Order of the Commission. The Court having reviewed the entire record herein, and being otherwise fully advised in the premises, finds that the Order of the Full Commission should be reversed and the findings and Order of the Appeals Referee should be affirmed, and that the Order of the Full Commission should be in all respects reversed.

It is therefore ordered and adjudged, that the Full Commission Order rendered in this case on September 19, 2002, be and the same is in all respects reversed, and the findings and Order of the Appeals Referee should be and the same is hereby affirmed.

So Ordered, this the 15th day of November, 2002.

¶14. The circuit court offers no readily discernible reason for its reversal of the Mississippi Employment Security Commission's decision. Such an action is by definition arbitrary and capricious.

¶15. In seeking to justify what was an arbitrary and capricious action by the Madison County Circuit Court, the dissent failed to place into full context some of its references to the record. The dissent states that Penn, the owner, testified that he could not recall whether Williams called him. However, a careful reading of Penn's testimony suggests that he did his best not to testify to anything, either pro or con. There is to be found in the transcript an inference that Penn was called by Williams. Penn testified, "But there could be one of a hundred calls that I got and so I left it up, if Darnell did call me, it seems like she, there was a problem here of not showing up and why were doing this or why were doing this." This

interpretation of Penn's testimony is consistent with that of Robbins the manager, who stated that Penn called her about this matter.

¶16. The dissent claims that Williams began another job and is therefore ineligible for unemployment compensation benefits. However, the record is unclear as to when and under what circumstances Williams began work. It is true that at the hearing Williams stated that she had obtained other employment. But no one bothered to ask her when or under what circumstances she had obtained employment. Therefore, what the dissent claims as evidence of other employment by Williams is of limited value.

¶17. As stated earlier, and contrary to the suggestion of the dissent, it is the decision of the Board of Review, and not that of the appeals referee which is entitled to deference. *Joseph v. Miss. Employment Sec. Comm'n*, 771 So. 2d 410, 411 (¶ 4) (Miss. Ct. App. 2000); *see also Miss. Employment Sec. Comm'n v. Universal Wearparts, Inc.*, 766 So.2d 104, 108 (¶ 13) (Miss. Ct. App. 2000) (Lee, J., concurring).

¶18. Finding the actions of the circuit court to be in error, we reverse and remand to the Mississippi Employment Security Commission for the purpose of determining the appropriate amount, if any, and period of compensation to which Williams is entitled.

**¶19. THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS HEREBY REVERSED. WE REMAND TO THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION TO DETERMINE THE APPROPRIATE AWARD OF BENEFITS.**

**McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, IRVING, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR. LEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, J.**

**LEE, J., DISSENTING:**

¶20. I disagree with the majority's decision to reverse as I find clear error with the Board of Review's fact finding and subsequent decision. Accordingly, I would affirm the circuit court's reversal of the Board of Review.

¶21. Our standard of reviewing the decision of the Board of Review is described in *Joseph v. Mississippi Employment Sec. Commission*, 771 So. 2d 410 (Miss. Ct. App. 2000):

The standard of review to be used when reviewing a trial court decision either affirming or denying an administrative agency's findings and decisions is an *abuse of discretion standard*. Our standard for reviewing the findings and decisions of an administrative agency such as the MESC is found in Miss. Code Ann. § 71-5-531 (Supp.1999). "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."

Apart from the statute, this Court has spoken to the standard of review of MESC proceedings: "*The denial of benefits may be disturbed only if (1) unsupported by substantial evidence, (2) arbitrary or capricious, (3) beyond the scope of power granted to the agency, or (4) in violation of the employee's constitutional rights.*" The MESC's decision is rebuttably presumed to be correct.

*Joseph*, 771 So. 2d at (¶¶4-5) (citations omitted) (emphasis added). Here, Williams claims the circuit court was "arbitrary and capricious" in reversing the Board of Review.

¶22. First, I would find Williams to be procedurally barred for failure to cite any authority in her one-page letter which served as her brief. *See Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051 (¶18) (Miss. 2003). Alternatively, I would apply our standard of review and find that the trial court did not abuse its discretion in reversing the Board as substantial evidence did not exist to support the findings of the Board of Review. During the hearing before the appeals referee, restaurant owner Roger Penn testified that the restaurant does not lay off employees because the need is too great for workers. Penn also stated that he could not recall if Williams had called him after the manager, Shirley Robbins, had told her not to come to work. Robbins stated Williams had neither reported to work the previous Saturday nor called to let

Robbins know where she was. Robbins testified that on Monday, May 13, 2002, she told Williams to take two days off work to attend to personal problems, but that Williams was scheduled to work on Thursday.

Robbins explained that when she called Williams to come back to work on Thursday, her scheduled day, she could not reach her because, as other employees explained, Williams had already taken another job.

The pertinent parts from the testimony of Robbins and Williams are as follows:

Robbins: . . . I called Darnell Thursday. I didn't get any answer. That's when I learned that she had another job. So I did not contact her anymore because I felt like that if she wanted her job, or wanted to know why, she should have called me, but she did not.

\* \* \*

Referee: Okay, you said that you learned that she was working somewhere else on that day?

Robbins: Yes.

Referee: How did you learn that?

Robbins: One, through one of the employees.

Referee: They told you that she was working for another?

Robbins: She was working somewhere else.

Referee: Did they tell you where she was working?

Robbins: Yes.

\* \* \*

Robbins: I would like to know, would she be willing to come back to work because I didn't lay her, I didn't fire her, or nothing like that. And the reason I was calling her Thursday was to get her back on schedule. But I did not.

Williams: I have caller ID, I never had been called.

Referee: Okay.

Williams: But I could.

Referee: Okay, well the question I believe was would you be willing to come back to work for them?

Williams: Well I'm already employed somewhere else.

¶23. Robbins further explained that the form which Williams claims is proof positive that she was laid off was not what it appeared to be, but only evidence of a favor Robbins had done for Williams to help Williams stay in her subsidized housing.

¶24. In looking at the facts, it is clear that the Board misconstrued the facts and reversed the initial claims examiner and the appeals referee without any justification. It would have been helpful to this Court had the circuit court developed its findings as to why it chose to reverse the Board of Review; notwithstanding this failure to enunciate its reasons, as previously described, I find that sufficient evidence did not exist to support the Board's findings, and the circuit court reached the proper decision in reversing the Board. I would affirm.

**THOMAS, J., JOINS THIS SEPARATE WRITTEN OPINION.**