

IN THE COURT OF APPEALS 8/6/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-01171 COA

HEMPHILL CONSTRUCTION COMPANY, INC.

APPELLANT

v.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION

APPELLEE

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

TRIAL JUDGE: HON. DENISE SWEET OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

STEPHEN W. RIMMER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: R. M. TIPTON

NATURE OF THE CASE: WEIGHT ENFORCEMENT APPEALS BOARD DECISION

TRIAL COURT DISPOSITION: AFFIRMED THE DECISION OF THE WEIGHT
ENFORCEMENT APPEALS BOARD

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

THOMAS, P.J., FOR THE COURT:

Hemphill Construction was assessed an overweight vehicle penalty by the Mississippi Department of Transportation ("the Department"). The Weight Enforcement Appeals Board of the Mississippi Transportation Commission ("appeals board") affirmed the penalty, and the chancery court affirmed the decision of the appeals board. Hemphill Construction appeals this decision. Finding no error, we affirm.

FACTS

On May 12, 1993, Hemphill Construction was assessed an overweight vehicle penalty by the Mississippi Department of Transportation for operating an overweight vehicle on state highways without a permit. The Hemphill Construction vehicle which weighed 151,500 pounds was being operated on a service road adjacent to Interstate 20 near the Gallatin Street exit. The maximum legal weight on the service road is 80,000 pounds. Hemphill Construction was fined \$7,865.00 for exceeding the weight limit by 71,500 pounds.

Upon receiving the penalty, Hemphill Construction requested and received a hearing before the Weight Enforcement Appeals Board of the Mississippi Transportation Commission. After the penalty was affirmed by the appeals board, Hemphill Construction appealed to the chancery court, which affirmed the decision of the appeals board.

Feeling aggrieved, Hemphill Construction appeals, assigning the following as error:

I. DID THE TRIAL COURT ERR IN REFUSING TO CONDUCT A DE NOVO REVIEW OF THE CASE UNDER SECTION 27-19-337 OF THE MISSISSIPPI CODE THEREBY DEPRIVING HEMPHILL CONSTRUCTION OF DUE PROCESS ?

II. DID THE TRIAL COURT ERR IN FINDING THAT THE WEIGHT LIMIT ON THE SERVICE ROAD WAS 80,000 POUNDS?

III. ALTERNATIVELY, WAS HEMPHILL CONSTRUCTION ENTITLED TO A STATUTORY REDUCTION OF THE PENALTY ?

Finding no error, we affirm.

ANALYSIS

The standard of review for the chancery court is that a ruling of an administrative agency may be disturbed only if the ruling of the administrative agency is (1) beyond the board's legal power, (2) violates some constitutional right of the complaining party, (3) is arbitrary or capricious, or (4) is not supported by substantial evidence. *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 317 (Miss. 1992). The standard of review for this Court of such an action is as follows: "When this Court reviews a decision by a chancery or circuit court concerning an agency action, it applies the

same standard of review those courts are bound to follow." *Mississippi Comm'n on Env'tl. Quality v. Chickasaw County*, 621 So. 2d 1211, 1216 (Miss. 1993).

I. DID THE CHANCERY COURT ERR IN REFUSING TO CONDUCT A DE NOVO REVIEW OF THE CASE UNDER SECTION 27-19-337 OF THE MISSISSIPPI CODE THEREBY DEPRIVING HEMPHILL CONSTRUCTION OF DUE PROCESS ?

Hemphill Construction asserts that it was entitled to de novo review by the Chancery Court of the assessment of the overweight penalty under section 27-19-337 of the Mississippi Code. Section 27-19-337, in part, provides:

Any person aggrieved by an assessment for license taxes, license tag or permit fee made upon him by the commission, or by any other order or act of the commission in the administration of this chapter may, where no specific remedy is prescribed, apply to the board of review by petition in writing for a hearing and a correction of the assessment of other order or act appealed from. . . . At the hearing, the board of review shall try the issues presented according to the law, the facts and within the guidelines established by the commissioner

If any person feels aggrieved by the decision of the board of review, he may apply to the commission . . . for a hearing and correction of the decision of the said board

Any person aggrieved by the final order of the state tax commission, and required to pay the taxes, tag, permit fees or penalties, may appeal from such order to the chancery court of Hinds County, Mississippi. . . to recover the amount paid. The appeal shall be tried de novo by the court as a preferred case. . . .

Miss. Code Ann. § 27-19-337 (1972) (emphasis added).

The penalty for failure to obtain a permit for an overweight vehicle is designated in section 27-19-89(c) which, at the time of the assessment, provided, in part, as follows:

If any person shall operate upon a highway of this state a vehicle which has a greater vehicle gross weight than the maximum gross weight limit established by law for that highway and shall have failed to obtain an overload permit as required by Section 27-19- 81. . . then such person, owner or operator shall be assessed a penalty on such . . . vehicle gross weight as exceeds the legal limit. . . .

Notwithstanding any other provision of the subsection (c) to the contrary, upon appeal to the tax commission board of review by an owner or operator upon whom a penalty has been assessed under this subsection (c) *for exceeding the legal weight limit(s) on a highway having a legal weight limit of less than eighty thousand pounds*, the board of review shall reduce the penalty assessed. . . A *reduction shall not be authorized under this paragraph if the excess weight for which an owner/operator has been charged with a violation of this section exceeds eighty thousand (80,000)*

pounds plus any legal tolerances; and, in any event, no reduction shall be authorized under this paragraph unless a penalty assessed under this section is appealed to the board of review and unless the board of review determines, based upon its records, that such owner/operator has not been granted a penalty reduction under this paragraph within a period of twelve (12) months immediately preceding the date of filing an appeal with the board for a penalty reduction under this paragraph. This paragraph shall stand repealed on June 30, 1993.

Miss. Code Ann. § 27-19-89(c) (repealed 1993) (emphasis added).

In 1992, the state legislature created the Mississippi Transportation Commission and transferred the powers of the State Tax Commission regarding weighing motor vehicles to the Mississippi Department of Transportation. Miss. Code Ann. § 65-1-2(6) (1972), *amended by* Miss. Code Ann. §65-1-2 (Supp. 1995). Section 65-1-46, which took effect at the same time, created the appeals board. At the time of the assessment, section 65-1-46 provided for a specific appeals board to hear excess weight penalties under section 27-19-89 as follows:

There is created an Appeals Board of the Mississippi Transportation Commission. If any person feels aggrieved by a penalty for excess weight assessed against him by an agent or employee of the Mississippi Department of Transportation pursuant to Section 27-19-89, Mississippi Code of 1972, he may apply to the Appeals Board. . . .

If any person feels aggrieved by the decision of the Appeals Board he may appeal the decision to the Chancery Court of the First Judicial District of Hinds County, Mississippi.

Miss. Code Ann. § 65-1-46 (1972), *amended by* Miss. Code Ann. § 65-1-46 (Supp. 1995).

Clearly, the creation of a specific remedy for appeals of overweight assessments removed such appeals from the purview of the Mississippi Tax Commission Board of Review under chapter 27 of the Mississippi Code. Since these appeals are specifically governed under chapter 65, the *de novo* appeal provision of section 27-19-337 is no longer applicable.

II. DID THE TRIAL COURT ERR IN FINDING THAT THE WEIGHT LIMIT ON THE SERVICE ROAD WAS 80,000 POUNDS?

Hemphill Construction asserts that the chancery court erred in affirming the board of review's factual finding that the maximum weight limit on the service road was 80,000 pounds. Hemphill Construction argues that there was no competent evidence of the weight limit since the only evidence was the hearsay testimony of the officers. However, since evidentiary and procedural rules are relaxed during administrative hearings, there is no merit to this issue. *McGowan*, 604 So. 2d at 317-

18.

III. ALTERNATIVELY, WAS HEMPHILL CONSTRUCTION ENTITLED TO A STATUTORY REDUCTION OF THE PENALTY ?

Hemphill Construction argues that its penalty should have been reduced under section 27-19-89 (c). Section 27-19-89(c) provides for a reduction of the excess weight penalty if (1) the penalty was received on a road with a legal weight limit of less than 80,000 pounds; (2) the weight of the cited vehicle does not exceed 80,000 pounds (plus any legal tolerances); and (3) the owner has not received a penalty reduction within the preceding twelve months. As we have previously stated, the weight limit for the service road was 80,000 pounds, and the weight of the vehicle was 151,500 pounds. *See* Miss. Code Ann. § 27-19-89(c) (1972) (current version at Miss. Code Ann. § 27-19-89 (Supp. 1995)). Although Hemphill Construction had not received a reduction in the preceding twelve months, it fails to meet the other two provisions of the statute. There is no merit to this issue.

THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IN FAVOR OF THE APPELLEE IS AFFIRMED. ALL COSTS ARE ASSESSED AGAINST THE APPELLANT.

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