

IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-01344 COA

SANDERSON PLUMBING PRODUCTS, INC.

APPELLANT

v.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION AND ANNIE EDWARDS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

J. DOUGLAS FORD

TAYLOR SMITH

ATTORNEYS FOR APPELLEES:

ALBERT B. WHITE

MARK RAY

NATURE OF THE CASE: CIVIL

TRIAL COURT DISPOSITION: AFFIRMED BD. OF REVIEW DECISION THAT EMPLOYER DID NOT PROVE VIOLATIONS BY CLAIMANT.

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

THOMAS, P.J., FOR THE COURT:

Annie Edwards filed a claim for unemployment benefits pursuant to the Mississippi Employment Security Law. The appeals referee entered a finding of fact and opinion that Edwards was not guilty of misconduct in not complying with established work rules and attendance policies of Sanderson Plumbing Products, Inc. (SPPI). SPPI appealed to the Mississippi Employment Security Commission (MESCC) board of review which affirmed the decision of the appeals referee. SPPI then appealed to the Circuit Court of Lowndes County which affirmed the board of review's decision. SPPI appeals to this Court and asserts the following issues:

I. WHETHER THE APPEALS REFEREE'S CONCLUSIONS OF LAW AND APPLICATION OF SAID LAW TO HIS FINDINGS OF FACT ARE CONTRARY TO AND UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE AND CONTRARY TO THE APPLICABLE LAW.

II. WHETHER THE FINDING OF THE APPEALS REFEREE THAT THE CLAIMANT WAS NOT GUILTY OF MISCONDUCT IN REFUSING TO COMPLY WITH ESTABLISHED WORK RULES AND ATTENDANCE POLICIES OF SANDERSON PLUMBING PRODUCTS, INC. IS CONTRARY TO THE APPLICABLE LAW IN THIS STATE.

III. WHETHER THE APPEALS REFEREE'S FINDING THAT THE CLAIMANT WAS NOT GUILTY OF MISCONDUCT IS A DEPARTURE FROM ESTABLISHED LAW AND A DEPARTURE FROM PRIOR FINDINGS OF THE APPEALS REFEREES OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION, INCLUDING THE APPEALS REFEREE WHO ISSUED THE DECISION IN THE CASE *SUB JUDICE*.

Finding that the circuit court did not err, we affirm.

FACTS

On May 31, 1995, Annie Edwards was terminated due to excessive absenteeism. On June 19, 1995, Edwards filed a claim for unemployment benefits with the Mississippi Employment Security Commission. On July 6, 1995, the claims examiner determined that Edwards was not discharged for misconduct connected with her work, and awarded unemployment benefits to Edwards. SPPI appealed to the appeals referee who determined that there was not substantial clear and convincing evidence provided by SPPI to show that Edwards committed misconduct. SPPI appealed to the

MESC board of review which adopted the findings of fact and opinion of the appeals referee. SPPI appealed the board of review's decision to the Lowndes County Circuit Court which held that the decision of the board of review was supported by substantial evidence. Subsequently, SPPI appealed to this Court.

In awarding benefits to Edwards, the board of review adopted the findings of the appeals referee who held as follows:

The claimant was employed approximately one year as a production worker by Sanderson Plumbing, Columbus, Mississippi. The claimant was terminated on May 31, 1995, for violation of the company's attendance policy. The company does have a four step progressive disciplinary policy which does call for three warnings with the next infraction or warning resulting in termination. Disciplinary action is taken if an employee exceeds 5 percent of the scheduled working hours during a month. The claimant received a verbal warning on August 5, 1994, for being absent on July 25, 1994. The claimant was absent due to hazardous conditions resulting from a flood. Only three weeks were worked during the month of July 1995, as the company was closed for one week. The claimant was warned on January 8, 1995, for being absent on December 10, 1994. This was also a month in which only three weeks were scheduled to be worked. The claimant was warned on May 12, 1995, for being absent on April 28, 1995. The claimant was also absent on May 1, and May 2, 1995. The claimant did have a doctor's excuse for April 28, May 1, and May 2, 1995. The company did not recognize excuses as the company has a no-fault policy.

It is the opinion of the Referee that the employer has the right to terminate his employees. In this case, the claimant was terminated for violation of the company's attendance policy. Whereas the company does have the right to establish his own policies, the Referee is of the opinion that based on the evidence and testimony provided, the claimant was not absent excessively and the majority of the reasons being absent were due to medical reasons. An employee cannot be expected to report to work when ill. The Referee concludes that the employer has failed to show that the claimant was separated due to reasons that would show a willful or wanton disregard of company policy. No misconduct has been shown as that term is defined by Law. The decision of the Claims Examiner will be affirmed.

ANALYSIS

I.

WHETHER THE APPEALS REFEREE'S CONCLUSIONS OF LAW AND APPLICATION OF SAID LAW TO HIS FINDINGS OF FACT ARE CONTRARY TO AND UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE AND CONTRARY TO THE APPLICABLE LAW.

II.

WHETHER THE FINDING OF THE APPEALS REFEREE THAT THE CLAIMANT WAS NOT GUILTY OF MISCONDUCT IN REFUSING TO COMPLY WITH ESTABLISHED WORK RULES AND ATTENDANCE POLICIES OF SANDERSON PLUMBING PRODUCTS, INC. IS CONTRARY TO THE APPLICABLE LAW IN THIS STATE.

The first two assignments of error are interrelated and will be addressed collectively. SPPI argues that Edwards was terminated for violation of SPPI's attendance policy, which constitutes misconduct on her part. SPPI asserts that the facts are not supported by substantial evidence, and that the finding of the appeals referee is contrary to applicable case law.

"The underlying purpose of implementing employment security law in Mississippi is to protect those workers not permitted to continue employment through no fault of their own." *Allen v. Mississippi Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994). Mississippi Code Annotated Section 71-5-531, in pertinent part, provides the standard of review for this Court:

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 (Revised 1995). *See also Mississippi Employment Sec. Comm'n v. Percy*, 641 So. 2d 1172 (Miss. 1994).

The board of review must be affirmed absent substantial evidence to support its factual findings or misapplication of the law. A rebuttable presumption exists in favor of the board of review's decision and the challenging party has the burden of proving otherwise. *Allen*, 639 So. 2d at 906. Further, the appellate court must not insert its judgment for that of the board of review nor reweigh the facts of the case. *Id.*

The Mississippi Supreme Court has defined 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 a right to expect from his employee. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere 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 were not considered 'misconduct' within the meaning of the statute.

Shannon Eng'g & Constr., Inc. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 448-49 (Miss. 1989) (citations omitted). The conduct is such that reasonable and fair-minded external observers would consider the conduct to be a wanton disregard of the employer's legitimate interest. *Barnett v. Mississippi Employment Sec. Comm'n*, 583 So. 2d 193, 196 (Miss. 1991). The employer has the burden of establishing a claimant's misconduct by "substantial, clear, and convincing evidence." *Shannon*, 549 So. 2d at 450.

In the case at bar, Edwards testified that she hurt her wrist at work by lifting pans. She informed her supervisor about her injury, and her supervisor told her he would make a doctor's appointment for her. Edwards' supervisor did not make the appointment, and Edwards made an appointment for herself on Friday, April 28. Edwards informed her supervisor about the appointment, and her supervisor told her to contact Anita Caldwell, the workers' compensation supervisor. Caldwell told Edwards that all Edwards needed to do was to bring her doctor's excuse back to work. The doctor's excuse covered April 28, May 1 and May 2, the three final days Edwards was absent.

SPPI asserts that "excessive absenteeism could constitute misconduct." *Barnett*, 583 So. 2d at 196. But, *Barnett* further held that "[t]his does not mean that excessive absenteeism would qualify as misconduct in all circumstances." *Id.* We believe that this is one of the circumstances where excessive absenteeism does not qualify as misconduct. Edwards' actions were not deliberate violations of company policy, and her actions were not in wanton disregard of SPPI's interests. SPPI, through Edwards' supervisor and SPPI's worker's compensation supervisor, had knowledge of Edwards' condition, and knew that she would be absent from work on April 28 because of her doctor's appointment. Edwards' three final absences from work resulted from an arthritic condition that had been aggravated at work. This hardly constitutes a deliberate attempt by Edwards in disregard of SPPI's legitimate interests. Therefore, Edwards did not engage in "misconduct." There is substantial evidence to support the decision of the appeals referee, the MESC board of review, and the Circuit Court of Lowndes County.

III.

WHETHER THE APPEALS REFEREE'S FINDING THAT THE CLAIMANT WAS NOT GUILTY OF MISCONDUCT IS A DEPARTURE FROM ESTABLISHED LAW AND A DEPARTURE FROM PRIOR FINDINGS OF THE APPEALS REFEREES OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION, INCLUDING THE APPEALS REFEREE WHO ISSUED THE DECISION IN THE CASE *SUB JUDICE*.

SPPI argues that previous decisions by the same appeals referee make it clear that violation of SPPI's attendance policy constitutes misconduct. SPPI has provided this court with three previous decisions by the same appeals referee regarding SPPI's attendance policy, each holding that excessive absenteeism resulted in misconduct. SPPI also provides decisions of other appeals referees that hold excessive absenteeism constitutes misconduct. However, SPPI does not provide any legal authority to support its claim that the appeals referee was in error in this situation simply because he had found misconduct resulting from excessive absenteeism in other situations. Failure to cite authority in

support of claims of error precludes appellate review of alleged errors. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992).

Notwithstanding a lack of legal authority, a review of this issue does not warrant reversal. A review of the previous decisions provided by SPPI show that none of the previous decisions given by this referee involved an absence from work due to a work-related injury or illness. In the instant case, Edwards testified that she went to the doctor because she suffered an injury resulting from work. The appeals referee determined that Edwards' absences were due primarily to medical reasons and this did not constitute misconduct. Therefore, the appeals referee did not depart from established law and prior appeals findings when determining Edwards was not guilty of misconduct and allowing her to receive unemployment benefits.

**THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND
SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.**