

**COPY**

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

**MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY**

**FILED**

**APPELLANT**

**MAR 14 2008**

**VS.**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS** **CAUSE NO. 2007-CC-01623**

**GOOD SAMARITAN PERSONNEL  
SERVICES, INC.**

**APPELLEE**

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**BRIEF OF APPELLANT,  
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

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**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY,  
STATE OF MISSISSIPPI**

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**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. Mississippi Department of Employment Security, Appellant
2. Good Samaritan Personnel Services, Appellee
3. Honorable LeAnne F. Brady, Attorney for Appellant
4. Albert Bozeman White, Esq., Attorney for Appellant
5. Honorable Judge W. Swan Yerger, Circuit Court Judge
6. Ruby McCoy, Claimant

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MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

**INTRODUCTION**

The public policy served by the Mississippi Department of Employment Security [hereinafter “MDES or “Department”] is set out in M.C.A. Section 71-5-3(1972, as amended). This statute provides that economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of Mississippi; and the achievement of a social security system to provide a measure of protection against this hazard requires the compulsory setting aside reserve funds by employers to provide unemployment benefits during periods of unemployment. Id. (Emphasis added). Further, the MDES is granted the jurisdiction and authority to determine who is an “employer”, and what constitutes covered “employment”, within the statutory definitions. M.C.A. Section 71-5-11 H, and (15), M.C.A. Section 71-5-11 I (8), (14) and (15) (1972, as amended). The MDES calls decisions as to covered employment

“status” determinations.

The MDES is also granted the jurisdiction and authority to make determinations as to an employee’s eligibility for receiving benefits, *i.e.* “benefit” determinations. M.C.A. Section 71-5-501 *et seq* (1972, as amended). This appeal involves a benefit determination, not a status determination.

The Employment Security Law sets up separate administrative procedures and systems, and appeal rights, regarding tax rates, “status” determinations, collection of taxes, and “benefits” determinations. *See M.C.A.* Section 71-5-355 (1972, as amended)(regarding tax rate determination and liability); and M.C.A. Section 71-5-355 (2)(b)(ix)(1972, as amended)(regarding status determination appeal rights); and M.C.A. Section 71-5-519 *et seq*(1972, as amended)(regarding benefit determination appeal rights.) By statute, the MDES is also given the right to implement rules and regulations to administer these statutes. Tax, Benefit, and Appeal Rules and Regulations have been implemented. *Id.*

The MDES has followed its statutes, and its Rules and Regulations, in determining (1) whether Good Samaritan Personnel Services, Inc. [hereinafter “Good Samaritan”] is liable for making contributions, *i.e.* paying employment taxes, regarding Ms. McCoy’s and other person’s status as an employee; and (2) whether Ruby McCoy is eligible to receive unemployment benefits regarding her separation from employment with Good Samaritan in this case, assuming she worked in “covered” employment. Pursuant to the statutes cited herein above, and the decision below, the issue of Ms. McCoy’s eligibility for benefits is separate and distinct from the issue of Good

Samaritan's status **as an employer** of Ms. McCoy. As set out above, those two issues are administered pursuant to separate procedures under separate statutes within the Employment Security Law; and those two separate decisions are proceeding separately.

The basis or gravamen of this appeal is that the Honorable Swan Yerger failed to recognize the distinctions discussed above in this case; and Good Samaritan's attorneys inappropriately injected the status issue into this benefits case. In fact, there is no administrative hearing record upon which Judge Yerger could properly rule that Ms. McCoy was not an employee of Good Samaritan in this benefit appeal.

### **STATEMENT OF ISSUES**

1. Whether the status of Good Samaritan as an employer of Ruby McCoy, Claimant, is properly before this Honorable Court as an issue in this matter, since the status issue is proceeding separately before the MDES under separate statutes, and since there is no record in this case upon which the Court may properly base a status determination?

2. Whether this Court should limit its decision in this case to Ruby McCoy's compliance with eligibility requirements for obtaining unemployment benefits under M.C.A. Section 71-5-501 *et seq* (1972, as amended)?

3. Whether the Circuit Court acted arbitrarily and capriciously, and erred, by ruling upon the issue of whether Ruby McCoy was an employee or independent contractor of Good Samaritan in this benefit appeal case, when the status



issue is proceeding separately before the MDES under separate statutes; and whether the Circuit Court erred by failing to limit its decision to Ruby McCoy's compliance with eligibility for obtaining unemployment benefits under M.C.A. Section 71-5-501 *et seq* (1972, as amended)?

4. Whether the Board of Review's decision was supported by substantial evidence and should be affirmed, finding that Good Samaritan failed to timely appeal from the Claims Examiner's July 14, 2005, decision finding that as to the separation from work issue, Ruby McCoy was eligible to receive unemployment benefits, pursuant to M.C.A. Section 71-5-519 (Rev. 2001)?

5. Whether the Board of Review's should be affirmed finding that Good Samaritan failed to show good cause for untimely filing its appeal of the Claims Examiner's July 14, 2005 decision finding as to the separation from work issue, Ms. McCoy eligible to receive benefits?

#### **STATEMENT OF THE CASE**

Ruby J. McCoy [hereinafter also "claimant"] worked as a CNA for Good Samaritan from September 2003 to November 3, 2005, when she was laid off due to lack of work. (R. Vol. 2 p. 1). Ms. McCoy filed a claim for unemployment benefits. (R. Vol. 2 p. 1). On July 14, 2005, Good Samaritan was notified that the Department investigated Ms. McCoy's claim; and determined that Ms. McCoy was not subject to disqualification based on a refusal of work. (R. Vol. 2 p. 7). Good Samaritan had

**fourteen (14) days from July 14, 2005**, to appeal this decision. (R. Vol. 2 p. 7).  
M.C.A. Section 71-5-519 (Rev. 2001).

Good Samaritan did not appeal this decision until **February 17, 2006**, being approximately seven (7) months late. (R. p. 8). A telephonic hearing was noticed and held for the purpose of determining whether Good Samaritan had good cause for filing its appeal untimely. (R. p. 11-15, 16-34). Good Samaritan was represented by Attorney Anne Sanders; and two witnesses testified. Documents were also tendered into evidence, including copies of the decision and appeal.

Based on the record, the Administrative Appeals Officer found that pursuant to M.C.A. Section 71-5-517 (Revised 1995), Good Samaritan had fourteen days from the Department's July 14, 2005, decision to appeal. The Administrative Appeals Officer further found that Good Samaritan's appeal was untimely, because it was not filed until February 17, 2006. (R. Vol. 2 p. 35-36). Further, the Administrative Appeals Officer found that Good Samaritan did not show good cause for missing the fourteen day appeal deadline. Thus, the Administrative Appeals Officer dismissed Good Samaritan's appeal as untimely. (R. Vol. 2 p. 35-36). The Administrative Appeals Officer's Decision in pertinent part was as follows:

An initial claim for benefits under the Mississippi Employment Security Law was filed by the above-named individual (Ruby J. McCoy), hereinafter called claimant, effective July 3, 2005. On July 14, 2005, the Claims Examiner notified Good Samaritan Personnel Services, an interested employer, Account No. 25-32044-0-00, that the claimant is not subject to disqualification based on the refusal of work. The employer was also advised that their account is chargeable for benefits paid during the

current benefit year. The employer filed Notice of Appeal therefrom on February 17, 2006. A telephone hearing before a Administrative Appeals Officer was held on March 22, 2006, at which employer representative with an attorney and a witness participated.

Based upon the record, testimony, and certain documents of evidence, the Administrative Appeals Officer finds as follows:

There was printed on the Notice of Nonmonetary Decision the following statement:

IF YOU WISH TO PROTEST THIS DECISION, you may ask for a reconsideration or file a Notice of Appeal within fourteen (14) days after date of mailing to you. This appeal may be filed at the nearest Claims Office or by a letter addressed to the Mississippi Department of Employment Security....

Section 71-5-517 of the Mississippi Employment Security Law provides that a claimant may file an appeal from an initial determination or an amended initial determination within fourteen (14) days after date such notification was mailed to the last known address. The Law contains no provision for the extension of such time for good cause or holidays.

In this case, the Notice of Nonmonetary decision was mailed to the last known address on July 14, 2005 (incorrectly stated "2006"). The appeal was filed February 17, 2006, which was not within the time limit prescribed in the Law, and good cause for failing to meet that time limit has not been established. The decision of the Claims Examiner therefore has become final and the Administrative Appeals Officer is without jurisdiction in the matter. The appeal is consequently dismissed. (emphasis added).

(R. Vol. 2 p. 35-36).

Good Samaritan appealed to the Board of Review. The Board affirmed adopting the AAO's Fact Finding and Opinion. (R. Vol. 2 p. 39).

Good Samaritan then appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi. Briefs were filed by Good Samaritan and the MDES. Good Samaritan argued facts that were not in the record, asserting that benefits were inapplicable because Ms. McCoy was not its employee. Good Samaritan did so knowing that the status issue was separately proceeding before the MDES. Judge Swan Yerger misunderstood the issue before him, and acted arbitrarily and capriciously, by ruling upon the status issue, and not the benefit issue in this case. (R. Vol 1 p. 7). On January 17, 2007, Judge Yerger inappropriately held as follows, to-wit:

1. That the decision of the Referee and the Board of Review's order affirming the decision was beyond the power of the lower authority to make. *See Davis v. Pub. Employees' Ret. Sys.*, 750 So.2d 1225, 1229 (Miss. 1999).
2. That Appellant is a nursing placement service which refers independent contractor nurses and nurse aides to various hospitals and nursing homes where they work on a temporary basis at the direction and control of the hospital or nursing home, and therefore, Appellant is not a statutory employer under the Mississippi Employment Security Act, and the Mississippi Department of Employment Security has no jurisdiction over Good Samaritan Personnel Services. *See Miss. Dep't Employment Sec. v. PDN, Inc.*, 586 So 2d 838 (Miss. 1991).

(R. Vol 1 p.7)

## SUMMARY OF THE ARGUMENT

The law and procedure in a status case is governed by M.C.A. Section 71-5-11 H, and M.C.A. Section 71-5-11 I(8),(14) and 15, and Section 71-5-355 (1972, as amended). The status of Ms. McCoy, and all similarly situated workers, as an employee of Good Samaritan has proceeded separately from Ms. McCoy's compliance with eligibility for benefits. (See Exhibits "A, B, C, and E" attached hereto.). **The MDES has jurisdiction and authority over the status issue, and has made a decision as to the status of Ms. McCoy, and all similarly situated workers, as an employee of Good Samaritan. (See Exhibit "A" attached hereto.) This issue is not now, in this case, before this Honorable Court, but is still pending before the MDES.**

The law and procedure in an unemployment benefit case is governed by M.C.A. Section 71-5-501 et.seq (1972, as amended). The issue before this Honorable Court **should be limited to** Ms. McCoy's eligibility for benefits under the statutes, not her status as an employee under separate statutes. The only issue for this Court's determination is Ms. McCoy's eligibility for benefits, in the event that she is ultimately held to be an employee of Good Samaritan. (See Exhibit "A" attached hereto.)

In that regard, in this case, the Honorable Judge Swan Yerger erred and acted inappropriately, and arbitrarily and capriciously, by holding that Ms. McCoy, and similarly situated workers, were not employees of Good Samaritan, when the status issue was not before the Court. In fact, in this case, there were no facts or record before the Court upon which to base a ruling that Ms McCoy, and similarly situated workers, were, or were not, employees of Good Samaritan. The MDES requests that the Court

reverse the Hinds County Circuit Court, and remand this matter to Judge Yerger for a determination on the benefit issue only. The MDES further requests that this Court recognize that the status issue has, and should, proceed separately before the MDES, with subsequent appeal rights to the courts. (See Exhibits "A, B, C and E" attached hereto.).

Procedure before the MDES in Ruby McCoy's unemployment benefit case is governed by M.C.A. Section 71-5-517 (Rev. 2001) et.seq. In this case, if Good Samaritan was unhappy with the initial decision of the Department, it had fourteen days from the date of mailing of that decision to appeal. M.C.A. Section 71-5-517 (Rev. 2001).

Regarding this benefit case, the Claims Examiner's Decision was mailed to Good Samaritan at its correct mailing address on July 14, 2005. (R. Vol. 2 p. 7). The notice letter informed Good Samaritan that it had fourteen days from the date mailed to appeal. (R. Vol. 2 p. 7). However, Good Samaritan did not appeal until February 17, 2006, being approximately seven (7) months late. (R. Vol. 2 p. 8).

Since notification was mailed to Good Samaritan's correct mailing address, the case of Wilkerson vs. Mississippi Employment Security Commission, 630 So. 2d 1000 (Miss. 1994) is on point; and controls as to calculating the appeal deadline. In Wilkerson, the Supreme Court held that **when notification is by mail, the fourteen day time period began running from the mailing date.** Id. at 1002. The Mississippi Supreme Court has upheld the validity of the Department statutes regarding the time deadlines for appeal. Wilkerson, supra; Booth v. Mississippi Employment Security

Commission, 588 So.2d 422, 427-28 (Miss. 1991). The Court has further held that relief from this time deadline is only appropriate where the notice is mailed to an incorrect address, or where the claimant otherwise shows good cause for late filing. Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979); Powell v. Mississippi Employment Security Commission, 787 So.2d 1277 (Miss. 2001); Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. App Ct. 1998).

Since the status of Ms. McCoy, and similarly situated workers, is the subject of a completely different administrative proceeding, and appeal, the Court's ruling in this matter should be limited to the issue of Ms. McCoy's eligibility for benefits under M.C.A. Sections 71-5-501 *et seq* (1972, as amended). Since there is no dispute that Good Samaritan's appeal was untimely filed under those statutes, and since Good Samaritan's assertions that it did not know that Good Samaritan had received the notice letter is insufficient under the case authorities, Good Samaritan has failed to show good cause for untimely filing; and the Board of Review's decision is supported by substantial evidence, and should be affirmed by this Honorable Court.

### ARGUMENT

The Good Samaritan appeal to the Circuit Court and the Department's appeal to this Honorable Court is governed by M.C.A. Section 71-5-531, (Rev. 1995). This statute provides for an appeal to the Courts by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the appeals court shall consider

the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. (emphasis added). Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (Miss. 1992); Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

A rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Security Commission, 639 So.2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

#### **Argument and Authorities as to Employment Status Issue**

Good Samaritan asked the Circuit Court to deny the claim of Ruby McCoy, asserting that Good Samaritan was not an employer of Ruby McCoy. While Ruby McCoy's status as an employee, or independent contractor, certainly is an issue to be determined by the MDES, it is not an issue to be determined in this benefit appeal. The "status" issue is a separate issue to be determined according to separate Mississippi statutes, being M.C.A. Section 71-5-11 H, and (15), M.C.A. Section 71-5-11 I (8),(14) and 15, and M.C.A. Section 71-5-355(2)(b)(ix)(1972, as amended), as well as TR 11. Independent Contractors, Unemployment Insurance Regulation (July 1, 1998). According to those statutes, the facts and law as to the status issue proceed separately and differently at both the administrative level, and before the courts. In that regard, not



only are these separate statutes and MDES regulations applicable, but there is also a separate body of case law applicable to the status issue. That is why the Hearing Officer refused to hear testimony in this benefit appeal as to the status issue. (R. Vol. 2 p. 13).

In that regard, **the MDES tax department, entitled Contributions and Status, did issue a decision on July 13, 2005 finding that Ruby J. McCoy and all other similarly situated workers were employees of Good Samaritan.** (A copy of this decision is attached hereto as **Exhibit "A"**.) This decision provides in pertinent part as follows, to-wit:

Section 71-5-11 I (14) of the Mississippi Employment Security Law states

"Services performed by an individual for wages shall be deemed employment subject to the law, unless and until it is shown to the satisfaction of the Department that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact...."

**The information provided to this Agency shows that all of the services were to be performed by the claimant personally. The claimant was given instructions or directions in the daily performance of her duties. The Claimant operated under the firm's name when performing services for the firm. The firm provided the place of work for the claimant and tools used to perform the work. Claimant has to wear a uniform or special clothing while performing services for the firm. Lunch and Coffee breaks were provided for the claimant and any absenteeism had to be reported. The claimant was paid an hourly rate by the firm. Either party could terminate services without liability. There existed an employer/employee relationship and the wage of the**

**above name claimant and all other in this class should be reported and taxes paid.** (Emphasis added).

(See Exhibit "A" attached). Further, pursuant to the applicable statute, tax regulation, and the Contributions and Status department's letter attached hereto as Exhibit "A", Good Samaritan had ten (10) days to appeal the status decision from the date of said letter. M.C.A. Section 71-5-355(2)(b)(ix)(1972, as amended), as well as TR 11. Independent Contractors, Unemployment Insurance Regulation (July 1, 1998). (See Exhibit "A" attached).

In that regard, Good Samaritan did not timely appeal this ruling. In fact, Good Samaritan did not appeal until the MDES received a letter from Attorney Anne Sanders on or about **February 18, 2006**. (A copy of Anne Sanders' letter dated February 17, 2006 is attached hereto as **Exhibit "B"**.) Subsequently, due to a turnover and re-organization of personnel in both the MDES tax and appeals departments, the MDES did not notice a hearing on the timeliness of Good Samaritan's appeal of Contribution and Status' July 13, 2005, decision until February 16, 2007. (A copy of the Notice from ALJ Timonhy Rush to Good Samaritan and Anne Sanders, Esq. , is attached hereto as **Exhibit "C"**.)

Regarding the issue of Ms. McCoy's status as an employee of Good Samaritan, that matter is not before the Court in this benefit case; and the MDES still has jurisdiction over the status case; and it is proceeding separately. (See Exhibit "C" hereto.) Id. at M.C.A. Section 71-5-11 I (14), M.C.A. Section 71-5-11 I (8) &(14), and M.C.A. Section 71-5-355(2)(b)(ix)(1972, as amended) and TR 11. Independent

Contractors, Unemployment Insurance Regulation (July 1, 1998). The status decision has not completely proceeded through the MDES administrative appeals process.

The only legal and factual issue before the Court in this case is whether Good Samaritan failed to timely appeal the MDES' decision regarding Ms. McCoy's compliance with the Employment Security Law eligibility requirements. None of the facts that would be applicable to a status determination were contained in the record before the Circuit Court.

Additionally, in response to Ms. Sanders' letter dated February 17, 2007, in ALJ Dustin Adams' letter, he stated that even though the Circuit Court erred in ruling on the status issue in the McCoy case, he would postpone a hearing scheduled for March 5, 2007, on the status issue until the Supreme Court has ruled upon the MDES' appeal in the McCoy matter. (See Exhibit "D" and "E"). Thus, this Honorable Court should not consider the Circuit Court's determination of the status issue in this case as dispositive, or relevant to a determination on Ms. McCoy's compliance with eligibility provisions of the Employment Security Law. Further, this Honorable Court should find that it was wrong for the Circuit Court to rule upon the status issue in this matter, since there was no record before the Court on that issue. Further, in finding that Mississippi Employment Security Comm'n v. PDN, Inc., 586 So. 2d 838 (Miss. 1991) precluded in determination that Good Samaritan was an employer of Ms. McCoy and similarly situated person, the Court ignores the case of Senior Partners, Inc. v. Mississippi Employment Security Commission, 2006 Miss. App. LEXIS 888 (November 28, 2006)(Petition for Rehearing *denied* at 2007 Miss. App. LEXIS 276, and Petition for

Writ of Certiorari *denied* at 2007 Miss. App. LEXIS 334).

In Senior Partners, the Court found that Senior Partners, a sitter placement service, was an **employer** of health care personnel provided to the sick and elderly in homes or nursing homes. The Court then concluded since the company exerted sufficient control over the sitters, an employment relationship was created, such that Senior Partners was liable for unemployment taxes. In so doing the Court distinguished PDN, supra. Since the facts and law in the Senior Partners case is analogous to Good Samaritan, Judge Yerger's Order finding that Ms. McCoy, or similarly situated CNA's, cannot be employees of Good Samaritan as a matter of law, is incorrect, even if that issue was before the Circuit Court, which it was not.

#### **Argument and Authorities as to Timeliness Issue**

M.C.A. Section 71-5-517 (Rev. 1995) sets out the applicable appeal time, and 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.

In the instant case, Good Samaritan's Office Manager, Cindy Franklin, testified that as of July 15, 2005, Good Samaritan's address was 1202 Canterbury Lane, Clinton, MS 39056. This was the address to which the Claims Examiner's notice letter was mailed. (R. Vol. 2 p. 18-19, 7). Copies of the decision and appeal were admitted into evidence. (R. Vol. 2 p. 20-21).

Pursuant to M.C.A. Section 71-5-517 (Rev. 1995), Good Samaritan was afforded all of the notice of the non-monetary determination to which it was entitled; and Good Samaritan's appeal was not timely filed. Since notification was mailed to Good Samaritan's correct mailing address, the case of Wilkerson vs. Mississippi Employment Security Commission, 630 So. 2d 1000 (Miss. 1994) is on point; and controls as to calculating the appeal deadline. In Wilkerson, the Supreme Court held that **when notification is by mail, the fourteen day time period began running from the mailing date.** Id. at 1002. Further, while holding that an appeal filed one day late was untimely, the Court in Wilkerson stated that **the fourteen day time period as set by statute is to be strictly construed.** Id.; Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991). Further, the Mississippi Supreme Court has held that the Department has **no authority** to extend the appeal deadline, but only to excuse late filing for good cause. Booth, supra.

Regarding the good cause issue, the Supreme Court and Court of Appeals have addressed that issue. Edwards v. Mississippi Employment Security Commission, 763 So.2d 194 (Miss. 2000). In Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. App Ct. 1998), the Court stated that good cause must be established by affirmative proof. In so doing, the Court recognized a presumption of delivery for properly addressed mail; and rejected claimant's argument that the mail routinely is not delivered correctly in her neighborhood without some affirmative, persuasive proof. The Court also indicated that a good cause showing must provide sufficient legal basis to excuse the late filing. Id.

Analogously to Holt, supra, in the instant case, assertions by the Office Manager and Good Samaritan's new CEO, Gail Frizzell, that they never saw the July 14, 2005 notice letter is simply not sufficient to show good cause, particularly considering the Office Manager's testimony that part-time help opened the mail. The implication is that the part-time help either did not deliver the mail to the appropriate person, or the letter was misplaced. (R. Vol. 2 p. 21).

There are several other cases discussing good cause. In City of Tupelo v. Mississippi Employment Security Commission, 748 So.2d 151 (Miss. 1999) the Court held that the 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. See also Maxwell v. Mississippi Employment Security Commission 792 So. 2d 1031(Ct.App. 2001)(where claimant waited until after his dishonorable discharge was changed to an honorable discharge to file appeal, good cause was not shown for appealing untimely); 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); Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979)(where notice is not mailed to the last known address good cause for late filing is shown).

## CONCLUSION

The initial notice of Ruby McCoy's claim determination was mailed to Good Samaritan at a correct mailing address. (R. Vol. 2 p.7). This decision informed Good Samaritan that it had fourteen days from the date mailed to appeal. Since Good Samaritan's proof as to late filing of its appeal did not fall within those things that have been recognized as establishing good cause for doing so, it failed to show good cause under the case authorities for filing its appeal late. Id.


In this case, the Administrative Appeals Officer and Board of Review correctly did not consider the facts or legal issues regarding Ms. McCoy's status as an employee of Good Samaritan, because that issue is subject to a completely separate and distinct proceeding before the MDES. Ms. McCoy's status as an employee of Good Samaritan is not now before this Honorable Court, only the untimeliness of the benefit appeal. Thus, the Court should reverse the Circuit Court finding that it erred in ruling on the status issue in this case.

As to Good Samaritan's failure to timely appeal Ms. McCoy's benefit case, at issue was whether Ms. McCoy refused an offer of suitable work, such that she may be ineligible for benefits, assuming she was ultimately found to be an employee of Good Samaritan in the status case. However, since Good Samaritan failed to appeal the Claims Examiner's decision that she did not refuse an offer of suitable work within 14 days thereof, the only issue before the AAO and Board of Review was whether Good Samaritan had good cause for failing to appeal timely.

Since the evidence and law supports the Board's decision holding that Good Samaritan did not timely file its appeal, or have good cause for late filing, the Board's dismissal of Good Samaritan's appeal should either be affirmed by this Honorable Court, or remanded to the Circuit Court with instructions to consider only that issue.

RESPECTFULLY SUBMITTED, this the 14<sup>th</sup> day of March,  
2008.

MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY

  
ALBERT BOZEMAN WHITE

OF COUNSEL:

Albert Bozeman White, Assistant General Counsel  
MSB No. [REDACTED]  
Post Office Box 1699  
Jackson, MS 39215-1699  
(601) 321-6074

**CERTIFICATE OF SERVICE**

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



Good Samaritan Personnel Services, Inc.  
c/o Mr. Michael Graves  
Post Office Box 42  
Brandon, MS 39042

Anne C. Sanders, Esq. (Who has made a Motion to Withdraw as  
Counsel for Good Samaritan.)  
Brunini Law Firm,  
Post Office Box 119  
Jackson, MS 39205

Ruby J. McCoy, Claimant  
Post Office Box 88  
Water Valley, MS 38965

Honorable W. Swan Yerger  
Circuit Court Judge  
Post Office Box 327  
Jackson, MS 39205-0327

THIS, the 14<sup>th</sup> day of March, 2008.

A handwritten signature in cursive script, reading "Albert Bozeman White", is written over a horizontal line.

ALBERT BOZEMAN WHITE



*S. A. H.*  
*Claims*

**Mississippi Department of Employment Security**

**Haley Barbour  
 Governor**

**Jim Lott  
 Deputy Executive Director  
 Chief Operating Officer**

**Tammy Dale Favre  
 Executive Director**

**Mike Marsh  
 Deputy Executive Director  
 Chief Fiscal Officer**

July 13, 2005

25-32149-0-00  
Good Samaritan Personnel  
Services Inc.

1202 Canterbury Lane  
Clinton, MS 39056

Attn: Cindy Franklin

Claimant: Ruby J McCoy  
587-32-5323

Dear Employer:

The above named claimant filed a claim for unemployment benefits alleging wages with your firm from September 1, 2003 to May 3, 2005. No wages were found for the above named claimant and an investigation was conducted by our Field Representative Margie Coleson.

Section 71-5-11 I (14) of the Mississippi Employment Security Law states:

"Services performed by an individual for wages shall be deemed to be Employment subject to this chapter unless and until it is shown to the satisfaction of the Department that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant."

The information provided to this Agency shows that all of the services were to be performed by the claimant personally. The claimant was given instructions or directions in the daily performance of her duties. The claimant operated under the firm's name when performing services for the firm. The firm provided the place of work for the claimant and tools used to perform the work. Claimant had to wear a uniform or special clothing while performing services for the firm. Lunch and Coffee breaks were provided for claimant and any absenteeism had to be reported. The claimant was paid an hourly rate by the firm. Either party could terminate

Exhibit "A" page 1

*Increasing Employment in Mississippi*

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Good Samaritan Personnel  
Services Inc.

July 13, 2005

Page 2

services without liability. There existed an employer/employee relationship and the wages of the above named claimant and all others in this class should be reported and taxes paid.

If you do not agree with this decision you will have ten (10) days from the date of this letter to file your protest as provided under Tax Regulation 11 of the Mississippi Employment Security Law. Your Appeal should be made in writing to: Chief of Contributions and Status Department, Mississippi Department of Employment Security, P O Box 22781, Jackson, Mississippi, 39225 2781. This decision becomes final ten (10) days from date of mailing.

Your cooperation in this matter is appreciated. If we can assist you in any way please contact this office.

Sincerely,

Veronica England, Chief  
Contributions and Status

VE:KS/fb

cc: F/R Colson - Jackson 480

Wage Unit - Scawood

Exhibit "A" page 2

*Increasing Employment in Mississippi*

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JM

# BRUNINI

BRUNINI, GRANTHAM, GROWER & HEWES, PLLC  
ATTORNEYS AT LAW

ANNE C. SANDERS

E-mail: [asanders@brunini.com](mailto:asanders@brunini.com)  
Phone: 601.960.6893

1406 Trustmark Building  
248 East Capitol Street  
Jackson, Mississippi 39201  
Telephone: 601.948.3101

Post Office Drawer 119  
Jackson, Mississippi 39205  
Facsimile: 601.960.6902

February 17, 2006

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713

Chief of Contributions and Status Department  
Mississippi Employment Security Commission  
P. O. Box 22781  
Jackson, Mississippi 39225-2781

RE: Ruby J. McCoy v. Good Samaritan Personnel Services, Inc.  
587-52-5323

Dear Sir or Madam:

This firm represents Good Samaritan, Inc., formerly known as Good Samaritan Personnel Services, Inc. On February 16, 2006, my client was faxed a copy of a July 13, 2005, letter which constituted an adverse decision for my client. This was the first time that Good Samaritan had received the July 13, 2005 letter decision.

I enclose with this letter an affidavit from Cindy Franklin, office manager for Good Samaritan, attesting to this fact. The resultant lack of notice resulted in my client losing its opportunity for appeal. Given the lack of notice, we hereby request that this matter be reopened and that Good Samaritan be given an opportunity to appear and present its defense not only to Ms. McCoy's claim for benefits, but also to its regulation as an employer under the statute.

Good Samaritan is a medical placement service for nurses and nurse aides. The Mississippi Supreme Court has ruled that medical placement services are not employers within the meaning of the Mississippi Employment Security Law. *MESC v. PDN, Inc.*, 586 So. 2d 838 (Miss. 1991). Thus, not only is the ruling in error as a matter of law, should the ruling not be reversed, it would place my client at a significant economic market disadvantage with other medical placement services in the state.

Please accept this letter as a formal request to reopen this matter. Thank you.

Sincerely,

Brunini, Grantham, Grower & Hewes, PLLC



Anne C. Sanders

Exhibit "B"

cc: Gail Frizzell



## Mississippi Department of Employment Security

### OFFICE OF UNEMPLOYMENT INSURANCE APPEALS TELEPHONE NOTICE OF HEARING

EMP-06-22  
ACCOUNT NO. 25-32044-0-00

**EMPLOYER**

Ms Cindy Franklin  
Good Samaritan Personnel Services Inc  
1202 Canterbury Lane  
Clinton MS 39056

**CLAIMANT**

Ruby J McCoy  
SSN: 587525323

Dear Ms Franklin:

Please be advised that a hearing regarding whether or not the employer's appeal was timely filed will be held via telephone on March 5th, 2007, at 8:30 a.m. Central Standard Time. All parties will be able to participate at the same time via the telephone conference system. The process will provide for a fair due process hearing.

You must provide the telephone number where you can be reached. **SUBMIT THIS TELEPHONE NUMBER BY CALLING 1-866-633-7041 OR (601) 321-6294, NO LATER THAN 5:00 PM OF THE PREVIOUS BUSINESS DAY.**

The Administrative Law Judge will contact you at the scheduled time at the number you furnish in this reply. Failure to provide a contact telephone number could mean you will lose your right to a hearing.

**THE HEARING CAN ONLY BE POSTPONED FOR COMPELLING REASONS AND ADEQUATE NOTICE IS REQUIRED.**

Any party requesting an in-person hearing must do so in writing. The request must be submitted at least seven (7) business days prior to the hearing and include a detailed explanation why the hearing should be changed.

You are advised to use a regular land line home or office phone. Cellular phones have a tendency to fail during a long hearing. If you do not have access to a regular phone, you may make arrangements with your local employment office to use a phone.

If the Administrative Law Judge has not called the number you provided within ten (10) minutes after the scheduled hearing time, you should call the Appeals Department at (601) 321-6294 or 1-866-633-7041.

Exhibit "C" page 1

*Increasing Employment in Mississippi*

Page 2

Any documents that you intend to use in the hearing should be marked and submitted to the Appeals Department and the other party listed on the notice of hearing seven (7) business days prior to the hearing.

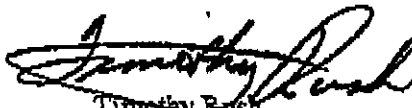
Documents introduced by the agency and parties should be marked "A" for agency, "E" for employer and "C" for claimant with a corresponding number for each document submitted, (such as A-1,A2; E-1,E2; C-1,C2). Please put your docket number on the documents before mailing them.

To follow these labeling instructions will assist in identifying the documents in the hearing. Labeling the document "E" does not any way indicate that an Employer/Employee relationship exists.

DATED AND MAILED FROM JACKSON, MISSISSIPPI, THIS 16TH DAY FEBRUARY OF 2007.

TR/sw

Sincerely,

  
Timothy Rush  
Administrative Law Judge

cc: Tax  
Veronica England, Tax Chief  
Cecil Jones, BPC

Ann C Sanders  
Brunini Grantham Grower & Hewes PLLC  
Post Office Drawer 119  
Jackson MS 39205-0119

Exhibit "C" page 2

*Increasing Employment in Mississippi*

**BRUNINI**

BRUNINI, GRANTHAM, GROWER &amp; HEWES, PLLC

ATTORNEYS AT LAW

ANNE C. SANDERS

E-mail: asanders@brunini.com  
Direct: 601.960.68931400 Trustmark Building  
248 East Capitol Street  
Jackson, Mississippi 39201  
Telephone: 601.948.3101Post Office Drawer 119  
Jackson, Mississippi 39205  
Facsimile: 601.960.6902

February 17, 2007

Dustin R. Adams  
Chief of Appeals  
Mississippi Employment Security Commission  
P. O. Box 1699  
Jackson, Mississippi 39215-1699

RE: Ruby J. McCoy v. Good Samaritan Personnel Services, Inc.  
587-52-5323

Dear Mr. Adams:

I am in receipt of a copy of your February 16, 2007 letter to Ms. Cindy Franklin at Good Samaritan Personnel Services, Inc. Please be advised that Ms. Franklin has not been affiliated in an active manner with Good Samaritan for over six months. All legal correspondence regarding Good Samaritan should be addressed to Ms. Gail Frizzell, 3136 Bishops Way, Franklin, Tennessee 37064. Your agency has been advised of this fact numerous times.

Please note that the issue of whether Good Samaritan filed a timely appeal from the July 13, 2005 Determination issued by the Contributions and Status Department of the MDES has already been appealed and adjudicated in the appeal recently heard and ruled upon by the Circuit Court for Hinds County in its January 17, 2007 order on the McCoy matter. You do not get two bites at the apple. Your agency argued the timeliness issue in its appeal brief to the Circuit Court (please read the brief filed by your attorney), but did not choose to address the jurisdictional issue which was also on appeal. Good Samaritan briefed both the timeliness issue and the jurisdictional issue. The Circuit Court ruled that Good Samaritan was not an employer covered by the Mississippi Employment Security Act, and therefore the timeliness issue did not need to be addressed since the July 13, 2005 Determination was void *ab initio*.

If you do not agree with the Circuit Court's ruling, then your legal recourse is to appeal the January 17, 2007 ruling to the Supreme Court. However, it appears that your appeal time has expired and therefore the Court's ruling that your Agency has no jurisdiction over Good Samaritan is final. If you proceed to try to get your second bite at the apple we will seek injunctive relief and



Office of Appeals  
February 17, 2006  
Page 2

damages against the Agency.

Sincerely,

Brunini, Grantham, Grower & Hewes, PLLC



Anne C. Sanders

cc: Gail Frizzell



**Mississippi Department of Employment Security****Unemployment Insurance Appeals Division**

February 27, 2007

Anne C. Sanders  
P.O. Drawer 119  
Jackson, MS 39205

Re: Good Samaritan Personnel Services, Inc. vs. MDES  
Docket Number EMP-06-22

Dear Ms. Sanders:

This letter is being sent in response to your letter dated February 17, 2006(s/c) responding to the February 16, 2007, letter I sent accompanying the Notice of Hearing issued in the above-referenced matter. I apologize for the delay in responding, however, I needed to reflect on the best way to handle the matter in light of the pending appeal to the Court of Appeals and your letter.

As I indicated in my previous letter, the Appeals Department acknowledges the January 17, 2007 Decision from the Circuit Court in the matter of Good Samaritan Personnel Services, Inc. vs. MDES and Ruby J. McCoy, which ruled on the issue of independent contractor versus an employer-employee relationship (tax status) in that case. However, it is the understanding of the Appeals Department that the decision is being appealed at this time. MDES is of the belief that the issue was not properly before the Court in that case, in part because it was an appeal filed in the matter involving Ruby J. McCoy's separation issue and not the tax status of Good Samaritan.

The Appeals Department has not held a hearing in this case on the issue of independent contractor versus an employer-employee relationship. You have a pending appeal before the Appeals Department that relates to the timeliness of that appeal, and whether the Appeals Department has jurisdiction over the issue. That appeal is referenced above. The issue that would have been addressed in the hearing on March 5, 2007, would have been whether Good Samaritan Personnel Services, Inc. filed a timely appeal of the July 13, 2005 Determination issued by the Contributions and Status Department of MDES. That Determination concluded that an employer-employee relationship did exist between the then Good Samaritan Personnel Services, Inc. and Ruby J. McCoy. The underlying issue of independent contractor status versus employer-employee relationship would not have been addressed at that time.

As this matter could become moot pending the outcome of the appeal of the Circuit Court's Decision, and both MDES and Good Samaritan question the authority of the Appeals Department over the matter for different reasons. The above-referenced matter is **HEREBY DISMISSED** at this time. If the Court of Appeals rules against Good Samaritan in this matter, you will have 14 days from the date of the Court's Decision to request that this matter be recalled and set for hearing on the timeliness issue.

Sincerely,

Dustin R. Adams, Chief of Appeals

Exhibit "E"

Cc: Ms. Gail Frizzell  
3136 Bishops Way  
Franklin, TN 37064

*Increasing Employment in Mississippi*

1235 Echelon Parkway • Jackson, Mississippi 39213  
Post Office Box 1699 • Jackson, Mississippi 39215-1699 • (601) 321-6294 • FAX (601) 321-6532  
TOLL FREE (866) 633-7041 • (877) 994-6329  
MDES is an Equal Employment Opportunity Employer