

E

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

FELISHA TILLMON

APPELLANT

VS.

CAUSE NO. 2007-CC-00940

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Felisha Tillmon, Appellant
2. MS Delta Community Mental Health, Employer
2. Mississippi Department of Employment Security, Appellee
3. Honorable LeAnne F. Brady, Attorney for Appellee
4. Albert Bozeman White, Esq., Attorney for Appellee
5. Honorable Judge Ashley Hines, Circuit Court Judge

TABLE OF CONTENTS

	<u>PAGE</u>
Certificate of Interested Parties	i
Table of Contents	ii
Table of Cases and Other Authorities	iii-iv
Statement of Issues	1
Statement of the Case	2, 3, 4,
Summary of the Argument	5, 6, 7
Argument	8, 9, 10
Conclusion	11, 12
Certificate of Service	12,,13
Exhibit "A"	,

TABLE OF CASES AND OTHER AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Barnett vs. Mississippi Employment Security Commission</u> 583 So.2d 193 (Miss. 1991).....	6, 8, 9
<u>Cane vs. Mississippi Employment Security Commission</u> 368 So.2d 1263 (Miss. 1979).....	6, 9
<u>City of Tupelo vs. Mississippi Employment Security Commission</u> 748 So.2d 151 (Miss. 1999).....	9
<u>Holt vs. Mississippi Employment Security Commission</u> 724 So.2d 466 (Miss. App. Ct. 1998).....	6, 9
<u>Powell vs. Mississippi Employment Security Commission</u> 787 So.2d 466 (Miss. App. Ct. 1998)	9
<u>Richardson vs. Mississippi Employment Security Commission</u> 593 So.2d 31 (1992)	8
<u>Wheeler vs. Arriola</u> 408 So.2d 1381 (Miss. 1982).....	8
 <u>OTHER AUTHORITIES</u>	
<u>Appeals Regulations of the Mississippi Employment Security Commission</u> Nos. 9 and 10 (October 13, 2000, and as amended)	1, 2
Mississippi Code Annotated §71-5-517 (Rev. 1995)	10
Mississippi Code Annotated § 71-5-519(1972 as amended)	2, 10
Mississippi Code Annotated § 71-5-523 (Miss. 1995)	5, 9, 11
Mississippi Code Annotated §71-5-525 (Rev. 1995).....	9
Mississippi Code Annotated §71-5-531 (Rev. 1995)	8

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

FELISHA TILLMON

APPELLANT

VS.

CAUSE NO. 2007-CC-00940

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

**BRIEF OF APPELLEE
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

STATEMENT OF ISSUES

1. Whether the Board of Review's decision is supported by substantial evidence and should be affirmed, finding that the Claimant, Felisha Tillmon, defaulted, or abandoned her appeal, by failing to be available to participate and offer proof at the Administrative Law Judge's [hereinafter also "ALJ"] telephonic hearing scheduled for October 5, 2006, pursuant to the provisions of Appeals Regulations of the Mississippi Employment Security Commission, Nos. 9 and 10 (October 13, 2000, and as amended)?

2. Whether Felisha Tillmon failed to timely appeal the ALJ's decision dated October 5, 2006, pursuant to M.C.A. Section 71-5-519 (1972, as amended), such that the Board of Review's dismissal of her appeal in its November 30, 2006 decision was proper?

3. If the Court finds that Felisha Tillmon did timely appeal the ALJ's decision to the Board of Review, whether the dismissal of Felisha Tillmon's claim by the Board of Review was nevertheless the appropriate result, because Ms. Tillmon defaulted, or abandoned her appeal, pursuant to the provisions of Appeals Regulations of the Mississippi Employment Security Commission, Nos. 9 and 10 (October 13, 2000, and as amended), and did not have good cause for failing to participate and offer proof at the ALJ's telephonic hearing scheduled for October 5, 2006?

STATEMENT OF THE CASE

Felisha Tillmon [hereinafter also "Claimant"] was employed by MS Delta Community Mental Health [hereinafter also "Employer"] from August 16, 2005, until August 12, 2006. After her discharge, Ms. Tillmon filed for unemployment benefits. (R. Vol 2 p. 1). A Claims Examiner investigated by interviewing Ms. Tillmon and an Employer representative, Naomie Davis, Human Resources. (R.

Vol 2 p. 3). Ms. Davis stated that Ms. Tillmon violated the Employer's policy prohibiting leaving work without permission. Ms. Davis further stated that violation of the policy was grounds for immediate termination; and Ms. Tillmon was terminated on August 14, 2006. (R. p. 3). Ms. Tillmon admitted leaving without permission, but alleged that she had a migraine headache, and told a co-worker. (R. Vol 2 p. 3).

Based upon this information, the Claims Examiner found that Ms. Tillmon violated the Employer's policy prohibiting leaving work without permission, which constituted misconduct. Thus, Ms. Tillmon was disqualified from receiving benefits. (R. Vol 2 p. 5).

Ms. Tillmon appealed. (R. Vol 2 p. 5). A telephonic hearing was scheduled for October 5, 2006; and Ms. Tillmon was sent instructions on how to participate. (R. p. 6-7). On the date and time of the hearing, the ALJ convened the hearing, but Ms. Tillmon was not available to participate. Thus, the ALJ held that Ms. Tillmon failed to follow the instructions and make herself available. (R. Vol 2 p. 8-9). The ALJ then made the following Findings of Fact and Decision, to-wit:

Based on an appeal filed by Felisha Tillmon (claimant), this case came on before the Administrative Law Judge for a telephone hearing scheduled for October 05, 2006, at 08:30 A.M.

The Appeals Tribunal Office mailed a Notice of Hearing to the interested parties on September 28, 2006.

After due notice was provided for the date, time, and place of hearing, the appellant in this case did not participate in the hearing. The appellant has not given notice of any reason or cause for his non-appearance.

The Mississippi Department of Employment Security Appeal Regulation 10 provides that a default ruling may be entered against the appellant for failing, without good cause, to appear at a hearing. Upon abandonment of a request for a hearing or appeal by the party who failed it, the Administrative Law Judge may dismiss the appeal or request for a hearing.

A party shall be deemed to have abandoned a request for a hearing if neither the party appealing nor his/her representative appears at the time and place fixed for the hearing and prior to the hearing such party does not show good cause why he/she or his/her representative cannot appear.

As of the date of this order, the appellant did not appear or show cause for non-appearance. The Administrative Law Judge, having determined that the appeal has been abandoned, hereby DISMISSES the appeal.

(R. p. 8-9).

Ms. Tillmon requested a re-hearing on October 11, 2006 and October 17, 2006. (R. Vol 2 p. 10-13). This request was denied by the Office of Administrative Appeals on October 23, 2006. This letter stated that since the ALJ's decision was mailed to the correct address for Ms. Tillmon, she failed to show good cause for missing the hearing. (R. Vol 2 p. 14).

Ms. Tillmon then appealed to the Board of Review on October 30, 2006. (R. Vol 2 p. 15). The Board wrote Ms. Tillmon a letter concerning her appeal stating the following:

In the matter of the claim for unemployment benefits, we are advising that an appeal to the Board of Review has been received. The Board will consider your appeal based upon the record already made and no hearing will be scheduled unless the Board, in its discretion, shall direct that a further hearing be scheduled.

A copy of the appellant's appeal is enclosed for review by the other party.

The Board's decision on your appeal, or notice of further hearing if directed by the Board, will be forthcoming.

(R. Vol 2 p. 17). Subsequently, at a regular session of the Board of Review on November 30, 2006, it found that Ms. Tillmon did not timely appeal the ALJ's October 5, 2006 decision. (R. p. 18).

Ms. Tillmon then filed her appeal to the Circuit Court. On May 9, 2007, the Circuit Court of Washington County affirmed the decision of the Board of Review. (R. Vol. 1 p. 8).

SUMMARY OF THE ARGUMENT

Pursuant to its rule-making authority, the Mississippi Department of Employment Security [hereinafter also "Department" or "MDES"] has adopted Appeals Regulations. Regulation Nos. 9 and 10 address failure to timely appear at a hearing. M.C.A. Section 71-5-525 (Miss. 1995). A copy of these Regulations are attached hereto as Exhibit "A". Regulation 2 provides that notices shall be given by mail. Regulation 9 (c) provides that when a party fails to appear, the MDES has the discretion as to refusing to re-open a hearing. Regulation 10 provides that failure to appear is a default or abandonment of the appeal; and a default ruling may be entered. Thus, the issue regarding Ms. Tillmon's default is within the MDES's authority to determine under M.C.A. Sections 71-5-523 and 71-5-525 (Miss. 1995), and the regulation making authority of the MDES.

Since Ms. Tillmon, the Appellant, was disqualified by the Claims Examiner, she had the responsibility of pursuing her hearing by making herself available to testify at the hearing. Pursuant to Department Regulation, Ms. Tillmon's failure to participate was an abandonment of her appeal, and tantamount to a default. Department Regulation 9 and 10, attached hereto as Exhibit "A".

Regarding Ms. Tillmon's argument that she had good cause for missing the hearing, she argues that she did not receive the hearing notice until after the hearing. The Mississippi Supreme Court has ruled that where notice was mailed to the last known address of the claimant, good cause for late filing has not been shown. Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979). Further, there is a presumption of proper delivery of the mail. Thus, for Ms. Tillmon to establish good cause based upon alleged failure to timely receive the notice, she must have presented some affirmative proof as to late or non-delivery of the mail, other than simply stating that she failed to receive the notice. See Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. COA 1998) (insufficient evidence was presented to overcome the presumption of proper delivery).

Regarding the Board of Review's decision dismissing her appeal because she did not appeal timely, Ms. Tillmon's appeal was filed within 14

days of the Appeals Department's denial of her request for rehearing. While this appeal was not within 14 days of the ALJ's decision, it was within 14 days of the Appeals Department's denial of her request for rehearing. Thus, even though this Court may find that the appeal to the Board of Review was timely, the dismissal by the Board is nevertheless correct under Regulations 9 and 10, as discussed above. In the interest of judicial economy, the MDES submits that remand of this matter to the Board would be unnecessary, and inappropriate, because there is substantial evidence supporting the Appeals Department's finding that she did not establish good cause to reopen the hearing. Id. (R. Vol 2 p. 14).

Since the Claims Examiner disqualified Ms. Tillmon based upon an investigation, and since Ms. Tillmon appealed and then failed to make herself available for the telephonic hearing, there is substantial evidence supporting the Board of Review's decision that she defaulted or abandoned her appeal, according to MDES Appeal Regulations 9 and 10. Since there is substantial evidence supporting the Appeal Officer's finding that she did not show good cause for missing the hearing, since the Board of Review's decision dismissing the case is the correct result, and since remand to the Board of Review to consider whether Ms. Tillmon had good cause for missing the hearing would

not achieve judicial economy, this Honorable Court should affirm the Board of Review and Circuit Court decisions.

ARGUMENT

This appeal is governed by the provisions of Section 71-5-531, Mississippi Code Annotated of 1972 (Revised 1995). That section provides that the Courts will consider the record made before the Board of Review of the Mississippi Department of Employment Security, and, absent fraud, will accept the Findings of Fact if supported by substantial evidence. Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (Miss. 1992); Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982).

In Barnett, the Mississippi Supreme Court stated that "{J}udicial review, under Miss. Code Ann. Section 71-5-531 (1972), is, in most circumstances, limited to questions of law, to-wit:

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."

Barnett, 583 So.2d at 195. Furthermore, if the Board's Findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing Court must affirm. Id.

In the instant case, Ms. Tillmon was given notice of the telephonic hearing, and instructions on how to participate. However, she failed to participate and testify. (R. Vol 2 p. 8-9, 10-13, 14). In that regard, the Department adopted Appeals Regulations to address this situation.

Regulations Nos. 9 and 10 address failure to timely appear at a hearing. In particular, Regulation 9 (c) provides that when a party fails to appear, the Department has the discretion as to refusing or granting re-opening of a hearing. Further, Regulation 10 provides that failure to appear is a default or abandonment of the appeal; and a default ruling may be entered. Thus, the issue regarding Ms. Tillmon's default is within the Department's authority to determine under M.C.A. Sections 71-5-523 and 71-5-525 (Miss. 1995), and the regulation making authority of the Commission. A copy of these Regulations are attached hereto as Exhibit "A".

Regarding Ms. Tillmon's argument that she had good cause for missing her hearing, the cases addressing timeliness of appeals are instructive. The Mississippi Supreme Court has ruled that where notice was mailed to the last known address of the claimant, good cause for late filing has not been shown. Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979). Further, to establish good cause based upon non-delivery

or late delivery of the mail, there must be some affirmative proof by Ms. Tillmon as to the alleged failure of the post office, other than she simply failed to receive the notice. See Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. COA 1998) (insufficient evidence was presented to overcome the presumption of proper delivery).

As applied to the facts of this case, this Court should find that Ms. Tillmon has not presented an excuse for missing the ALJ hearing that would be recognized as good cause under the appeal deadline case authorities. Id. See also City of Tupelo v. Mississippi Employment Security Commission, 748 So.2d 151 (Miss. 1999)(City did not show good cause for filing an appeal late simply because the notice was mailed to one of several addresses for the City); Powell v. Mississippi Employment Security Commission, 787 So.2d 1277 (Miss. 2001)(Circuit Court's allowance of untimely appeal based upon claimant's assertion of "unforeseen circumstances" was insufficient proof of good cause).

Regarding the appeal to the Board of Review deadlines, M.C.A. Section 71-5-517 (Rev. 1995) provides in pertinent part, to-wit:

The claimant or any party to the initial determination or amended initial determination may file an appeal from such initial determination or amended initial determination within fourteen (14) days after notification thereof, or after the date such notification was mailed to his last known address.

M.C.A. Section 71-5-519 provides in pertinent part, to-wit:

... an appeal tribunal...shall affirm, modify or reverse the findings of fact and initial determination or amended initial determination. The

parties shall be duly notified of such tribunal's decision, together with its reason therefor, which shall be deemed to be the final decision of the board of review **unless within fourteen (14) days after the date of notification or mailing of such decision**, further appeal is initiated pursuant to Section 71-5-523.

Regarding the Board of Review's decision dismissing her appeal, because she did not appeal timely, Ms. Tillmon's appeal was filed within 14 days of the Appeals Department's denial of her request for rehearing. While this appeal was not within 14 days of the ALJ's decision, it was within 14 days of the Appeals Department's denial of her request for rehearing. Thus, even though this Court may find that the appeal to the Board of Review was timely, the dismissal by the Board is nevertheless correct under Regulations 9 and 10, as discussed above. In the interest of judicial economy, the MDES submits that remand of this matter to the Board would be unnecessary, and inappropriate, because there is substantial evidence supporting the Appeals Department's finding that she did not establish good cause to reopen the hearing. *Id.* (R. Vol 2 p. 14).

CONCLUSION

The facts of this case establish that Ms. Tillmon was the appellant in her administrative appeal; and she failed to make herself available to testify in the scheduled hearing on her appeal. Pursuant to the Department's Regulations, where the Appellant fails to appear, the Department is entitled to find that the

appellant, Ms. Tillmon, has defaulted or abandoned the appeal. Additionally, Ms. Tillmon fails to establish good cause for re-opening the hearing, considering the cases authorities addressing what would be considered good cause for an untimely appeal. Further, although the Board of Review's reasoning for dismissing Ms. Tillmon's appeal may have been wrong, the result was proper, based upon Appeal Regulations 9 and 10, and considering Ms. Tillmon's reason for missing the hearing. Thus, the decision of the Board of Review and Circuit Court should be affirmed by this Honorable Court. Alternatively, this matter should be remanded by the Court to the MDES with instructions.

RESPECTFULLY SUBMITTED, this the 14th day of March, 2008.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT
SECURITY

By: Albert Bozeman White
ALBERT BOZEMAN WHITE

CERTIFICATE OF SERVICE

I, Albert Bozeman White, Attorney for Appellee, Mississippi Department of Employment Security, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to the following:

Ms. Felisha Tillmon, Appellant
1724 N. Broadway Ext., # 9
Greenville, MS 38703

MS Delta Community Mental Health, Employer
Post Office Box 5365
Greenville, MS 38704-5365

Honorable Ashley Hines
Circuit Court Judge
Post Office Box 31315
Greenville, MS 38702-1315

This, the 14th day of March, 2008.



ALBERT BOZEMAN WHITE

OF COUNSEL:

Albert Bozeman White, Assistant General Counsel
MSB No. 7132
Post Office Box 1699
Jackson, MS 39215-1699
(601) 321-7064

U:\DEIDRA\SUPREME COURT\TILLMON Appear Failure Brf.wpd

APPEAL REGULATIONS

A. APPEALS FROM INITIAL OR AMENDED DETERMINATIONS TO A REFEREE

1. Filing of Appeal.

(a) A party desiring to appeal from an initial or amended determination shall, within fourteen days after notification thereof or within fourteen days after the date such notification was mailed to his last known address, file at the office or itinerant point where his original claim was filed, a notice of appeal in triplicate, on Form MAR-1, setting forth the information called for thereon.

(b) No appeal shall be declared invalid for failure to file the same on said form if there shall have been mailed to or received by the Board of Review of the Commission, within the prescribed time, any written objection to the determination, or request or demand for a review thereof or for a hearing thereon.

2. Assignment of Appeals and Scheduling of Hearing.

(a) Upon the scheduling of a hearing, the Notice of Hearing shall be mailed by the Appeals Department to the parties interested in the decision which is being appealed at least seven days before the date of the hearing specifying the place and time of the hearing.

(b) Upon receipt of an intrastate appeal, the Appeals Department shall assign a docket number and promptly schedule the case for hearing at a time and location reasonably convenient for the parties. When scheduling hearings, consideration shall be given to the requirement of prompt disposition of the cases, office availability, the proximity of the hearing location to the parties involved, the administrative needs of the department, and the safety of the staff and parties involved in the appeal. Hearings shall be scheduled at such time and places deemed necessary by the department in order to assure a reasonable opportunity for a fair hearing. Telephone hearings may be scheduled at the discretion of the department if it is determined that the parties are at a distance, an in-person hearing works an extreme hardship on one or both of the parties, there is a clear and present concern for safety, or there is or has been threats or physical violence on the part of any party to a hearing.

(c) Upon receipt of an interstate appeal, or an appeal where one or both parties are out of state, a docket number shall be assigned and a telephone or an in-person hearing promptly scheduled. An in-person hearing may be set in Mississippi when it is determined feasible by the Appeals Department and if all parties to an appeal agree. Any out of state employer who operates a business in Mississippi and employed a claimant in an appeal to which it is a party, may be scheduled for an in-person hearing unless it no longer is operating such business within the borders of the State of Mississippi. In any case the Appeals Department shall determine the most feasible method for hearing the case.

(d) If the department determines that a number of cases appealed are similar in fact and circumstances, the department, at its own discretion, may consolidate the cases. The department shall advise the parties to select from their members an individual to represent them.

3. Disqualification of Referees

A Referee shall not participate in the hearing of an appeal in which he has an interest. Challenges to the interest of a Referee may be heard and decided by the Chairman of the Board of Review. The Chairman may designate an alternate to serve in the absence or disqualification of a Referee.

4. Conduct of Hearings.

(a) All hearings shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. All issues relevant to the claim shall be considered and passed upon. The claimant and any other party to an appeal may present such evidence as may be pertinent to the issues. Where a party appears in person, the Referee shall examine such party and his witnesses, if any, and may cross-examine the witnesses of any opposing parties. Upon the hearing of any appeal, the Referee, after due notice to the parties, may take such additional evidence as he deems necessary.

(b) The parties to an appeal, with the consent of the Referee, may stipulate the facts involved, in writing. The Referee may decide the appeal on the basis of such stipulation or, in his discretion, may set the appeal down for hearing and take such further evidence as he deems necessary to enable him to determine the rights of the parties.

(c) The testimony of all parties and witnesses at a hearing shall be under oath, administered by the Referee, who is authorized and empowered to administer such oaths.

(d) The Chief of Benefits shall place at the disposal of the Board of Review the jacket, file, and all other information connected with the case in question.

(e) A record shall be kept of the proceedings, including the testimony given by witnesses.

(f) In order to assure the confidentiality of hearings before an Appeals Referee, no party or participant at a hearing shall be permitted to record such hearing by any means, and the recording made by the hearing officer shall be the official record of the proceeding. This prohibition is pursuant to the provisions of sections 71-5-127 and 71-5-525, Mississippi Code of 1972.

(g) In the event any party's representative, whether an attorney or other authorized representative, conducts himself during a hearing in a manner determined by the referee to be disrespectful to the latter, and who, after having been warned once to desist from such conduct, falls to desist, such representative shall be dismissed from the hearing. If, in the Referee's opinion, justice requires that the party be granted a continuance to obtain another representative, then it shall be granted.

5. Adjournment of Hearings.

The Referee shall use his best judgment as to when adjournment of a hearing shall be granted in order to secure all the evidence that is necessary and to be fair to the parties. If a party fails to appear at a hearing, the Referee shall consider the appeal and proceed to make his decision on the record and testimony of any other parties, unless it appears that there is good cause for further adjournment; provided, however, that any party not present, or represented at such a hearing may, not later than fourteen days after the date of notification or mailing of the Referee's decision, file with the Referee a written application to set aside such decision and reopen the case for another hearing. Such application shall state the reasons for the party's failure to appear, and if the Referee

determines that the party has made a showing of good cause for his failure to appear, he shall reschedule the case for another hearing and his final decision.

6. The Determination of Appeals.

(a) As soon as is reasonably possible after the conclusion of a hearing, the Referee shall announce his decision with respect to the appeal, in writing, setting forth therein a statement of the issues, his findings of facts, his conclusions of law, and his decision. All decisions shall be signed by the Referee.

(b) A copy of the decision and the reasons therefor shall be mailed by the Referee to the claimant, the claimant's attorney, if any, the Chief of Benefits, and all other parties to the appeal.

(c) There shall appear in bold face type upon the transmittal letter, following the instructions to a party wishing to appeal, the following statement: "If an appeal is taken to the Board of Review, such appeal will be considered on the record previously made, and no hearing before the Board will be scheduled."

B. APPEALS PENDING BEFORE REFEREE AND REMOVED TO BOARD OF REVIEW

1. The Chairman of the Board of Review may remove to the Board of Review the proceedings on any claim pending before a Referee.

2. Any appeal removed to the Board of Review shall be presented, heard, and decided by the Board of Review in the manner prescribed in Regulation A.

C. APPEALS FROM DECISIONS OF REFEREES TO THE BOARD OF REVIEW

1. Filing of Appeal.

(a) A party desiring to appeal from the decision of any Referee shall, within fourteen days after notification of such decision or within fourteen days after the date such notification was mailed to his last known address, file at the local office or itinerant point where his original claim was filed, a notice of appeal in triplicate, on Form MBit-1a, setting forth the information called for thereon.

(b) No appeal shall be declared invalid for failure to file the same on said form, if there shall have been mailed to, or received by, the Board of Review or the Commission, within the prescribed time, any written objections to the determination, or request or demand for a review thereof or for a hearing thereon.

2. Presentation of an Appeal to the Board of Review.

Any party to a decision of a Referee, or any examiner whose decision has been overruled or modified by a Referee, shall have the right, without permission or leave of the Board of Review first obtained, in all cases to appeal to the Board of Review.

3. Hearing of Appeals.

(a) All appeals to the Board of Review shall be heard upon the evidence in the record previously made. The Board of Review, itself, may in its discretion, and in order to enable it to determine the rights of the parties, direct that a hearing be held for the taking of additional evidence before it. In such event, notices of hearing shall be mailed, by the Chairman, at least seven days before the date of hearing, specifying the place and time of hearing, to the claimant and to all others interested in

the decision of the Referee which is being appealed. The Board of Review will consider written arguments or briefs filed by any of the parties.

(b) At any evidentiary hearing directed by the Board of Review, any party to the appeal may present such evidence as may be pertinent to the claim. Such evidence shall be taken by the Board in the manner prescribed for the conduct of hearings before the Referee.

(c) The Board of Review, in its discretion, may remand any claim which is before it to a Referee for the taking of such additional evidence as the Board of Review may deem necessary to determine the rights of the parties. Such testimony shall be taken by the Referee in the manner prescribed for the conduct of hearings on appeal before the Referee. Upon the completion of the taking of evidence by a Referee pursuant to the direction of the Board of Review, the record of such evidence, with the claim, shall be returned to the Board of Review for its decision thereon.

4. The Hearing of Appeals by Board of Review of its Own Motion

(a) Within fourteen days following a decision by a Referee, and in the absence of filing of a notice of appeal by any of the parties to the decision of the Referee, the Board of Review, on its own motion, may order the parties to appear before it for a hearing on the claim or any issue involved therein.

(b) Such hearing shall be held only after seven days prior notice to the parties, and shall be heard in the manner prescribed for the hearing of appeals from the decision of the Referee.

5. Determination of Appeals.

(a) Following the conclusion of consideration of an appeal, the Board of Review, as soon thereafter as is reasonably possible, shall announce its findings of fact and decision with respect to the appeal. Within four days after its decision, the Board of Review shall notify the parties to any proceedings of its findings and decision. The decision shall be in writing and shall be signed by the members of the Board of Review who considered the appeal. It shall set forth the findings of fact and law of the Board of Review with respect to the issues involved, its decisions, and the reasons therefor.

(b) If a decision of the Board of Review is not unanimous, the decision of the majority shall control. The minority may file a dissent from such decision setting forth the reasons why it fails to agree with the majority.

(c) Any decision of the Board of Review shall become final ten days after the date of notification or mailing thereof. No request by any party for reconsideration by the Board of its decision shall be considered by the Board. Provided, however, that in any case in which the Board of Review conducts a hearing and receives additional evidence, testimony, or hears argument on the issues, any party not present or represented at such a hearing may, not later than ten days after the date of notification or mailing of the Board's decision, file with the Board a written application to set aside such decision and reopen the case for further hearings. Such application shall state the reasons for the party's failure to appear and if the Board of Review determines that the party has made a showing of good cause for his failure to appear, it shall reschedule the case for further hearing and its final decision.

6. Appeal to Courts.

Within ten days after any decision of the Board of Review has become final (i.e., within twenty days after the date of notification or mailing thereof) any party who is aggrieved thereby may commence an action in the Circuit Court of the County in which he resides against the Commission for a review of such decision, in which action any other party to the proceeding before the Board of Review shall be made a defendant. In the event the Commission takes an appeal from a decision of the Board of Review, involving questions of interpretation of the Employment Security Law, as authorized by Section 71-5-533, Miss. Code 1972, the provisions of the next preceding sentence herein shall apply insofar as they may be applicable.

D. REGULATIONS APPLICABLE TO ALL APPEALS.

1. Subpoenas.

(a) Subpoenas to compel the attendance of witnesses and the production of records for a hearing of an appeal may be issued by a member of the Board of Review or by the Referee before whom the hearing is scheduled, upon a showing of a necessity therefor by the party applying for the issuance of the subpoena.

(b) Witnesses subpoenaed for a hearing before a Referee or the Board of Review shall be paid a witness fee of ten dollars (\$ 10.00) per day and shall be paid for each mile going to and returning from the hearing to their homes by the nearest route according to the rate provided in *Section 25-3-41, Miss. Code of 1972*.

(c) No witness fee shall be allowed a witness who does not appear at the hearing when called or who is so intoxicated as to be disqualified from testifying; and no witness fees shall be allowed a witness unless he shall, during the hearing or immediately at the conclusion thereof, prove his attendance and obtain a certification of attendance in the manner hereinbelow provided.

(d) Upon affidavit of a witness, stating the number of days he has attended and the amount of mileage to which he is entitled, the Referee or the Chairman of the Board of Review before whom the witness was called to testify shall certify as to the attendance of the witness and the amount of witness fee to which he is entitled. One copy of such witness certificate shall be given to the witness, one copy transmitted to the Commission, and one copy preserved in the file of the case.

2. Requests to Supply Information from the Records of the Employment Security Commission.

Requests for information from the records of the Employment Security Commission by a party to an appeal or his representative shall be complied with to the extent necessary for the proper disposition of the claim, in accordance with Section 71-5-127, Miss. Code 1972. All such requests shall state, as nearly as possible, the nature of the information desired. Such compliance for such purpose, may include the furnishing of a copy of the record on appeal to a party.

3. Representation before Referees and Board of Review.

(a) Any individual may appear for himself or by his duly authorized representative or counsel in any evidentiary hearing before a Referee or the Board of Review. Any partnership may be represented by any of its members or its duly authorized representative. Any corporation or association may be represented by an officer or its duly authorized representative.

(b) All fees which are charged claimants must be approved by the Referee or the Board of Review, as the case may be, for representation in hearings before them. No fee shall be allowed unless application for same shall have been filed with the Referee or the Board of Review, as the case may be, prior to the adjournment of the hearing.

(c) In determining the amounts of fees approved herein for representing claimants in appeal proceedings, the Board of Review takes notice that the legislation creating the fund from which benefits are paid is administered as an unemployment compensation fund for the relief of those unemployed through no fault of their own.

(d) As authorized in Section 71-5-537, Miss. Code 1972, the Board of Review hereby approves, subject to the provisions of subsection (4) hereof, the following charges for representing claimants by persons entitled to charge for such representation by the laws of this State:

(1) For representation in proceedings before a Referee, not to exceed eighty (80) per centum of the claimant's weekly benefit amount or thirty dollars (\$ 30.00), whichever is greater.

(2) For representation in proceedings before the Board of Review, not to exceed one hundred twenty (120) per centum of the claimant's weekly benefit amount or fifty dollars (\$ 50.00) whichever is greater.

(3) For representation in proceedings in the Circuit Court or the Supreme Court, such fee as may be approved by the Court.

(4) In any case in which the claimant and his counsel believe the fee as approved in subsection (1) or (2) above for representation in proceedings before the Referee or the Board of Review is insufficient, the amount of the fee may be appealed by giving notice in writing to the Referee or the Board of Review at the hearing and filing within ten days thereafter a sworn statement, signed by the claimant and his counsel, of the facts upon which they base their contention. In addition to the written notice and sworn statement, the contention for a larger fee may be presented in person if the proceeding is before the Board of Review, or if the proceeding before the Referee is appealed to the Board of Review on its merits. The Board of Review will render its final decision on any such appeal on the amount of fee at its next regular meeting after receipt of the sworn statement. In appeals on the amount of fee for representation in proceedings before the Referee, the Board of Review may request a statement from the Referee on the reasonableness of the fee being requested.

(5) An appeal on the amount of fee for representation of a claimant shall be entirely separate and apart from and shall have no bearings whatsoever upon the appeal proceedings on the merits of the claim, the decisions thereon, or appeals therefrom.

(e) If a party is represented by more than one attorney at a hearing, only one of them may participate in the hearing.

4. Waiver of Notice and Entry of Appearance.

Any party in interest to whom a notice of any hearing on appeal is required by these Regulations to be given, whether before a Referee or the Board of Review, may, at or prior to such hearing, waive the service of such notice and enter his appearance at such hearing for all purposes; provided such waiver and entry of appearance be evidenced by a statement in writing to that effect, or a statement duly recorded, which is made part of the record of the hearing.

5. Records of Decisions of Referees and Board of Review to be Kept.

(a) All decisions of any Referee and of the Board of Review shall be listed in a minute book provided for such purpose and shall be signed by the individual or members of the body rendering the same; and said minute book shall be kept by the Chairman of the Board of Review.

(b) Copies of all decisions of Referees and of the Board of Review shall be kept on file at the Office of the Mississippi Employment Security Commission at Jackson, Mississippi. Such decisions shall be open for inspection, but without in any manner revealing the names of any of the parties or witnesses involved. The said decisions shall be numbered, codified, or identified by the Board of Review, or its authorized representative, and in such manner as it shall determine.

(c) Whenever used herein "parties in interest", "interested parties", and "parties interested" shall mean, unless otherwise indicated, the claimant, the Commission, the Claims Examiner whose determination has been appealed, and the claimant's last employer, and any other person whose interests may be proximately affected.

6. Responsibility of Parties to Notify the Appeals Department of Address Change.

(a) It is the responsibility of each party to an appeal before the Referee or the Board of Review to notify the Appeals Department of any change of name or address. If any party to an appeal has reason to believe that it will be difficult to receive correspondence mailed to the provided address, that party should make whatever arrangements are necessary to insure that such party receives immediate notification of the contents.

(b) In any instance where a party alleges failure to receive due or timely notice of a hearing or of a decision from the Referee or Board of Review, it shall be the burden of such party to prove compliance with subsection (a) above.

7. Notices from the Appeals Department.

Any notice of hearing, decision, postponement or continuance properly named, addressed, and mailed by the Appeals Department to any interested party, and not returned by the U.S. Postal Service, shall create a rebuttable presumption of proper delivery and receipt of such notice or decision.

8. Postponements.

(a) Due to Federal requirements for the prompt dispositions of appeals, a hearing scheduled before a Referee or the Board of Review shall not be postponed except for compelling reasons.

(b) Request for postponements need not be in writing but promptly made so as to assure notice to other interested parties of the postponement.

9. Failure to Appear Timely at a Hearing.

(a) A party shall be deemed to have failed to timely appear at a scheduled hearing before the Referee or Board of Review when such party fails to appear at the location of the hearing within 10 minutes after the scheduled time for such hearing. For purposes of this section, a party to a telephone hearing shall appear by telephoning the designated Appeals Department telephone number within 10 minutes after the scheduled time for such hearing if the party has not been contacted by the Referee. A party may be deemed to have appeared if any attorney, authorized

representative or witness appears on behalf of such party within 10 minutes. The Referee's watch or timepiece shall be the sole instrument by which timely appearance at the hearing is determined.

(b) If any party fails to appear timely at a scheduled hearing, the Referee may:

(1) Proceed with the hearing and take the testimony, evidence, and argument put forth by those present and issue a decision on the merits of the appeal. If the Referee does elect to proceed, he will advise those present that in the event another hearing is scheduled on the case, it will be advisable for such party to again appear at such further hearing.

(2) Proceed with the hearing if the party has appeared for the hearing more than 10 minutes past the scheduled time, if administratively feasible to proceed.

(c) When any party or authorized representative realizes that such party or authorized representative will not likely appear timely for a scheduled hearing, it is the responsibility of such party or authorized representative to immediately report such fact, and the reason therefor, to the Referee or Chairman of the Board. The Referee or Chairman may refuse to grant a motion to reopen the case filed on behalf of any party which failed to timely reveal good cause for failing to timely appear.

10. Discretionary Dismissal (abandonment of appeal)

A default ruling may be entered against the appellant for failing without good cause, to appear at a hearing. Upon the abandonment of a request for a hearing or appeal by the party who filed, the Referee may dismiss his or her appeal or request for a hearing.

A party shall be deemed to have abandoned a request for a hearing if neither the party appealing nor his/her representative appears at the time and place fixed for the hearing and prior to the hearing such party does not show good cause why he/she or his/her representative cannot appear.