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

EMC ENTERPRISES, INC., a Louisiana Corporation — APPELLANT

VS. — NO. 2007-CC-01770

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY — APPELLEE

APPEAL FROM THE CIRCUIT COURT
THE SEVENTH JUDICIAL DISTRICT
HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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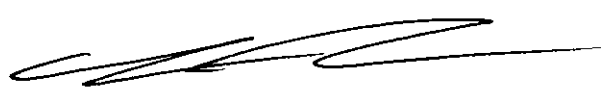
CERTIFICATE OF INTERESTED PERSONS

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

1. Eula Matthews, Owner of EMC Enterprises, Inc., Appellant;
2. Sandra Watson, former Vice President of Operations for EMC Enterprises, Inc., Appellant;
3. David B. Grishman, Attorney for Appellant;
4. Benjamin C. Windham, Attorney for Appellant;
5. Mississippi Department of Employment Security, Appellee; and
6. Albert B. White, Attorney for Appellee.

So certified this, the 7th day of May 2008.



BENJAMIN C. WINDHAM
Attorney of Record for Appellant

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2. Whether the recent case of *MDES v. Product Connections, LLC*, collaterally estoppes MDES from re-litigating the issue of reclassifying a class of workers as employees rather than as independent contractors.

3. Whether MDES denied EMC due process of the law when MDES failed to provide notice to EMC's attorney of a decision and time for appeal, failed to adhere to applicable statutory and regulatory authority for scheduling and conducting the appeal, and failed to conduct fair and independent proceedings.

4. Whether substantial evidence exists to support the determination made by MDES.

5. Whether demonstrators associated with EMC are independent contractors for purposes of unemployment security based on prior treatment by the MDES and based on undisputed facts and circumstances.

II. STATEMENT OF THE CASE

This case concerns the application for unemployment benefits of one Claimant, Donis C. Chatham ("Claimant"), and the subsequent investigation by the Mississippi Department of Employment Security ("MDES") into the legal status of "all other workers in this class" performing services as product demonstrators with EMC Enterprises, Inc. ("EMC"). Claimant and all other product demonstrators for EMC are hired as independent contractors subject to an agreement signed by both parties. In 1996, the same issue was pending between MDES and EMC. Then on February 5, 1996, the Review Board of MDES issued its order providing that all product demonstration workers are considered independent contractors. (R.E. 35). Thus, these workers have been recognized as independent contractors under Mississippi unemployment security law for over ten (10) years. On July 21, 2004, MDES issued a decision that Claimant and all other workers in this class were now considered employees under Mississippi law.

MDES failed to notify EMC's attorney of record of the July 21, 2004 decision and therefore, the ten (10) days to appeal the decision expired before EMC's attorney learned that a decision had been issued. MDES has taken the position that since the appeal as to one claimant's (Chatham's) determination of eligibility was rendered untimely, EMC should not be allowed an opportunity to litigate or challenge the legal classification of the entire class of workers in this case or in any subsequent claimant's administrative hearings.

On April 24, 2007 the Mississippi Court of Appeals rendered its opinion in *Mississippi Department of Employment Security v. Product Connections, LLC*, 963 So.2d 1185 (Miss. Ct. App. 2007), a case in which the same claimant, Donis Chatham, applied for unemployment benefits. Prior to applying for the benefits, Mrs. Chatham had been performing jobs for EMC and Production Connections ("P.C."). (R.E. 36). As in the case at bar, MDES found against P.C., and held that Mrs. Chatham and all other workers in her class were employees and not independent contractors. P.C. appealed the MDES ruling to the Hinds County Circuit Court where the ruling was reversed and a finding made that Mrs. Chatham was an independent contractors was issued. From that reversal, MDES appealed to the Mississippi Court of Appeals. The Mississippi Court of Appeals affirmed the circuit court's ruling finding that Mrs. Chatham and others similarly situated product demonstrators were independent contractors and not employees. *Id* at (¶ 12)

Other than the issue of an untimely appeal, the facts in the case at hand are substantially identical to those in *Product Connections* the only difference being the taxpayer. However, it should be noted that both cases arise from the same claimant, Donis Chatham. Moreover, EMC and P.C., operate the same with respect to their product demonstration work. In fact many of the same demonstrators work for both companies, as did Mrs. Chatham.

EMC was denied due process in the administrative proceedings. The July 21, 2004 decision which determined the workers to be employees cites no factual or legal basis for the decision, therefore, it is not supported by substantial evidence and is clearly an erroneous legal conclusion. Moreover, since the substantive issue has never fully litigated, the July 21, 2004 Decision should not be given preclusive effect in subsequent administrative hearings regarding other claimants in this class.

Additionally, MDES should be barred by the doctrines of res judicata and collateral estoppel either as a result of the *Product Connections* case or as a result of MDES's February 5, 1996 order issued to EMC classifying product demonstrators as independent contractors.

III. STATEMENT OF THE FACTS

On or about April 18, 2004, Donis C. Chatham ("Claimant") filed a claim for unemployment benefits with the MDES.[1] (R. at S-70). On June 4, 2004, the Claims Examiner of MDES rendered a decision that Claimant had not refused work and, therefore, was not disqualified from receiving unemployment benefits but that no determination regarding the chargeability of EMC's account had been made. (R. at S-1, S-70). On June 13, 2004, EMC Enterprises ("EMC") filed a timely appeal as to whether Claimant was subject to disqualification of benefits. (R. at S-2, S-70).

On June 28, 2004, MDES sent a letter to EMC informing the company that an investigation as to whether Claimant and all other workers in that class were employees or independent contractors under Mississippi law was being initiated. (R. at S-4). MDES requested that employer fill out an Independent Contractor Questionnaire and return it by July 9, 2004.

[1] On July 1, 2004, the Mississippi Employment Security Commission ("MESC") underwent a reorganization, and the name was subsequently changed to Mississippi Department of Employment Security ("MDES"). In an effort to limit confusion, the agency is consistently referred to throughout the brief as "MDES."

(R.E. 32). EMC completed the form, and on July 9, 2004, counsel for EMC returned the form, along with an "Application to Perform Contract Services" completed and signed by the Claimant (R.E. 20). In addition to the requested information, EMC's counsel submitted a memorandum, thereby proffering the relevant facts and legal analysis of the status of the demonstrators. (R.E. 32).

On July 6, 2004 ("July 6, 2004 Hearing"), during the pending investigation of the legal status of the demonstrators, a telephonic hearing on the appeal regarding Claimant Chatham's disqualification of benefits was held before the Appeals Referee. (R. at 70). EMC's attorney, David Grishman, entered an appearance as counsel of record for EMC and represented EMC in the appeal hearing. (R. at S-70). The sole issue before the Referee was the appeal regarding Claimant Chatham's disqualification for benefits. The Claimant did not participate in the hearing. (R. at S-70).

On July 21, 2004, Dale Smith, Chief of Contributions and Status for MDES rendered a decision finding that an "employer/employee" relationship exists between Claimant and EMC ("July 21, 2004 Decision"). The reference line in the decision stated **"Claimant: Donis Chatman 587-14-0090"** on the first page. (emphasis added). (R.E. 34). Furthermore, it consistently referred to "worker", singular and not plural. The decision was not from the Referee or the Appeals Department and only contained one reference on the second page as to its applicability to "other workers." (R.E. 34). The decision provided that an appeal could be taken within ten (10) days from the date of the letter. *Id.* Additionally, despite having entered an appearance at the July 6, 2004 Hearing, having spoken with and corresponded with Brian Bosarge, field representative for MDES on numerous occasions, and having submitted letters and documentation to MDES on July 9, 2004, EMC's counsel was not notified of the decision. (R. at

S-70, 90). Although EMC had timely appealed prior decisions regarding Claimant, once EMC had retained counsel and that counsel made an appearance, EMC believed that its counsel of record had been notified by MDES of the decision in order to file a timely appeal.

On August 11, 2004, EMC contacted its counsel to discuss the status of the appeal of the July 21, 2004 decision. (R. at S-81). Counsel advised EMC that he had never received the decision and requested that EMC fax a copy to him. (R. S-85-86). After learning of the July 21, 2004 Decision, EMC's counsel immediately telephoned Scott Greer at MDES to inform him that counsel had never received the decision. Mr. Greer advised Counsel to send a letter explaining what had occurred. (R. at S-86). On August 11, 2004, Counsel sent a letter detailing the events and requesting an appeal from the July 21, 2004 decision. (R. at S-64).

On November 30, 2004, MDES conducted a telephone hearing to determine whether EMC had good cause for not timely filing an appeal. (R. at S-69-91). On December 7, 2004, MDES issued a Decision ("December 7, 2004 Decision") which held EMC's appeal to the July 21, 2004 Decision to be untimely. (R. at S-97-100).

In the meantime, on December 6, 2004, EMC received two (2) Employer's Quarterly Wage Reports (also referred to as Contribution Reports) based entirely on the new classification of these workers determined by the July 21, 2004 decision. (R. at A-1-2). On December 9, 2004, EMC filed the first of four (4) requests for hearing as authorized by Miss. Code Ann. §71-5-365 (1972), as amended, to contest EMC's tax liability as stated in the Quarterly Wage Reports. (R. at A-4). Sixty three (63) days after EMC's initial request for a hearing, in a letter dated February 10, 2005, MDES notified EMC of a hearing for March 16, 2005 ("March 16, 2005 Hearing"). (R. at Emp. Ex. 1, p. 2 with Ex. 3F). EMC made multiple requests to MDES for certain information contained in EMC's MDES file so that it could prepare for the March 16,

2005 Hearing. (R. at Emp. Ex. 1, p. 2-3 with Ex. 3G-3F). MDES did not produce any information related to EMC's requests. (R. at Emp. Ex. 1, p. 3). As a result, EMC participated in the March 16, 2005 Hearing without the benefit of being able to prepare by using EMC's "complete file" as required by Tax Regulation 71. (R. at A-50, 98).

At the beginning of the March 16, 2005 Hearing, Referee Timothy Rush assured EMC that all future correspondence would be sent to EMC's attorney, David B. Grishman. (R. at A-25). Over strong objections by EMC, the Referee limited the scope of the hearing to the assessment issue stating that he lacked "jurisdiction" to hear the independent contractor issue. (R. at A-25-26, 46). Furthermore, Referee Timothy Rush informed EMC that the issue of classification of demonstrators was currently being addressed in a pending appeal before the Board of Review to determine whether or not EMC had timely filed an appeal. Referee Rush advised that he did not know when the matter would be resolved and that he had to confer with his "immediate supervisor" to determine the status of the proceeding concerning the independent contractor issue. (R. at A-44). EMC had not been notified of the pending Appeal prior to the hearing, and therefore moved to adjourn the hearing until the timeliness issue could be resolved because the assessments in the Quarterly Wage Reports were, at that time, premature. (R. at A-41, 44, 46, 78). Referee Timothy Rush denied EMC's request. *Id.*

EMC objected to the hearing by stating that it violated EMC's right to due process of the law because MDES failed to respond to EMC's requests for information and to adhere to the administrative procedure set forth in Miss. Code Ann. § 71-5-365 (1972), as amended, and in Tax Regulation. (R. at A-47, 50, 51, 94, 98). Thereafter, EMC introduced Employer's Composite Exhibits 1 and 2 which contained undisputed and uncontroverted evidence that EMC's relationship with the demonstrators was one of an independent contractor and that EMC

had good cause for not timely appealing the earlier decision by MDES because EMC's attorney was not notified. (R. at A-48). Referee Timothy Rush stated that his job was only to gather testimony and evidence and forward such information to the Board of Review, who would then issue a decision. (R. at A-99). However, Referee Timothy Rush conducted the hearing like a judge by ruling on objections, evidence and interpretations of the law. (R. at A-26, 41, 46, 76, 78, 81).

Pursuant to the Referee's statements at the March 16, 2005 Hearing concerning the pending appeal, on March 17, 2005, EMC wrote a letter the Board of Review requesting that EMC be able to present its case before the Board of Review so that it could demonstrate why EMC should be entitled to appeal the classification of demonstrators. (R. at S-102). In the letter, EMC explained that the Board of Review should schedule a hearing to decide all unresolved issues because the proceedings at the MDES had become time consuming and expensive. *Id.* MDES failed to acknowledge EMC's request. Subsequently, on April 4, 2005, April 15, 2005, and May 13, 2005, EMC wrote three (3) more letters which reiterated EMC's position that MDES should resolve all outstanding issues in a fair and timely manner. (R. at S-104-109). MDES did not respond to any of EMC's requests for information regarding the status of the outstanding matters.

Finally, as a result of the March 16, 2005 Hearing, MDES issued a Decision dated May 20, 2005 ("May 20, 2005 Decision") affirming the Referee's December 7, 2004 Decision which denied EMC a hearing on the issue of whether or not demonstrators were independent contractors or employees purportedly because EMC did not timely file an appeal as to the July 21, 2004 Decision regarding Claimant. (R. at S-110-111). The May 20, 2005 Decision did not address any of the matters Referee Timothy Rush contended were issues at the March 16, 2005

Hearing but stated that EMC had thirty (30) days to appeal the Decision to Circuit Court. *Id.* Therefore, EMC filed a "Complaint and Appeal of Decision by Mississippi Department of Employment Security" on June 9, 2005 ("Complaint"). (R.E. 5).

After reviewing the Complaint and realizing that the May 20, 2005 Decision did not address the assessments made in the Quarterly Wage Report, Albert B. White, attorney for EMC, contacted the Board of Review and requested an amended decision. (R.E. 4). On July 18, 2005, the Board of Review issued an Amended Decision ("July 18, 2005 Amended Decision") upholding the Quarterly Wage Report assessments. (R. at S-112-114). Interestingly, both the May 20, 2005 Decision and the July 18, 2005 Amended Decision recited that both decisions affirmed Referee Timothy Rush's decision, but neither decision addressed the merits of the case. (R. at S-110-S-114). MDES filed its Answer on July 22, 2005. (R.E. 6).

To date, MDES has issued numerous Notices and Determinations regarding additional claims by demonstrators for unemployment compensation to EMC. (R.E. 7). Some of the correspondence from MDES only allowed five (5) days to respond. *Id.* Additionally, several of the notices and correspondence did not cite any statutory or regulatory authority to which EMC could refer to determine its legal rights. *Id.* Therefore, EMC notified MDES that the volume of correspondence from MDES had become burdensome due to the excessive amount of time and money EMC has been forced to expend in order to respond to each Notice and Determination. (R.E. 8).

EMC has repeatedly noted for the record in each Claimant's hearing that determining the qualification of each worker's claim was premature due to the matters pending before this Court. (R.E. 10, 31). MDES has repeatedly acknowledged that the issue regarding classification of these workers is currently on appeal before this Court. (R.E. 10, 31). Despite numerous requests

by EMC, and the Referee's assurances, none of the Notices and Determinations regarding claimants were sent to EMC's attorney, David B. Grishman. Finally, MDES notified EMC that a hearing to determine the eligibility of Claimant Bonnie Dunn was scheduled for October 3, 2005. (R.E. 9). The notice was not mailed to David B. Grishman but was simply addressed to his firm. *Id.* At the hearing, Referee Timothy Rush refused to allow counsel for EMC to litigate the threshold question of whether Claimant Dunn was an employee or Independent Contractor stating that the issue was on appeal in the Circuit Court of Hinds County. (R.E. 10). Despite the admission that this crucial issue had not yet been determined, the Referee stated that a hearing for each claimant would also be necessary. In a Decision dated October 5, 2005 ("October 5, 2005 Decision"), the Referee found that the claimant was entitled to benefits. (R.E. 10). To date, EMC has appealed the October 5, 2005 Decision and MDES continues to periodically send correspondence to EMC and schedule hearings without offering any relief. (R.E. 7). On October 28, 2005, counsel for EMC received the first notice or piece of correspondence from MDES which was properly addressed to EMC's counsel. (R.E. 31).

IV. SUMMARY OF THE ARGUMENT

The MDES Review Board order dated February 5, 1996, issued to EMC barred the re-litigation of the issue of whether or not product demonstrators of EMC were independent contractors or employees.

In light of *Product Connections*, MDES's argument, beyond the untimely appeal issue, is moot. Moreover, because of the holding of the Mississippi Court of Appeals in *Product Connections*, MDES should be collaterally estopped from re-litigating the classification of similarly situated product demonstration workers as employees. To find in favor of MDES in this case would cause an unjust ruling. In essence, all product demonstration companies in

Mississippi, other than EMC, would be exempt from unemployment taxes. This simply cannot be the result.

The administrative proceedings before the MDES resulted in a denial of EMC's constitutionally protected right to due process of law. MDES denied EMC due process of the law when MDES failed to provide EMC's counsel of record with notice of a decision and right to appeal a decision regarding the legal classification of Claimant and the entire class of workers in the class, which is approximately two hundred (200) workers. MDES failed to adhere to applicable statutory and regulatory authority for scheduling and conducting the appeal and failed to conduct fair and independent proceedings. As a result, EMC was denied an opportunity to a hearing on the substantive issue regarding the legal status of the product demonstrators. There is a lack of substantial evidence supporting the July 21, 2004 decision reclassifying product demonstrators as employees. MDES's decision ignores certain evidence provided to MDES by EMC and fails to attempt any legal analysis of the redetermination under Mississippi law. Additionally, the decision fails to explain why the workers were reclassified as employees after having been determined by MDES in 1996 to be independent contractors. Mississippi courts have held that such a determination is a legal issue, and such is subject to *de novo* review.

V. STANDARD OF REVIEW

Our restrictive standard of review for administrative appeals is well known. In the absence of fraud and if supported by substantial evidence, an order from a Board of Review on the facts is conclusive in the lower court. *Miss. Employment Sec. Comm'n v. PDN, Inc.*, 586 So.2d 838, 840 (Miss.1991). On appeal, employees have the burden of overcoming a rebuttable presumption in favor of the Board's decision. *Miss. Employment Sec. Comm'n v. Noel*, 712 So.2d 728, 730(¶ 5) (Miss.Ct.App.1998). The denial of benefits may be disturbed only if (1) unsupported by substantial evidence, (2) arbitrary or capricious, (3) beyond the scope of power

granted to the agency, or (4) in violation of the employee's constitutional rights. *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors,* 621 So.2d 1211, 1215 (Miss.1993). Furthermore, the burden of proof is upon the party seeking to show that the worker is not an employee. *PDN, Inc.,* 586 So.2d at 840." *Miss. Employment Sec. Comm'n v. Product Connections, LLC,* 963 So.2d 1185, 1187 (¶ 3) (Miss. Ct. App. 2007). As to questions of law, however, the administrative agencies decision will be reviewed in de novo. *See Harrah's Vickburg Corp. v. Pennebaker,* 812 So.2d 163, 170 (Miss. 2001).

"The supreme court has articulated the additional principle that employment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power." *Product Connections,* 963 So.2d at (¶ 4).

VI. ARGUMENT

A. *RES JUDICATA* AND COLLATERAL ESTOPPEL

This Court should reverse MDES's Decisions and the decision of the Hinds County Circuit Court, and find that MDES was barred by the doctrines of *res judicata* and collateral estoppel from re-litigating the classification of EMC's product demonstrators as employees or independent contractors.

1. MDES Review Board order dated February 5, 1996 and issued to EMC bars the re-litigation of the classification of product demonstration workers.

2. The recent case of *MDES v. Product Connections, LLC* bars the re-litigation of the classification of product demonstration workers as employees.

In the interest of brevity, the foregoing arguments will be discussed together as the same analysis applies to each issue.

The requirements for both *res judicata* and its subsidiary doctrine of collateral estoppel are found in *Dunaway v. W. H. Hopper and Associates, Inc.*, 422 So.2d 749 (Miss. 1982):

Generally, four identities must be present before the doctrine of *res judicata* will be applicable: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made. When collateral estoppel is applicable, the parties will be precluded from re-litigating the specific issue actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action. And, collateral estoppel, unlike the broader doctrine of *res judicata*, applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated. *Norman v. Bucklew*, 684 So.2d 1246, 1253 (Miss. 1996).

The *Norman* Court went further and gave three requirements for the application of collateral estoppel: When collateral estoppel is applicable, the parties will be precluded from re-litigating a specific issue [1] actually litigated, [2] determined by, and [3] essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action. *Norman*, 684 So. 2d at 1254.

In *Garraway v. Retail Credit Company*, 244 Miss. 376, 141 So.2d 727, 385 (1962), Judge Ethridge stated as follows:

> ... [W]here a question of fact essential to a judgment is actually litigated and determined by a valid and final judgment, that determination is conclusive between the same parties in a subsequent suit on a different cause of action.

See also *Mississippi Employment Security Comm'n v. Philadelphia Municipal Separate School District of Neshoba County*, 437 So.2d 388, 395 (Miss. 1983).

Under Mississippi law, *res judicata* or collateral estoppel precludes re-litigation of administrative decisions. *A & F Properties, LLC v. Madison County Board of Supervisors*, 933 So.2d 296, (¶ 14) (Miss. 2006). The doctrine of collateral estoppel serves a dual purpose. It

protects litigants from the burden of re-litigating an identical issue with the same party or his privy. It promotes judicial economy by preventing needless re-litigation. These considerations and needs seem equally present when the litigation begins before administrative agencies as when it is conducted exclusively in the courts. *Philadelphia,* 437 So.2d at 396. This Court has recognized heretofore that the doctrine of collateral estoppel may have application in the field of administrative law. *Id.* In *City of Jackson v. Holliday,* 246 Miss. 412, 149 So.2d 525 (1963), the Court, again speaking through Justice Ethridge, said:

> The common law doctrine of res judicata, including the subsidiary one of collateral estoppel, is designated to prevent re-litigation by the same parties of the same claims or issues. The reasons behind the doctrine, as developed in the courts, are fully applicable to some administrative proceedings, particularly applicable to some, and not at all applicable to others. The doctrine is best applied to an adjudication of past facts.... We hold that the doctrine of collateral estoppel is fully applicable in cases such as this. It appears to us that the fact questions litigated and decided before the Board of Trustees of PMSSD and those litigated and decided before the [Mississippi Employment Security Commission] are the same.

Philadelphia, 437 So.2d at 396. Thus the Court held that the common law doctrines of res judicata and collateral estoppel are fully applicable to administrative hearings before MDES.

There is a plethora of case law concerning the applicability of the common law doctrines of res judicata and collateral estoppel to rulings of administrative agencies such as MDES. The remaining question is whether or not an issue on appeal has any effect on the application of the doctrines to an issue. In *Mississippi Power & Light Co. v. Town of Coldwater,* 168 F. Supp. 463, 476 (N.D. Miss. 1958), the United States District Court found on the basis of Mississippi law that "the appeal to the Supreme Court of Mississippi does not prevent the judgment in a former suit from being res judicata. The court stated the following: The question next to arise is whether or not the appeal to the Supreme Court which is still pending prevents the judgment of the trial court from being res judicata. *Norman,* 684 So.2d at 1254. This question has been answered by

this Court in the case of *Early v. Board of Supervisors,* 182 Miss. 636, 181 So. 132, the Court says an appeal with supersedeas does not vacate the judgment appealed from it; it merely suspends the enforcement of the judgment pending the determination of the appeal. If on that determination the judgment is affirmed, the effect thereof is to establish or confirm the validity of the judgment from and as the date of its rendition in the court of original jurisdiction. *Norman,* 684 So.2d at 1254. (*See also Klaas v. Continental Southern Lines,* 225 Miss. 94, 82 So.2d 705, 708.) The effect of these decisions is that the judgment in the former suit is res judicata of everything complained of in the present suit or is pending before the Supreme Court and that the appeal to the Supreme Court of Mississippi does not prevent it from being res judicata. The appeal simply supersedes the enforcement of the judgment. *Mississippi Power,* 168 F. Supp. at 475-76. The federal court's characterization of Mississippi law is reasonable and echoes the holdings of other jurisdictions. The various states have ruled with virtual unanimity that a judgment is "final" for res judicata and collateral estoppel purposes even though pending on appeal. *Norman,* 684 So.2d at 1255.

The 1996 decision by the MDES Board of Review which determined that the workers were independent contractors is a *prima facie* determination of the issue and should serve to bar further litigation of the issue. The sudden change in classification by MDES is not based on any change in the statutes, case law, or MDES Regulations. Nor has there been any change in the way EMC conducts its business since the 1996 decision by the MDES Board of Review. Moreover, the recent case of *Product Connections* reaffirmed the Board of Reviews 1996 decision. Therefore, the Appellant requests that this Court find that the issue of employee versus independent contractor is res judicata or barred by the doctrine of collateral estoppel.

B. VIOLATION OF DUE PROCESS

In the alternative, this Court should reverse MDES's Decisions and the decision of the lower court, and find that MDES did not provide proper notice to EMC's attorney regarding EMC's appeal rights, MDES did not properly follow statutory and regulatory authority governing appeal procedures and MDES's Decisions regarding law and fact were arbitrary and capricious.

1. MDES Violated EMC's Guarantee of Due Process of the Law by Failing to Provide Adequate Notice and by Failing to Specify and Follow Proper Administrative Procedures.

No person shall be deprived of life, liberty, or property except by due process of law. Article 3, § 14 of the Mississippi Constitution (1890).

a. MDES Violated EMC's Guarantee Of Due Process Of The Law By Failing To Notify EMC's Attorney Of The July 21, 2004 Decision And Time For Appeal.

Because EMC's attorney was not given notice of the July 21, 2004 Decision, this Court should reverse MDES's May 20, 2005 Decision and July 18, 2005 Amended Decision which preclude EMC from an opportunity to appeal the July 21, 2004 Decision concerning the status of demonstration workers. The July 21, 2004 Decision stated EMC had only ten (10) days from the date of mailing, July 21, 2004, to appeal the Decision. (R.E. 34). EMC relied upon its attorney to handle all matters before MDES, including appearing via telephone at the July 6, 2004 Hearing regarding Claimant's qualification for benefits and correspondence with MDES regarding information requested from EMC supporting the position that product demonstrators are independent contracts. EMC's reliance on its representative attorney demonstrated good cause for failing to request a timely appeal because EMC's attorney did not receive the July 21, 2004 Decision.

Due process always stands as a constitutionally grounded procedural safety net in administrative hearings. *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 318 (Miss. 1992). A party before an administrative agency is entitled to more than minimum due process which consists of (1) notice, and (2) opportunity to be heard. *Id.* In order to determine how much due process should be afforded, the Supreme Court looks to a three part balancing test which considers (1) the nature and weight of the public and private interests at stake, (2) the incremental change in risk of an erroneous decision, and (3) the incremental costs of added formality. *Id.*

EMC's experience with MDES is not unique. In *Booth v. Mississippi Employment Sec. Com'n*, 588 So.2d 422, 426-427 (Miss. 1991), the Mississippi Supreme Court recognized that due process included providing notice to a party's attorney:

> It follows that when a client has employed an attorney to present his defense to claims in litigation, and notice of this representation by entry of appearance has been given to the opposing party and the court, or other adjudicatory body, all notices required to be given in relation to the matters in controversy, including notice of the decision and entry thereof, should be given to the attorney of record. This basic requirement flows from the attorney-client relationship by which the management, discretion and control of all procedural matters connected with the litigation is invested in the attorney... If the attorney through no fault of his own is denied notice of the critical determination in the case, and by reasons thereof fails to take procedural steps necessary to preserve his client's rights, fundamental unfairness results. *Procedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests.*

Booth at 426-427. (quoting *Mountain State Telephone & Telegraph Co. v. Department of Labor & Employment*, 184 Colo. 334, 520 P.2d 586, 589 (1974)).

Ultimately, the Mississippi Supreme Court disregarded the clear notice violations in *Booth* and ruled in favor of the MDES. *Id.* at 428. However, the Court did so with reservations by stating:

> Therefore, this Court **at this time** does not hold that there is a constitutional requirement for notice to the attorney for the claimant as long as notice to the claimant is "reasonably calculated" to apprise the claimant of necessary information. **However, this Court strongly recommends to the Commission that it consider amending its procedural rules to require notice to both a claimant and the attorney of record for the reason set forth in the *Mountain State* case.**

Id. (emphasis added)

It appears that the Supreme Court wanted to give MDES a chance to issue a regulation that provided notice to a party's attorney. However, some seventeen years later after the Supreme Court issued a warning to MDES concerning its notification procedure for attorneys, and after numerous instances of claimants and taxpayers missing appeals deadlines due to the failure of MDES to notify attorneys of record, MDES has failed to adopt any procedure that provides notice to a party's attorney. MDES has been made aware of the inadequate procedure and given an opportunity to correct it with minimal effort. The New York Supreme Court has addressed the issue of whether due process requires that notice be sent a party's attorney. In *Claim of Van Alphen*, 179 A.D. 2d 918 (N.Y. 1992), the New York Supreme Court held that due process required the Unemployment Insurance Appeal Board send a notice of appeal to a party's attorney. Additionally, Unemployment Insurance Appeal Board enacted a rule regarding correspondence to a party's attorney:

> [In] the event that an attorney at law...appears at an administrative law judge hearing on behalf of a party...copies of all subsequent written communications or notices sent to such party...shall be sent, at the same time, to such attorney at law.

Id.

In Mississippi only administrative agencies are afforded the right not to notify counsel of the opposing party. Rule 5(b) of the Mississippi Rules of Civil Procedure requires that notice in any civil matter be served upon the attorneys of record for all parties involved. Additionally,

Rules 3(d) and 25(b) of the Mississippi Rules of Appellate Procedure require notice be served upon the attorneys of record for all parties involved in any matter being appealed. Thus, at all levels of judicial hearing, attorneys of record are afforded the right to notice. In fact, the notice is required by statute. To the contrary, in administrative proceedings, which are afforded judicial deference, notice to counsel of record is not required. In light of the substantial amount of authority given to administrative agencies and their ability to deny taxpayers of their constitutional rights to life, liberty, or property, administrative hearings and rulings thereon, should be subject to the same constitutional scrutiny and procedural rules as are other judicial proceedings, including this Court.

Clearly, the *Product Connections* case would control the outcome of this case, but for the untimely appeal issue. To allow an absurd result would be unfair to EMC, and would offend the notion of judicial economy.

MDES's conduct violates all of the considerations set forth in *McGowan* concerning procedural due process because (1) EMC's interest having its attorney notified of the July 21, 2004 Decision and time for appeal is very great due to the amount of taxes involved, (2) EMC's lack of opportunity to appeal the independent contractor/employer issue created a great risk that the administrative agency ruled incorrectly, and (3) the added cost of sending a copy of the July 21, 2004 Decision to EMC's attorney was only the price of a stamp. Despite the Supreme Court's admonition years ago, MDES has failed to act. Therefore until the Courts hold MDES responsible for their inaction by declaring that due process requires MDES to send notice to EMC's attorney, the agency will continue in this unconstitutional practice.

b. MDES Violated EMC's Guarantee Of Due Process Of The Law By Failing To Specify And Follow Proper Administrative Procedures For Conducting Hearings And Issuing Decisions.

MDES disregarded statutory and regulatory authority governing the administrative process as well as EMC's right to due process of the law, and therefore, this Court should reverse MDES's May 20, 2005 Decision and July 18, 2005 Amended Decision and the Hinds County Circuit Court decision. This Court is only required to limit its review of an administrative agency's action where an "independent arbiter has found the facts and applied the law." *Id.*, 604 So.2d at 315. This Court may consider an administrative agency's "process in the aggregate" in order to determine whether procedural due process has been satisfied. *McGowan,* 604 So.2d at 318. Due process always stands as a constitutionally grounded procedural safety net in administrative hearings. *McGowan v. State Oil and Gas Bd.*, 604 So.2d 312, 318 (Miss. 1992).

Specifically, the Mississippi Court of Appeals has stated that, "[I]t is an 'immutable' aspect of due process that a person against whom evidence is to be used be afforded an opportunity to refute the evidence. *Bermond v. Casino Magic*, 874 So.2d 480, 485 (Miss.App. 2004). "While administrative agencies are to be given deference in applying their rules, what conveys due process is the very fact that agencies abide by these rules when making decisions." *Id.* The Connecticut Court of Appeals has stated that, "[P]rocedural due process mandates that the commissioner 'cannot consider additional evidence submitted by a party without granting the opponents...the opportunity to examine that evidence and offer evidence in explanation or rebuttal.'" *Bryan v. Sheraton-Harford Hotel*, 774 A.2d 1009, 1013-1014 (Conn. App. 2001). Additionally, the Court stated, "An integral premise of due process is that a matter cannot be properly adjudicated 'unless the parties have been given a reasonable opportunity to be heard on the issues involved....'" *Id.* With regard to administrative regulations, the federal courts have

also even recognized the concept that, "Procedural due process requires the government to adhere to its own rules." *Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy*, 451 F.Supp. 281, 286 (D.C. Tex. 1978); *Campos v. I.N.S.*, 32 F.Supp.2d 1337, 1348 (S.D. Fla. 1998). "Finally, administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process." *Bryan,* 774 A.2d at 1013; *see also, Prince George's County v. Hartley*, 822 A.2d 537, 546 (Md.App. 2003) (stating administrative agencies must "observe basic rules of fairness as to the parties appearing before them so as to comport with the requirements of procedural due process").

Beginning with MDES's failure to provide EMC's attorney notice of the July 21, 2004 Decision, MDES has demonstrated a pattern of behavior which has not only frustrated EMC's attempt to resolve its dispute with MDES but has also denied EMC due process of the law. Even though MDES's Board of Review had not issued a final decision with regards to whether EMC could appeal the July 21, 2004 Decision of whether demonstrators were independent contractors, MDES began issuing assessments against EMC in the form of Quarterly Wage Reports. On December 9, 2004, EMC made a written protest and petition to MDES requesting a hearing concerning assessments made in two (2) Employer's Quarterly Wage Reports generated by MDES. (R. A-4). EMC's request was timely made under the authority provided by Miss. Code Ann. § 71-5-365 (1972), as amended, which states in pertinent part:

> Such determination and assessment by the executive director shall be final at the expiration of fifteen (15) days from the date of the mailing of such written notice thereof demanding payment, unless such employer shall have filed with the commission a written protest and petition for a hearing, specifying his objections thereto. *Upon receipt of such petition within the fifteen (15) days allowed, the commission shall fix the time and place for a hearing and shall notify the petitioner thereof* (emphasis added).

MDES did not schedule a hearing within the fifteen (15) day time period. Instead, EMC was forced to make a second request for a hearing on January 13, 2005, (R. A-7-8) a third request for a hearing on January 21, 2005, (R. A-9-10) and a fourth request for a hearing on February 9, 2005. Finally, sixty-three (63) days after EMC's initial request for a hearing, in a letter dated February 10, 2005, MDES scheduled a hearing for March 16, 2005. (R. A-15-16).

An administrative agency's decision may be dismissed by a court where the agency has acted in an "arbitrary and capricious" manner. Under this standard, judicial review includes the "court's ability to divine with confidence what the Board has done and how it has done it." *McGowan*, 604 So.2d at 318. The Supreme Court has adopted the following definitions for examining whether the procedures used by an agency are arbitrary and capricious:

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational,--implying either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles....

Id. at 322.

MDES has applied its procedural deadlines against EMC with inflexibility and with no regard for a "good cause" failure to comply. This practice has resulted in decisions which are clearly arbitrary and capricious. However, when the procedural time restraints present a hardship for MDES to comply, not only does the agency repeatedly fail to acknowledge or respond to EMC's request in any sort of timely manner, but when a response is finally given, MDES offers no compelling reason for its failure to adhere to its own guidelines. Moreover,

MDES suffers no repercussions for its failure to adhere to these time restraints, unlike the draconian effect it applies to EMC and other companies doing business in Mississippi.

MDES stated that the March 16, 2005 Hearing would be conducted pursuant to Tax Regulation 71 and Miss. Code Ann. 71-5-365. (R. A-19). Accordingly, pursuant to Tax Regulation 71, EMC requested that its complete MDES file be made available prior to the hearing so that it could prepare for the hearing. (R. at Emp. Ex. 9, p. 2-3 with Ex. 3G-3F). Tax Regulation 71 states in pertinent part:

> 4. Prior to the hearing, the hearing officer shall obtain from the Contributions and Status Department the complete file pertaining to the employer filing the protest, as well as any claim file appertaining thereto, in order that he may prepare for the hearing. The *complete files shall be made available to the employer* at the hearing so that he may have an opportunity to review same at the time. The files shall be made a part of the record which is made at the hearing (emphasis added).

On February 28, 2005, March 8, 2005, March 9, 2005, and March 14, 2005 EMC requested that MDES provide certain information regarding EMC's MDES file so that it may appropriately prepare for the March 16, 2005 Hearing. (R. at Emp. Ex. 1, p. 2-3 with Ex. 3G-3F). Also, pursuant to Referee Timothy Rush's instructions, in a letter dated March 15, 2005 EMC requested its MDES file from Ernie Webb, Chief of Appeals for MDES. (R. at Emp. Ex. 3G). Strangely, Referee Timothy Rush deferred the decision to produce the file to another person when he had the authority to require the production of the MDES file. Both Miss. Code Ann. §§ 71-5-365 and 71-5-139 and Tax Regulation 71 paragraph 9 give the referee the authority to summon information relevant to the protest. Such action is not the type of conduct an "independent arbiter would exhibit." Specifically, EMC requested information relating to a letter dated February 5, 1996 from Dale L. Smith of the MDES advising EMC that MDES would not treat EMC as an employer and that other demonstration companies had been treated similarly. (R. at Emp. Ex. 3G and 3G7). MDES did not produce any information related to EMC's

requests which violated both Tax Regulation 71 and the *Bermond* case which requires that EMC be able to refute evidence presented against it. As a result, EMC was forced to participate in the March 16, 2005 Hearing without the benefit of being able to prepare by using EMC's "complete file" or examine its "complete file" during the Hearing as required by Tax Regulation 71.

Referee Timothy Rush's conduct at the March 16, 2005 Hearing was also far from the type of conduct an "independent arbiter" would exhibit, as required by *McGowan*. At the March 16, 2005 Hearing, in accordance with Miss. Code Ann. § 71-5-365 and Tax Regulation 71, EMC offered evidence that MDES had improperly assessed EMC because demonstrators associated with EMC were independent contractors. Despite having no authority to restrict the scope of the hearing and in violation of Miss. Code Ann. § 71-5-365 (1972), as amended, and Tax Regulation 71, Referee Timothy Rush stated that he only had "jurisdiction" to discuss the assessment amounts contained in Quarterly Wage Reports. (R. at A-25-26, 46). Moreover, Referee Timothy Rush stated that the issue of appealing the classification of demonstration workers was still pending before the Board of Review and that he would have to check with his "immediate supervisor" to determine its status. (R. A-44). As a result, EMC objected to the March 16, 2005 Hearing as being premature because there had to be a final decision as to how to classify the demonstration workers before EMC could be assessed. (R. at A-46, 78). After hearing and overruling EMC's objections, Referee Timothy Rush proceeded with the March 16, 2005 Hearing even though Tax Regulation 71 paragraph 11 gave him discretion continue the hearing at a later time.

As to the actual procedure of the March 16, 2005 Hearing, Referee Timothy Rush stated that his function was to gather evidence for the Board of Review. (R. at A-99). Then, the Board

of Review would determine the facts and decide the legal issues in a Decision. *Id.* Referee Timothy Rush's statements directly contradicted Tax Regulation 71 which states in relevant part:

> 1. From and after May 3, 1985, any employer who shall appeal a determination, or redetermination, of his unemployment tax liability, hereinafter called tax protest, *shall have such tax protest heard by a hearing officer* designated for that purpose by the Commission.
>
> . . .
>
> 12. As soon as reasonably possible after the hearing has been concluded the *hearing officer shall issue his written decision*, which shall in concise form state the findings of fact, and the conclusions based on such findings. The decision shall be mailed to the employer and delivered to the Contributions and Status Department.
>
> 13. There shall appear in bold face type upon the transmittal letter the following language:
>
> **THIS DECISION SHALL BECOME FINAL UNLESS WITHIN TEN (10) DAYS AFTER DATE OF MAILING HEREOF THERE SHALL BE AN APPEAL TO THE COMMISSION ITSELF** (emphasis added).

Referee Timothy Rush's function as Referee should have been to issue an independent and impartial decision which could be appealed to the Board of Review under Tax Regulation 71. Therefore, MDES refused to even follow its own regulations which the *Bryan* court and other courts have held to be a violation of due process.

Finally, after all the confusion, the Board of Review issued the May 20, 2005 Decision which stated the Board of Review affirmed the December 7, 2004 Decision that EMC's appeal of the July 21, 2004 Decision was not timely. (R.E. 2). The May 20, 2005 Decision did not even address the issue Referee Timothy Rush advised was the issue of the March 16, 2005 Hearing, namely, the Quarterly Wage Reports. *Id.* In response to the May 20, 2005 Decision, EMC filed an appeal and Complaint in the Hinds County Circuit Court. (R.E. 5). After realizing that the Board of Review failed to address the Quarterly Wage Reports in the May 20, 2005 Decision,

Albert B. White, attorney for MDES, contacted the Board of Review and requested that they issue a Decision addressing the Quarterly Wage Reports. (R.E. 4). As a result, the Board of Review issued the July 18, 2005 Amended Decision which stated that EMC had not timely filed an appeal and that the assessments in the Quarterly Wage Reports were correct. (R.E. 29). Interestingly, both the May 20, 2005 Decision and July 18, 2005 Amended Decision stated that they affirmed Referee Timothy Rush's Decision. (R.E. 2, 29). The contact by Referee Timothy Rush and Albert B. White with the Board of Review appears not only to violate the regulatory procedures for administrative hearings and decisions but such contact also violates the principle established in *McGowan* that the Board of Review must be an "independent arbiter" in order to ensure due process is satisfied. MDES filed its Answer with the Hinds County Circuit Court on July 22, 2005. (R.E. 6).

Even to date, MDES has continued to push EMC through its administrative process. MDES has sent various notices and determinations to EMC regarding claims for unemployment benefits from demonstration workers. (R.E. 7). Even after being assured at the March 16, 2005 Hearing by Referee Timothy Rush and after EMC has written several letters requesting that copies of all correspondence concerning EMC be sent to EMC's attorney, MDES failed to send notices to EMC's attorney. In fact, the October 21, 2005 decision regarding Claimant Evelyn Stapleton was the first notice properly addressed to EMC's counsel. (R.E. 31). Many of the aforementioned notices and determinations regarding claimants only have a short time period (some as few as five (5) days) in which EMC may respond. Additionally, each claimant ultimately has a hearing before an MDES Referee. Despite the huge influx of correspondence and the fact that the matters before this Court could render all subsequent proceedings moot, MDES has refused to hold the proceedings in abeyance or to consolidate the proceedings.

The procedural goal of MDES appears to be to dispose of EMC as quickly as possible or to drag the proceedings out so long that EMC will no longer have the time nor resources to contest MDES's conduct. Not only did MDES drag out the proceedings, but it has confused the legal issues to the point where EMC has been unable to determine exactly what issues have been determined, what its rights are and how to proceed. Referee Timothy Rush and the Board of Review have clearly failed to conduct themselves a "independent arbiters" by entertaining comments and evidence from other persons associated with MDES outside of EMC's presence. Procedural rules and statutes are enacted and followed for one reason, that is, to ensure that parties involved in a dispute have a fair hearing. Administrative agencies are supposed to provide a forum where specialized matters may be resolved in a "fundamentally fair" and timely fashion. This is the very reason that courts recognize their decisions with some deference. Yet, under circumstances such as these where MDES has created the rules as it proceeds, this Court should not take comfort in what the MDES has done because it has completely disregarded not only its own rules, but the fundamental rules of notice and opportunity for a fair hearing which are the foundation for our justice system. EMC requests this Court reverse all of MDES's Decisions and the Hinds County Circuit Court's decision because MDES has violated the procedural safeguards set up to ensure EMC received due process of the law. However, if necessary, EMC requests that this Court consider further evidence of MDES's misconduct after EMC has had an opportunity to fully develop the facts through discovery in the pending cause before this Court.

2. There is a Lack of Substantial Evidence to Support the Decisions Made by MDES

The restricted standard of review for administrative appeals is well known. In the absence of fraud, an order from a Board of Review of the Employment Security Commission on

the facts is conclusive in the lower court if supported by substantial evidence. *Miss. Employment Sec. Comm'n v. PDN, Inc.*, 586 So.2d 838, 840 (Miss.1991). The challenge faced by this Court is that the decisions rendered by the Referee and the Board of Review fail to cite any evidence in support of these decisions which purport to be findings of fact.

Supreme Court has no authority to reverse circuit court's affirmance of decision of Board of Review, where Board's decision is supported by required substantial evidence. *Richardson v. Mississippi Employment Sec.* Com'n, 593 So.2d 31, 34 (Miss. 1992) (citations omitted). "Substantial evidence" means more than a "mere scintilla" of evidence, and that it does not rise to a level of "a preponderance of the evidence." It may be said to mean "such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *Toldson v. Anderson-Tully Co.*, 724 So.2d 399, 401 (Miss. Ct. App. 1998) (quoting *Delta CMI v.* Speck, 586 So.2d 768, 772-73 (Miss. 1991)). Despite repeated requests by EMC to introduce evidence in support of its argument that the demonstrators were independent contractors and not employees, The Appeals Referee denied such requests continuously and instead tried to "limit" the proceedings to the issue of timing of the appeal. As a result, the record below is devoid of necessary facts to make the legal determination as to the status of these employees.

Moreover, MDES has asserted conflicting positions regarding the issues decided by the Board of Review and the issues before this Court on appeal.

First, MDES has asserted that the only issues before this Court are the timeliness of the appeal regarding one claimant, Doris Chatham, and the accuracy of the quarterly wage assessments. (R.E. 5). If this assertion is true, then MDES has admitted that EMC has never

received a full hearing on the substantive issue of determining whether *the entire class of workers* of product demonstrators are independent contractors or employees. The denial of a hearing on the merits was purportedly because EMC failed to file a timely appeal from the decision in Claimant Chatham's case. Even assuming that the appeal in Claimant Chatham's case was untimely, that decision cannot bar litigation of a substantive issue affecting the classification of approximately two hundred other workers. The effect of the *Product Connections* case, renders MDES's argument moot. Therefore, to apply MDES's ruling against EMC would cause a result directly conflicting with the finding of the Mississippi Court of Appeals in *Product Connections*, and cause EMC to pay taxes not otherwise due from other similarly situated companies.

Second, and in direct contrast to its initial position, MDES has repeatedly asserted in its pleading in this case and in subsequent ongoing administrative proceedings concerning other potential unemployment claimants in this class that EMC is prohibited from litigating the issue of whether the workers are independent contractors, citing that a determination regarding the status of these workers is currently on appeal. (R.E. 6). If this second position is true, then MDES has conceded that at some point a hearing on the merits was held and/or decision was made and that the Referee and Board of Review purportedly based their decisions on the record. The opinion issued by the Board of Review, however, cites no basis for its determination. In fact, even a cursory reading of the record below reveals that EMC was repeatedly denied an opportunity to a full hearing on the substantive issue. On November 30, 2004, the Referee restricted the first hearing to the issue of "timeliness" of the claimant Chatham's appeal, and on March 16, 2005, he restricted the second hearing to the accuracy of the quarterly wage assessments which was based on the determination that these demonstration workers were, in

fact, deemed employees.[2] (R. at A-23-100.) The effect of this decision results in an entire classification of workers to be considered employees by default, directly conflicting with the determination made by the Mississippi Court of Appeals in *Product Connections*. In other words, because the MDES failed to notify EMC's attorney of record of a decision regarding Claimant Chatham, EMC's attorney did not file his appeal within the ten days allowed under the MDES guidelines and is now precluded from ever obtaining a hearing on the substantive issue which has the likelihood of affecting over 200 potential claimants. MDES should not be allowed to win by default by virtue of precluding litigation of the substantive issue underlying every potential future claimant's classification under Mississippi law, especially in light of the ruling made by the Mississippi Court of Appeals in *Product Connections*.

If this determination were involving one potential claimant, the prejudice and the harm would not be nearly as great. However, it is inconceivable that MDES or any agency be allowed to manipulate its own procedures in such a way that results in a windfall for the MDES. Certainly, such a draconian effect was not intended under the law which is precisely why issue preclusion cannot apply absent full litigation of the issue.

EMC was never allowed a full hearing on the merits to determine the classification of these workers. Instead, MDES has attempted to use a "timeliness" issue of an appeal of one claimant's benefits to bar a full hearing on the merits as to any of the workers in this class, directly conflicting with *Product Connections*.

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[2] EMC made a timely objection to any restriction of the issues at the hearing, and even requested that the hearing be adjourned pending a resolution of the substantive issue. This request was denied.

C. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

1. The Classification of EMC Product Demonstrators under Mississippi Unemployment Security Law is a Legal Issue Subject to *de novo* Review

Despite MDES's failure to allow EMC a hearing on the substantive issue regarding the legal status of these workers, EMC submitted a brief and proffered the salient facts to the agency on July 9, 2004, prior to the July 21, 2004 "determination" of Claimant Chatham's status as an employee. (R. S-9-32). The determination and subsequent opinions by the agency make no reference to the proffer and disregard these facts without any explanation.

Where the issue is one of law and not of fact, the standard of review is *de novo.* In *Fruchte,* 522 So.2d at 199, the Mississippi Supreme Court reiterated that whether an individual was an employee or an independent contractor was "a very elusive question," but nevertheless, it was a question of law. Therefore, it is without question that the issue to be resolved in the case *sub judice* is a question of law, and this Court should follow the standard of review to which the Mississippi Supreme Court referred to in *Smith v. Jackson Const .Co.*, 607 So.2d 1119, 1125 (Miss. 1992):

> If there is substantial evidence to support the Commission, absent an error of law, this Court must affirm. On the other hand, where the Commission has misapprehended the controlling legal principles, we will reverse, for our review in that event is *de novo.*

2. MDES Rendered a Determination in 1996 Which Held That EMC Demonstration Workers Are Independent Contractors and Not Employees Under Mississippi Law

Despite the fact that appellate courts apply a deferential and limited standard of review to factual findings of the MDES Board of Review, if the Board "offer[s] an explanation for its decision that runs counter to the evidence before [it]," the Board's action is arbitrary and capricious. *See Citizens Ass'n for Responsible Development, Inc. v. Conrad Yelvington*

Distributors, Inc., 859 So.2d 361, 365 (Miss. 2003) (quoting *Mississippi Dept of Environmental Quality v. Weems*, 653 So.2d 266, 281 (Miss. 1995)).

MDES previously ruled, in a similar case that in-store demonstration workers are independent contractors, not employees. (R. at S-38). In fact, in 1996, the MDES previously advised EMC that its workers are independent contractors. (R. at S-37) and (R.E. 35). MDES has offered no explanation as to why an investigation into the status of these workers was initiated. In fact, Miss. Code Ann. § 71-5-355 (viii) provides that in reference to a determination made "the finding of fact in connection therewith may be introduced into any subsequent administrative or judicial proceeding involving the determination of the rate of contributions of any employer for any tax year; and shall be entitled to the same finality as is provided in this subsection with respect to the findings of fact in proceedings to redetermine the contribution rate of a employer." Therefore, the 1996 decision by the Board of Review which determined that the workers were Independent Contractors is a *prima facie* determination of the issue and should serve to bar further litigation of the issue.

The sudden change in classification by MDES is not based on any change in the law or a change in the way EMC conducts its business. MDES has not provided any new information with respect to why demonstration workers should now be classified as employees of EMC. Accordingly, MDES's change in classification is arbitrary and capricious because it is not supported by the law or by any evidence. In order to conform to the principles of justice and fairness, the MDES should be consistent in its rulings.

An employee is defined by our Mississippi Employment Security Law as follows:

> Services performed by an individual for wages shall be determined to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commission 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

> services and in fact; and the relation of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

Miss. Code Ann. § 71-5-11(I)(14) (1972).

3. The Employee/Independent Contractor Analysis under Mississippi Law.

In *Mississippi Employment Sec. Commission v. Plumbing Wholesale Co.*, 219 Miss. 724, 69 So.2d 814 (1954), this Court considered the following factors in determining the employee/independent contractor issue:

a. The extent of control exercised over the details of the work;

b. Whether or not the one employed is engaged in a distinct occupation or business;

c. The skill required in the particular occupation;

d. Whether the employer supplies the tools and place of work for the person doing the work;

e. The length of time for which the person is employed;

f. The method of payment, whether by the time or by the job; and

g. Whether or not the work is a part of the regular business of the employer.

In *Product Connections* the Mississippi Court of Appeals undertook the foregoing analysis of this same class of worker, more specifically focusing on the same person, Donis Chatham, and determined that similarly situated product demonstration workers are independent contractors.

i. The extent of control exercised over the details of the work;

The questionnaire completed by EMC supports the contention that the manufacturer and service recipient have the exclusive right to control the details of the product demonstrators'

work. *MDES v. Product Connections, LLC,* 963 So.2d at (¶ 11); See also *Mississippi Employment Sec. Com'n v. PDN, Inc.*, 586 So.2d 838, 841 (Miss. 1991). In fact, the facts supporting the Court's determination that the workers in *Product Connections* were independent contractors are identical to the facts in this case. The product demonstrators worked at the site of the service recipient and manufacturer, were subject to the control of the service recipient, the workers signed independent contractor agreements and the workers were responsible for their own taxes. *Id.* at (¶ 11).

MDES Regulation TR-11 approaches the determination of Independent Contractors in a similar fashion to Miss. Code Ann. § 71-3-3 (1972). TR-11 provides that an employer-employee relationship exists when "the person for whom services are performed has the right to control and direct the individual who performs the services, not only to the result to be accomplished . . . but also as to the details and means by which that result is accomplished. (R.E. 12). This regulation establishes that independent contractors are not subject to control or direction of another and they furnish their own tools. Determination of a worker's status under TR-11 depends on the particular facts of each case and no single test is conclusive.

The primary factor is the right to or degree of control. In *Texas Co. v. Wheeless* the court stated:

> The test as to who is a servant is stated to be whether the service is rendered by one whose physical conduct, time and activities in the performance of his duties are controlled, or are subject to the right of control, by the alleged master under the contract of employment or hire.

In determining whether a worker is an employee or an independent contractor, the analysis focuses on the power of control which the person for whom the worker is providing the service exercises over the worker. *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 147 n.2, 148 (Miss. 1994); *see also, Mississippi Employment Sec. Com'n v. PDN*, 586 So.2d at 842.

"The right of control rather than the actual exercise of control is a primary test of whether a person is an independent contractor or employee." *Georgia-Pacific Corp. v. Crosby*, 393 So.2d 1348, 1350 (Miss. 1981). The IRS guidelines provide that when a worker is required to comply with instructions given about when, where, and how he or she is to perform, a determination will generally be made that he or she is an employee. (R.E. 13). EMC does not supervise the worker or give any instructions in the way the work is to be performed. (R.E. 32). If EMC had a right to require compliance with instructions given, the necessary control factor would be present. However, EMC does not retain the right to control the demonstration workers.

As in *Product Connections*, demonstration workers at EMC are completely responsible for their performance while displaying a product. *Product Connections,* 963 So.2d at (¶ 7). The only instructions given by EMC are where the assignment will be and what will be needed. Such information is provided by a manufacturer, food broker, or marketing company. EMC has no power to change these instructions nor can they substitute any of their own. The services provided by the demonstration workers are not personally rendered to EMC. Consequently, EMC has no special interest in how the work is performed. (R.E. 32). Such disinterest implies that EMC is not an employee of the demonstration workers. (R.E. 14). Obviously, EMC has an interest in whether the job is performed at all because its compensation from the manufacturer, food broker, or marketing company depends on EMC providing a working body. Also, its reputation as a dependable service provider is dependent upon the workers showing up. However, EMC does not reserve the right to formally admonish or punish demonstration workers for failing to appear at the assigned location.

Once the assignment is given, the demonstration worker reports to the manager of the location to which he or she has been assigned. The order, sequence, or manner in which the

demonstration worker displays the product is under the exclusive control of the manufacturer, food broker, or marketing company. (R.E. 32). EMC cannot alter, void or create methods other than those given by the manufacturer, food broker or marketing company. Furthermore, EMC does not and cannot reserve the right to affect the order, sequence or manner in which the demonstration worker displays the product. The absence of such right generally designates the worker as an independent contractor. (R.E. 15). Although the manufacturer, food broker, or marketing company can give specific directions for how they want their product displayed, the demonstration worker is free to choose whether or not he or she will follow those instructions as well. Once the demonstration worker reaches the job site, EMC has no control over what actions the demonstration workers take during the course of their assignment. Clearly EMC has no control over the "details" of the work. As stated throughout this brief, the facts herein are identical to those in *Product Connections*. *Product Connections,* 963 So.2d at (¶ 7).

ii. Whether or not the one employed is engaged in a distinct occupation or business;

Product demonstrators have historically been treated as workers engaged in a distinct occupation or business. In fact, the IRS. has issued determination that these workers are independent contractors under the Federal Tax Regulations. Although the IRS determination is not binding, it is persuasive evidence based on a detailed analysis under substantially similar principles of law. *Mississippi Employment Sec. Com'n v. PDN, Inc.*, 586 So.2d at 842.

In 1997, the Internal Revenue Service (the "IRS") held that EMC is not an employer of the demonstration workers. (R.E. 16). The IRS has summarized several factors it considers to be crucial in establishing that a worker is an independent contractor. (R.E. 17). The IRS reaches its determinations by comparing its rulings in several examinations of cases considering the status of a worker.

Another factor that distinguishes an independent contractor from an employee is the ability of the independent contractor to make his or her service available to the general public. Nothing in a demonstration worker's agreement with EMC restricts them from advertising their availability to other companies. (R.E. 20). In fact, the demonstration worker is free to work for other companies while on the EMC's active roster. Any worker who can make his or her services available to the general pubic on a regular and consistent basis indicates an independent contractor relationship. (R.E. 37). A demonstration worker on the active roster of EMC can openly and freely make his or her services available to the public as he or she desires without repercussion or adverse treatment. (R.E. 32).

While the court in *Product Connections* did not expand on its analysis of this factor, the court held that all employees of this class, that is similarly situated product demonstrators, are independent contractors. *Product Connections,* 963 So.2d at (¶ 5). Again, as stated earlier, the facts in the case at bar are identical to *Product Connections*. *Product Connections,* 963 So.2d at (¶ 11).

iii. The skill required in the particular occupation;

Demonstration workers of EMC are individuals who are skilled in marketing and presentation. Prior to being assigned to their first demonstration, the workers do not receive any training or advice from EMC regarding how to pitch the products. (R.E. 32). The demonstrators are free to decide how to conduct themselves. This freedom from training usually establishes that a worker is independent. (R.E. 22). EMC does not require the demonstrators to attend any meetings, seminars, *etc.* before taking an initial assignment.

Not only does EMC not require any training before beginning an assignment, it does not hire any assistants or send another demonstrator to assist the worker in learning how to display the product. Although demonstration workers seldom enlist the help of assistants, he or she is

free to do so at his or her discretion. (R.E. 32). The demonstration worker is responsible for compensating an assistant if he or she chooses to bring someone along with them. EMC does not reserve the right to select, approve, discourage or have any control over the use of assistants. When a worker is allowed to hire, supervise, and pay assistants and is the only person responsible for enforcing the terms under which the assistant agreed to work, this factor indicates an independent contractor status. (R.E. 23). EMC cannot reserve the right to intervene, enforce its own terms, contradict nor annul any agreement entered into between a demonstration worker and an assistant. The agreement is governed exclusively by the terms upon which the demonstration worker and the assistant agree.

The foregoing facts are substantially similar to the facts of *Product Connections* wherein the courts found that an employer-employee relationship did not exist with this class of worker. *Product Connections,* 963 So.2d at (¶ 11).

iv. Whether the employer supplies the tools and place of work for the person doing the work;

EMC has no power to decide where and when a worker will be placed. EMC can only assign workers as they are requested by the manufacturer, food broker or marketing company. The final decision rests with workers and they can accept and refuse referrals at their discretion. EMC selects workers randomly from an active roster which lists all of the demonstration workers that have signed up with EMC. (R.E. 32). The persons on this roster are free to work for other companies providing services similar to those provided by EMC. In fact, many of the workers on EMC's active roster also work for other companies. The IRS has provided that where a worker performs more than *de minimis* services for several unrelated persons or firms, they are generally considered to be independent contractors. (R.E. 24). None of the other demonstration companies for which the demonstration workers provide services are affiliates or subsidiaries of

EMC nor does EMC have any service arrangements with these companies. Persons on EMC's roster are free to accept or refuse work at their discretion and are free to work for other demonstration companies if they so choose.

Most employers supply their employees with the necessary tools and equipment for the completion of the assigned task. EMC does not provide any such tools and it explicitly requires that all demonstration workers must provide their own equipment. (R.E. 32). With the exception of products used to serve the food, none of the utensils used in the preparation of the food are furnished by the manufacturers, food brokers or marketing companies. The cups, paper towels, spoons, *etc.* are considered to be part of the product display provided by the manufacturer, food broker or marketing company, and are therefore supplied by the manufacturer. However, demonstration workers are required to provide the equipment necessary to prepare the food.

This amount can soar into the high $100's depending on the brand of equipment purchased by the demonstration worker. Each job pays around $45 on average. If, for example, a worker spent $300 on a crockpot, electric skillet, a folding table, tablecloth, and other necessary utensils, it would take at least seven (7) jobs before the worker could realize a profit. Likewise, if the worker only completed two (2) assignments, he or she would suffer a loss of $210 on his or her investment. Employees do not experience such gains or losses. The realization of profit or loss is unique to independent contractors and other persons who work for themselves. Due to the significant amount of time and money that the workers have invested into establishing themselves as demonstration workers, they stand to realize a profit or suffer a loss. Such a possibility is strong evidence that a worker is an independent contractor. (R.E. 19).

The existence of an employer-employee relationship is generally found only where the company furnishes significant tools, materials and other equipment. (R.E. 18). EMC, as in *Product Connections*, does not provide any tools or equipment to the demonstration workers on its roster. *Product Connections,* 963 So.2d at (¶ 7).

v. The length of time for which the person is employed;

Demonstration workers are offered an assignment as they become available. The worker is free to accept or decline the assignment, but once the task is accepted, the worker is expected to complete the job. (R.E. 32). Once the task is completed, the working relationship comes to an end. There is no continuing obligation on either part unless and until another job is accepted by the worker. (R.E. 32).

In addition to being able to work for other demonstration companies at their discretion, the demonstration workers are not required to devote any particular time to EMC. Thus, EMC does not have control of the amount of time the worker spends working. The amount of time and the frequency with which the workers accept assignments is totally at the worker's discretion. EMC cannot require a worker to accept an assignment nor can it require a worker to work a certain amount of time over a specified period. There are no adverse affects of refusing an assignment from time to time or refusing for a long period of time. Because the worker is free to work when and for whom he or she chooses, the demonstration workers should be considered independent contractors. (R.E. 32). EMC does not reserve the right to require the demonstration workers on its roster to work full time nor can it restrict the freedom of the workers and require them to work when they desire not to do so.

Generally, employees are required to work a certain number of hours, report to the employers' place of business and employees usually have a schedule indicating when they are to work. (R.E. 32). None of these incidents of employment are present in the current situation.

The establishment of set hours of work by EMC for the services performed by the demonstration workers would indicate the existence of an employer-employee relationship. (R.E. 25). No set schedules exist at EMC. There is no continuing relationship between the workers and EMC sufficient enough to establish that a employer-employee relationship exists. In fact, the workers are assigned sporadically and there is no set way of determining when or if a worker will be given a job assignment.

Again, the courts in *Product Connections*, was confronted with identical facts as are enumerated above, and the courts held that an employer-employee relationship did not exist with this class of employee. *Product Connections*, 963 So.2d at (¶ 11).

vi. The method of payment, whether by the time or by the job

Payment by the hour, week, or month generally is *prima facie* evidence that an employer-employer relationship exists. This presumption is rebuttable if the company distributing the compensation can prove that this method of payment is merely a convenient way of paying a lump sum agreed upon as the cost of a job. (R.E. 26). The Mississippi Supreme Court recently allowed such a rebuttal. In *Mississippi Employment Sec. Com'n v. Total Care, Inc.*, 586 So.2d 834, 835, 838 (Miss. 1991), the Mississippi Supreme Court decided that a corporation engaged in the business of providing health-care personnel to hospitals and individuals on an as needed basis was not an employer of such persons. Although the customer paid the sitter on an hourly basis which in turn required Total Care to pay in the same fashion, the presumption of hourly wages was rebutted because Total Care lacked the requisite control over the day-to-day activities of the sitters once they were assigned. *Id.* at 834-835. Similar to the issue at hand, EMC compensates the worker upon completion of a job. (R.E. 32).

In some instances, the number of hours and the amount of the check may correspond in a manner that could infer that the worker is given an hourly rate. Any occurrence such as this

would be a mere coincidence and would not establish an employer-employee relationship. The manner in which EMC pays its demonstration workers is generally regarded as consistent with the method in which independent contractors are paid. (R.E. 27). Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. (R.E. 26). Demonstration workers are paid at a lump sum amount determined by the manufacturer, food broker, or marketing company. EMC has no control over the amount paid to each worker except for the percentage that they retain for referring the worker to the manufacturer, food broker, or marketing company.

The amount determined by the manufacturer, food broker or marketing company is distributed by check after the completion of a job. EMC receives notice that the job has been completed once a worker completes a form providing proof of completion is submitted to EMC. Requiring the worker to complete the proof of completion does not indicate a degree of control over the workers. (R.E. 19). In fact, it is possible for the workers to be paid before or without completion of the form. The purpose of the form is to provide proof to the manufacturer, food broker or marketing company that the job has been completed and also provides statistical information that assists EMC in better serving its clients.

This factor and the facts supporting the same are identical to those cited by the court in *Product Connections* in supporting its conclusion that product demonstrators should be and are classified as independent contractors. *Production Connections,* 963 So.2d at (¶ 9).

vii. Whether or not the work is a part of the regular business of the employer.

When an assignment is made, the workers are not required to report to the place of business of EMC. In fact, it is quite possible for the workers never to set foot in EMC's offices during the entire time they are assigned jobs. Although EMC does business in Mississippi,

Louisiana and several other states, it only has offices in Louisiana. The only contact that demonstration workers in states other than Louisiana would have with EMC is through the area coordinators. Work done off the premises of the business is not *prima facie* evidence of freedom from control, but this freedom establishes that the workers are independent contractors because the work required cannot be done on the premises of EMC. (R.E. 21). Furthermore, the nature of the services provided by the workers does not allow the work to be done anywhere but on the premises of the individual manufacturers, food brokers, or marketing companies.

Neither party can terminate the contract without repercussions. EMC does not reserve the right to discharge or terminate any of the demonstration workers on its roster. In fact, the workers cannot remove themselves from the roster. The IRS has held that establishing that right to end relationship at liberty is indicative of employer-employee relationship. (R.E. 19). In fact, demonstration workers are removed from the list only in the event of death. In accordance with IRS guidelines, no demonstration worker can be fired so long as he or she is able to perform the demonstrations. (R.E. 28). In the event that a manufacturer, food broker, or marketing company is dissatisfied with a worker's performance, they can request that the worker not be assigned to them again. However, EMC cannot remove a worker from the roster upon such request. EMC may at its election discuss the errant behavior with the demonstrator. Such a discussion would be in the furtherance of upholding the reputation of EMC providing quality and dependable workers, but is not a formal admonishment which serves as a control by EMC of the workers' behavior. The demonstration workers are free to conduct themselves as they see fit. (R.E. 33).

The contention that workers are independent contractors and not employees is evidenced by the actions of the parties involved rather than their intent. *Mississippi Employment Sec. Com'n v. Total Care, Inc.*, 586 So.2d at 837. In addition to the parties' agreement, the actions of

the demonstration workers and EMC are sufficient evidence to establish that its demonstration workers are independent contractors.

This factor and the facts supporting the same are identical to those cited by the court in *Product Connections* in supporting its conclusion that product demonstrators should be and are classified as independent contractors. *Production Connections,* 963 So.2d at (¶ 8).

4. The Independent Contractor Agreement Between EMC and Product Demonstrators Is Clear Evidence of The Understanding Between the Parties

While the contracts of service are not conclusive of the issue, the contracts and facts of operation must be considered in determining the relationship of the parties. *Mozingo v. Mississippi Employment Security Commission,* 224 Miss. 375 (1955). Although a contract designating a demonstration worker as an independent contractor is not *prima facie* conclusive in determining that a employer-employee relationship did not exist, it is relevant in establishing that an employer had a reasonable basis for believing that the worker was an independent contractor. *See Elder v. Sears, Roebuck & Co.*, 516 So.2d 231, 235 (Miss. 1987); *Hardy v. Brantley*, 471 So.2d 358, 372 (Miss. 1985); *see also, Mississippi Employment Sec. Com'n v. Scott*, 137 So.2d 164 (Miss. 1962) (stating that terms of contract are only part of elements to be considered in determining status of worker). The burden is on the employer to prove that no employer-employee relationship exists.

Upon adding a demonstration worker to its active roster, EMC requires that each person complete an "Application to Perform Contract Services." (R. E. 20). The application sets forth the expected relationship between EMC and the demonstration workers. At the top of the second page of the application is a section which is designated "INDEPENDENT CONTRACTOR AGREEMENT." (R.E. 20). The language in this section explicitly describes the nature of the relationship between the demonstration workers and EMC. The Agreement specifies that the

"[c]ontractor understands and agrees that by demonstrating products for EMC, *Contractor is not, and shall not be deemed or construed to be, an employee of EMC, nor entitled to any benefits of an employee of EMC, or any nature and kind whatsoever.*" The document states that the contractor is responsible for paying any and all taxes and contributions owed to state and federal entities.

The July 21, 2004 decision was allegedly based on information obtained from Claimant Chatham and EMC. However, the decision ignores Claimant's admission that she signed an independent contractor agreement and acknowledges the terms stated in the contract. Claimant never was led to believe that she was an employee of EMC. She never received any benefits, treatment, withholding of taxes, *etc.* incident to employment. In addition to her acknowledgement of her status as an independent contractor, Claimant completed a questionnaire issued by MDES which asked a number of questions regarding the relationship between Claimant and EMC. (R. at S-53-56). Claimant acknowledged in the questionnaire that she provided her own equipment and materials, that she performed her services at the service recipient's store, and that the only instructions she was given regarding her performance of her duty were received through the mail. *Id.* These are strong indications supporting the argument that Claimant is an independent contractor.

A determination that EMC is an employer cannot be made from a single instance, but must be made by examining the entire pattern of the relationship. *Brown v. L. A. Penn and Son*, 227 So.2d 470, 473-474 (Miss. 1969). Employment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power. *Mozingo,* 224 Miss. 375, 80 So.2d 75, 79; *Texas Co. v. Wheeless,* 185 Miss. 799, 187 So. 880, 889 (1939). As discussed above, there are numerous

doubts as to the appropriateness of the application of these assessments to this classification of workers. Under Mississippi law, each one of these doubts should have been resolved in favor of EMC.

In light of *Product Connections*, and the striking similarities between the case at hand and *Product Connections*, EMC should not be considered an employer of the demonstration workers on its roster, and, thus, should not be subject to employment taxes for such workers. EMC does not satisfy the necessary requisite control over the demonstration workers and does not compensate the workers at an hourly rate. The status of the demonstration workers is evidenced by the independent contractor agreements which they sign as a prerequisite to being placed on the EMC roster. Under this contractual agreement, the workers are free to accept and refuse assignments at their discretion, and therefore are subject to a realization of profit or loss on their investment depending on the amount of work they wish to accept. EMC should not be liable for the employment taxes sought to be imposed by the MDES on behalf of the demonstration workers.

VII. CONCLUSION

The 1996 decision by the Board of Review which determined that the workers were Independent Contractors is a *prima facie* determination of the issue and should serve to bar further litigation of the issue. The sudden change in classification by MDES is not based on any change in the statutes, case law, or MDES Regulations. Nor has there been any change in the way EMC conducts its business since the 1996 decision by the MDES Board of Review. To the contrary, the recent case of *Product Connections* reaffirmed the Board of Reviews 1996 decision. Therefore, the Appellant requests that this Court find that the issue of employee versus independent contractor is res judicata or barred by the doctrine of collateral estoppel.

MDES has repeatedly violated EMC's constitutional right to due process. MDES has refused to allow EMC a full and fair hearing to present arguments and evidence necessary to make a determination regarding the classification of these workers. In spite of MDES's obstructionist tactics in the hearings and proceedings below, the substantive issue and the proffered facts are properly before this Court for *de novo* review and consideration, EMC respectfully requests that this Court, in accordance with the standard in *Harrah's Vicksburg Corp. v. Pennebaker* and *Smith v. Jackson Construction Co.* reverse the Board of Review's findings and render a decision finding the workers to be independent contractors and not employees. In the alternative, EMC requests that EMC be allowed to present oral argument in support of these issues so that EMC will finally be afforded due process in a hearing on these matters.

Respectfully submitted,

EMC ENTERPRISES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, return receipt requested, a true and correct copy of the above document to:

Albert Bozeman White
Assistant General Counsel
Attn: Legal Department
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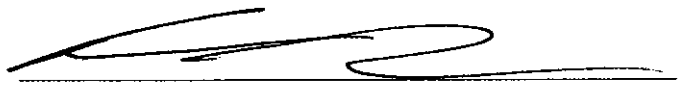
THIS 7th day of May, 2008.



Benjamin C. Windham

CERTIFICATE OF MAILING

I, Benjamin C. Windham, hereby certify that I have this day mailed true and correct copies of the above and foregoing document by placing said copies in the United States Mail, postage prepaid, in packages addressed to:

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This the 7th day of May, 2008.

Benjamin C. Windham