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

EMC ENTERPRISES, INC., **APPELLANT**
a Louisiana corporation

VS. **CIVIL ACTION NO. 2007-CC-01770**

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY **APPELLEE**

BRIEF OF APPELLEE
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

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

ORAL ARGUMENT NOT REQEUSTED

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CERTIFICATE OF INTERESTED PARTIES

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 Court may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security "MDES", Defendant-Appellee
2. David B. Crishmann, Esq., Attorney for Appellant
3. Benjamin C. Windham, Esq., Attorney for Appellant
4. Honorable Tomie T. Green, Hinds County Circuit Court Judge

ALBERT BOZEMAN WHITE

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BRIEF OF APPELLEE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

The Appellee, Mississippi Department of Employment Security, is hereinafter referred to as "**Department**" or "**MDES**". The Appellant, EMC Enterprises, Inc., is hereinafter referred to as "**EMC**".

STATEMENT OF ISSUES

1. Whether the Circuit Court correctly decided that EMC failed to show good cause for untimely appealing the Department's July 21, 2004 decision, finding that Donis Chatham was its employee, pursuant to the appeal provisions in M.C.A. Section 71-5-355(2)(b)(ix)(Rev. 1995) and TR 11. Independent Contractors, *Unemployment Insurance Regulation* (July 1, 1998)?

2. Whether the Circuit Court correctly decided that the Department's decision finding that Donis Chatham and all similarly situated individuals were employees of EMC did not violate its due process rights, because EMC was adequately apprized of it appeal rights, and because it failed to exhaust its administrative remedies?

3. Whether the decision in *Mississippi Department of Employment Security v. Product Connections, LLC*, should bar, and collaterally estop, the Department's decision in this matter, when this case involves a separate and distinct issue, *i.e.* whether EMC had good cause for failing to exhaust its administrative remedies?

4. Whether Dale L. Smith's letter dated February 5, 1996 informing an attorney for EMC that the Mississippi Employment Security Commission would take no further action at that time to register its demonstrators as employees bars the Department from classifying Donis Chatham, a demonstrator, and all similarly situated individuals, as an employees on July 21, 2004, based upon *res judicata* and/or collateral estoppel?

5. Whether EMC has raised as the issue for the first time on this appeal as to whether *res judicata* applies to Dale L. Smith's letter dated February 5, 1996, and effectively bars the Department from classifying Donis Chatham, a demonstrator, and all similarly situated individuals, as employees on July 21, 2004, such that this Honorable Court should not consider that issue?

6. Whether the Department's tax assessments against EMC Enterprises, LLC for delinquent wage reports and unpaid taxes for the quarters ending June 30, 2004, and September 30, 2004, were correct, pursuant to M.C.A. Section 71-5-365 (1972, as amended)?

INTRODUCTION

The record in this matter consists of pages numbered S-1 through S-114, which is so identified by the Department as the **tax status** issue [hereinafter "**status**" issue]. Pages numbered A-1 through A-118 and Employer Exhibits 1 and 2 of the record is so identified by the Department as the assessment of unpaid taxes [hereinafter "**assessment**" issue]. The status issue concerns the Department's determination that Donis Chatham and all similarly situated persons are employees of EMC Enterprises, LLC. The status issue is governed by M.C.A. Section 71-5-355(2)(b)(ix)(Rev. 1995), and TR 11. Independent Contractors, *Unemployment Insurance Regulation* (July 1, 1998). In the Statement of Issues herein above, numbers 1, 2 and 3 concern the status issue.

Regarding the tax assessment issue, the Department assessed EMC for unpaid employee contributions, *i.e.* taxes, for two quarters during 2004. Those two quarters were the quarters ending June 30, 2004, and September 30, 2004. The Department's right to assess an employer for failing to file quarterly reports is specified in M.C.A. Section 71-5-365 (1972, as amended). Although interest and penalties continue to accrue, the Department makes no efforts to collect these unpaid taxes while the status matter is on appeal. In the Statement of Issues herein above, number 4 concerns the assessment issue.

STATEMENT OF THE CASE

STATEMENT OF THE CASE AS TO THE STATUS ISSUE:

A primary purpose of the Employment Security Law is for the compulsory setting aside of reserves to be used to benefit the unemployed. M.C.A. Section 71-5-3 (1972, as amended). The Department is charged with collecting contributions, *i.e.* taxes, from employers as provided in M.C.A. Section 71-5-351 et seq. (1972, as amended). To determine whether a worker is an employee, the Employment Security Law provides that "**employment**" shall include the following, to-wit:

> (14) **Services performed by an individual for wages shall be deemed to be employment** subject to this chapter **unless and until it is shown to the satisfaction of the 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 service and in fact**; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant. (emphasis added).

M.C.A. Section 71-5-11 I (14) (1972, as amended).

Donis Chatham worked for EMC as a product demonstrator. (R. Vol. 2 p. S-1, S-59-60). After Mr. Chatham was separated from his job with EMC, he filed for unemployment benefits. (R. Vol. 2 p. S-1). On June 4, 2004, the Department determined that Mr. Chatham was not subject to disqualification from receiving benefits. (R. Vol. 2 p. S-1). EMC appealed that decision, and an appeal proceeded upon Mr. Chatham's unemployment benefits claim. (R. Vol. 2 p. S-2).

Also as a result of Mr. Chatham's claim for unemployment benefits, the Department instructed Brian Bosarge, Field Tax Representative, to investigate whether an employer/employee relationship existed. (R. Vol. 2 p. S-3-58). EMC completed an Independent Contractor Questionnaire. (R. Vol. 2 p. S-4). Sandra Watson, Vice President of Operations, signed the form,

and EMC's attorney, David Grishman, returned it to the Department, along with a Memorandum of Law and Exhibits. (R. Vol. 2 p. S-5-51).

Mr. Chatham also completed and returned an Independent Contractor Questionnaire. (R. Vol. 2 p. S-53-56). Along with his Questionnaire, Mr. Chatham submitted a copy of an Independent Contractor Agreement, and a copy of his Application. (R. Vol. 2 p. S-57-58).

Based upon the Questionnaires and the investigation, on July 21, 2004, Dale L. Smith, Chief of Status and Contributions, determined that Mr. Chatham was an employee; and determined that wages for Mr. Chatham, and all similarly situated persons, must be reported, and taxes paid. (R. Vol. 2 p. S-59-60). The July 21, 2004 letter to EMC stated in pertinent part as follows, to-wit:

> ...Donis Chatham filed a claim for Unemployment Insurance Benefits alleging employment with your firm. ...an investigation was conducted by our Field Representative....
>
> **The information shows** the worker filled out an application. The worker performed services under firm's name. The worker was restricted to a specific territory. The worker reported to the firm. The worker received written instructions and the firm required the worker to follow them exactly. The worker was to perform all services personally. The worker was provided a debit card for which he was required to use to buy materials used in the demonstration. The worker was paid an hourly rate. The worker was required to make purchases at the beginning and at the end of each day which was used as a time card. The firm required worker to file timesheets within 24 hours. The worker was given a lunch break if the demonstration was 6 hours long. The worker was required to work the hours assigned - no more no less. The worker was required to call the firm or his supervisor if late or absent or unable to start or complete an assignment. The firm had a dress code. The firm carried Workman's Compensation Insurance. The worker was an integral part of the firms operation. The worker had no investment in a business and did not stand to make a profit nor suffer a loss. Either party could terminate services without liability. **There existed an employer/employee relationship and the wages of this worker and all others in this class should be reported and taxes paid.** (emphasis added).
>
> If you do not agree with this decision **you have ten (10) days from the date of this letter to file your protest**.... Your appeal should be made in writing to: Chief of Contributions and Status Department, Mississippi Department of Employment Security, P O Box 1699, Jackson, Mississippi, 39215-1699. **This decisions becomes final ten (10) days from the date of mailing.** (emphasis added).

Pursuant to M.C.A. Section 71-5-355(2)(b)(ix)(Rev. 1995), and TR 11. Independent Contractors, *Unemployment Insurance Regulation* (July 1, 1998), EMC had ten (10) days from July 21, 2004, to appeal to the next level within the Department's jurisdiction. (A copy of said Regulation is attached hereto as Exhibit "A"). In that regard, Dale Smith's July 21st letter explicitly informed EMC that the appeal **must be filed within ten (10) days of the date of that letter**. (R. Vol. 2 p. S-59-60). However, EMC did not appeal by the July 31, 2004, deadline.

On August 9, 2004, Mr. Bosarge sent EMC a Status Report to complete; and informed EMC that Wage Reports should be completed and returned by August 24, 2004. (R. Vol. 2 p. S-61). Subsequently, on August 11, 2004, Attorney David Grishman faxed a letter to the Department requesting an appeal. (R. Vol. 2 p.S-64). **Thus, EMC 's appeal was actually filed eleven (11) days late**. Further, the Department apparently only received this appeal letter after contacting EMC by letter dated August 9, 2004. (R. Vol. 2 p. S-61).

Since EMC's appeal was untimely filed, a telephonic hearing was scheduled for the sole purpose of determining whether EMC had good cause for late filing. (R. Vol. 2 p. S-65-68). **The notice letter specifically provided "...Please be advised that a hearing to determine whether or not the employer's appeal was timely filed will be held via telephone...."** (R. Vol. 2 p. S-65).

The hearing occurred on November 30, 2004, before Hearing Officer Timothy Rush. Mr. Brian Bosarge, Field Tax Representative, testified for the Department and tendered the July 21st letter into evidence. (R. Vol. 2 p.S-69-96). Attorney David Grishman testified for EMC; and tendered his letter dated August 11, 2004, into evidence. (R. Vol. 2 p.S-69-96). No employee or officer of EMC participated or testified.

At the hearing, Mr. Grishman confirmed that the Department's letter dated July 21, 2004, had the correct address for EMC, and that EMC's appeal was untimely filed. (R. Vol. 2 p. S-82-83).

However, Mr. Grishman asserted that EMC's appeal should be allowed anyway, because the Department did not send him a copy of the July 21st decision, and because EMC assumed he received a copy, and appealed for it. Mr. Grishman gave no explanation for EMC making this assumption, even though the notice letter did not reflect that he was an addressee, or that he received a copy.

Based upon the entire record, testimony and documents, the Hearing Officer found that pursuant to M.C.A. Section 71-5-355(2)(b)(ix), EMC's August 11th appeal was untimely filed. (R. Vol. 2 p. S-97-100). Further, the Hearing Officer found that EMC's assumption that its attorney had received the July 21, 2004, decision and appealed for it, was not good cause for untimely filing. Thus, the Hearing Officer dismissed the appeal. (R. Vol. 2 p. S-97-100).

The Hearing Officer's Decision in pertinent part was as follows:

Findings of Fact:

> The Contributions & Status Department's decision was dated July 21, 2004, notifying the employer of their right to protest and file a timely appeal ten (10) days from the date of this letter.... **The determination was mailed to the employer's correct address. The employer's representing attorney contends that the employer did not file an appeal in a timely manner because the employer representative... assumed that a decision had also been mailed to the attorney.... The attorney was not aware that a decision had been rendered or that the employer was aware of the appeal rights. The employer representative had no knowledge as to when the decision was received by the employer and did not have any employer witnesses available to offer testimony in behalf of the employer regarding the timeliness of the appeal. There is no documentation from the employer or the attorney advising that the employer's attorney should be notified of any decisions rendered by the Mississippi Department of Employment Security in order that they may represent the employer in any or all matters, including filing an appeal. All previous communication... was mailed to their address of record. The employer's attorney filed an appeal by facsimile on August 11, 2004, indicating that there was a delay in filing the appeal because the employer did not notify their office until August 11, 2004, that a decision had been rendered.** (emphasis added).

Opinion:

...In this case, the notice to the employer was mailed to the employer's **correct mailing address** or the address of record provided by the employer to this State Department. **Neither the employer nor their attorney had notified the Mississippi Department of Employment Security that the attorney's address should be an address of record of party of notification whereby the employer should file their appeal.** It is without question that the **employer did receive the notice** sent to them at the address of record by this State Department notifying them of their rights to file an appeal in a timely manner. The hearing officer is further of the opinion that the **employer has not shown good cause** for failing to file an appeal in a timely manner. Therefor, the hearing officer is without jurisdiction regarding the merits of this case. The decision of the Contributions and Status Department is, therefore, not disturbed. (emphasis added).

Decision:

Dismissed. The appeal of the employer is dismissed as not timely filed.

(R. Vol. 2 p. S-97-100).

The Hearing Officer's decision was then appealed to the Board of Review. (R. Vol. 2 p. S-101). This matter was considered by the Board of Review at its May 20, 2005, meeting. (R. Vol. 2 p.S-110-111). After noting that the matter was fully explored by the Department, the Board adopted the Hearing Officer's findings of fact; and affirmed. (R. Vol. 2 p. S-110-111). On July 18, 2005, an Amended Decision was also issued to include and address the assessment issue, *i.e.* whether the Department's tax assessments were correct. (R. Vol. 2 p. S-112-114).

STATEMENT OF THE CASE AS TO THE ASSESSMENT ISSUE:

When EMC did not respond to the Department's request for an employee status report, and when it did not file quarterly wage reports for the quarters ending June 30, 2004, and September 30, 2004, the Department sent EMC a first notice of assessments, and then a final notice of assessments,

pursuant to M.C.A. Section 71-5-365 (1972, as amended). This statute specifically provides as follows:

> "If an employer fails to make and file any report as and when required...for the purpose of determining the amount of contributions due...**the Executive Director may (a) determine the amount of contributions due from such employer on the basis of such information as may be readily available...., which said determination shall be prima facie correct, (b) assess such employer with the amount of contribution so determined, to which amount may be added and assessed...., as damages, an amount equal to ten percent (10%) of said amount, and (c) immediately give written notice by mail to such employer....** Such determination and assessment by the Executive Director shall be final at the expiration of fifteen (15) days from the date of mailing...., unless such employer shall have filed with the Commission a written protest and petition for a hearing.... Upon receipt...., the Commission shall fix the time and place for a hearing.... At the hearing...., evidence may be offered to support such determination and assessment in order to prove that it is incorrect..." (emphasis added).

Final assessments for the quarters ending June 30, 2004, and September 30, 2004, were mailed to the employer on December 2, 2004. (R. Vol. 2 p. A-1-2). EMC objected to the assessments and requested a review by letters dated December 6, 2004, and December 9, 2004. (R. Vol. 2 p. A-3-6). Thereafter, EMC's attorney wrote several letters to the Department complaining that the Department had failed to timely set this matter for hearing. (R. Vol. 2 p. A-7-14). **John Garrett, General Counsel, responded on February 10, 2005, explaining the cause for the delay in setting this matter for hearing, and citing the statutes under which the hearing would proceed.** (R. Vol. 2 p. A-15-16). **The hearing was then noticed for March 16, 2005**, stating that the issue to be determined was assessments made regarding EMC's failure to file quarterly contribution reports. (R. Vol. 2 p. A-19).

Attorneys, David Grishman and Cory Lancaster, appeared at the hearing along with EMC's owner, Ella Matthews, and one witness, Sandra Watson, Vice-President of Operations. (R. Vol. 2 p. A-23). Field Tax Representative, Greg Boggan, testified for the Department; and Attorney Albert White represented the Department. Testimony was taken from Mr. Boggan and Ms. Watson, and

Agency and Employer Exhibits were admitted into evidence. (R. Vol. 2 p. A-23-105). Afterwards, the record was forwarded to the Board of Review for a determination.

The Board of Review issued its decision, entitled Amended Board Decision, on July 18, 2005. (R. Vol. 2 p. A-116-118). Applying M.C.A. Section 71-5-365, this decision stated in pertinent part as follows, to-wit:

> ...The employer was notified again of their obligation to file and pay their taxes with quarterly wage reports for weeks ending June 30, 2004, September 30, 2004, and December 31, 2004. The employer failed to file said reports or pay any taxes. An assessment was made by the Mississippi Department of Employment Security....
>
> In this case, the employer was given an opportunity to present evidence that the determination and assessment was incorrect. The employer's position is that they are not an employer and wages paid to vendors and individuals of which they will not identify are not covered wages. The employer's documents of evidence do not show any wage or any financial data whereby an accurate and correct computation can be made.
>
> It is the opinion of the Board of Review that the employer has not shown sufficient evidence to show that the assessment for the quarters ending June 30, 2004, September 30, 2004, and December 31, 2004, are incorrect. Therefore, the Board affirms the decision of the Referee.
>
> Decision: Affirmed. The appeal of the employer is dismissed as not timely filed. Furthermore, the decision and assessment of contribution and status is not to be disturbed.

(R. Vol. 2 p. A-117-118).

From the Board of Review's decision, EMC appealed to the Circuit Court of Hinds County, Mississippi. (R. Vol. 1 p. 3-14). The Department filed its Answer on July 25, 2005. (R. Vol. 1 p. 17-36). On November 1, 2005, EMC filed a Motion To Correct Record. (R. Vol. 1 p. 37-39). The Department filed a Response on January 17, 2006. (R. Vol. 1 p. 40-45). After Briefs were filed by EMC and the Department, the Honorable Tomie Green issued her Memorandum Opinion and Order

on June 26, 2007, filed on June 27, 2007. (R. Vol. 1 p. 46-50). In so doing, Judge Green held as follows:

> ...On July 21, 2004, MDES issue a decision that Mr. Chatham and all other workers who fall within his "class" were now considered employees under Mississippi law....
>
> On November 30, 2004, MDES conducted a telephone hearing to determine whether EMC had good cause for not filing its appeal in a timely fashion. On December 7, 2004 MDES held that EMC's appeal of the July decision was untimely....
>
> ...The decision provided that the time for appeal was ten (10) days from the date of the letter. **The determination was mailed directly to EMC's correct address. However, EMC did not forward the letter to their attorney.... The hurdled of the out-of-time appeal must be resolved before any challenge by EMC of MDES's employee classification may be reviewed....** (emphasis added).
>
> To determine whether EMC is entitled to an out-of-time appeal, MDES cites *Wilkerson v. Mississippi Employment Security Commission* 630 So. 2d 1000 (Miss. 1994). (the Court concluded that notice mailed to the party's last know address was sufficient notice). See also, *Booth v. Mississippi Employment Security Commission*, 588 So. 2d 422, 426-427 (Miss. 1991) which held that, **"...notice to the party alone did satisfy constitutionally required due process." This was so because notice to the party was reasonably calculated, under the circumstances, to notify interested parties and afford them an opportunity for objections....** (emphasis added).
>
> **This Court finds that EMC's due process rights were not violated. MDES sent notice of their July 21st decision to the only address of record. Mr. Grishman participated in the telephonic hearing, but MDES also sent its rulings directly to EMC. MDES has always communicated by mail with EMC because that was the only address provided by EMC**. Moreover, between April 18, 2004, when the Claimant filed for unemployment benefits and July 31, 2004, when the appeal was dismissed, there were consistent communication between EMC and MDES. There's no evidence to suggest that other communication prior July 21, 2004, was not responded to in a timely fashion. When MDES found that Claimant was eligible for benefits on June 4, 2004, EMC responded nine (9) days later on June 13, 2004. When EMC was sent an Independent Contractor Questionnaire and asked to return it by July 9, 2004, they returned it on July 9, 2004. **Prior to July 21, 2004, all communication between the two agencies was sent and timely responded to, with EMC's address being the only address listed in the record....** (emphasis added).

The Court is of the opinion that the decision of MDES Board of Review was supported by substantial evidence, was not arbitrary and capricious, and should be affirmed. Thus, **EMC is not entitled to an out-of-time appeal**. (emphasis added).

From this decision, EMC appealed to this Honorable Court. (R. Vol. 1 p. 51).

SUMMARY OF THE ARGUMENT

A determination by the Department as to the status of a worker as an employee or independent contractor is governed by M.C.A. Sections 71-5-11 I (14) and 71-5-355(2)(b)(ix)(Rev. 1995). Procedure for appealing a "status" decision made by the Department is set out in M.C.A. Section 71-5-355(2)(b)(ix)(Rev. 1995) and TR 11. Independent Contractors, *Unemployment Insurance Regulation* (July 1, 1998). Pursuant to both the statute and the regulation, an employer unhappy with a Department status decision has ten (10) days from the date of the Department's initial decision to appeal.

In this case, the Department gave EMC notice of its decision that Donis Chatham and all similarly situated persons were EMC's employees by letter dated July 21, 2004. However, EMC failed to timely appeal. EMC did not appeal until August 11, 2004.

Regarding the notice to EMC , it is undisputed that the Department's July 21st decision was mailed to EMC 's correct address. The notice letter clearly informed EMC that it had ten days from the date mailed to appeal. (R. Vol. 2 p. S-59-60). The letter was not a pleading and was written in a manner that any putative employer receiving it could understand it, and determine how to appeal. Further, according to its attorney, EMC received the letter, but did not appeal; and did not contact him until August 11th, at which time EMC inquired as to whether he received the letter, and appealed for EMC.

Why didn't EMC appeal or contact its attorney sooner? EMC supposedly did not because it assumed that its attorney received the letter and appealed. However, Mr. Grishman, EMC's attorney, was not an addressee, nor was he shown as receiving a copy. (R. Vol. 2 p. S-59-60). All other Department decisions and correspondence to this date went to EMC only; and there were no requests in the record that notices be sent to an attorney.

Further, **while the Department makes reasonable efforts to notify third parties or attorneys, and routinely does so, particularly where a prior written request to do so has been made, the Supreme Court recognizes that the Department's responsibility is to notify the party, *i.e.* claimant or employer**, not an attorney. The Court's rationale in this decision is that regarding the large number of notices in administrative matters, involving much more than just notices of hearing officers' or appellate boards' decisions, administrative procedures are designed to give the actual parties notice. Thus, while the Court recommends that the Department give notices to attorneys, which the Department attempts to do when requested, no due process requirement is made. Conversely, the Court holds that a party's due process is not violated by notice to it alone. Booth v. Mississippi Employment Security Comm'n, 588 So.2d 422, 427-28 (Miss. 1991). This makes sense considering the volume of notices that the Department gives to both claimants and employers regarding everything from claims filings, to status decisions, tax rates, quarterly wage report filings, charges or non-charges, assessments, taxes past due, hearings, and appeals.

Since the Department gave EMC notice of its July 21st decision, since EMC 's appeal was untimely filed, and since there is no statutory or common-law requirement that notice be given to a party's attorney, EMC has not presented good cause for untimely filing its appeal. Thus, the Department's dismissal of its appeal should be affirmed. M.C.A. Section 71-5-355(2)(b)(ix)(Rev.

1995) and TR 11. Booth, supra; Wilkerson vs. Mississippi Employment Security Commission, 630 So. 2d 1000 (Miss. 1994); Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979).

Regarding the Department's assessment of EMC for unpaid employment taxes for the quarters ending June 30 and September 30, 2004, the Department was authorized to make this determination by statute. M.C.A. Section 71-5-365 (1972, as amended). Further, the Department made this determination based upon its general procedures; and clearly explained this process at the assessment hearing. Conversely, EMC failed to offer any proof indicating that the Department's assessment determination was incorrect. In fact, EMC's representative's testimony indicated that it could, with some effort, file the missing wage reports, but it chose not to do so. It simply was not going to do so, even though doing so would not prejudice its appeal rights in this matter.

EMC argues that in light of Mississippi Department of Employment Security v. Product Connections, LLC, 963 So. 2d 1185 (Miss. COA 2007), the instant case is moot, because the Court ruled that demonstrators similar to EMC's demonstrators were not employees, but independent contractors. As an extension of that argument, EMC argues that even if the Court were to find that EMC failed to timely appeal the Department's ruling regarding Donis Chatham's employment, that decision should not preclude EMC from raising the status issue as to any other demonstrator claimant, as *res judicata* or collateral estoppel should not be applied to the Department's July 21, 2004 decision, particularly in light of Product Connections. Id. However, EMC fails to recognize the principle of *exhaustion of administrative remedies*. *See* Suddith v. University of Southern Mississippi, 977 So. 2d 1158, 1178-79 (Miss. COA 2007)(because plaintiff failed to file a grievance within a timely manner, he failed to exhaust his administrative remedies, such that Circuit Court's

summary dismissal of plaintiff's state court action was proper); Midland Hotel Corporation v. Director of Employment Security, 282 Ill. App. 3d 312, 668 N. E. 2d 82 (Ill. App. Ct 1996)(an administrative decision becomes final where a party fails to timely exhaust administrative remedies, such that *res judicata* applies to all parties affected, and issues determined by that decision). Judge Green so aptly recognized this time honored principle in stating that ... **"The hurdle of the out-of-time appeal must be resolved before any challenge by EMC of MDES' employee classification may be reviewed"**. (R. Vol 1. p. 47). Thus, since the Department's **July 21, 2004 decision** became final long before the Court's **April 24, 2007 ruling** in Product Connections, and since EMC failed to timely pursue its administrative remedies by timely appealing the July 21, 2004, decision, which is the primary issue in this appeal, EMC should not now be relieved of that omission where the Department's July 21, 2004, decision was not arbitrary or capricious, did not violate EMC's constitutional rights, was supported by the record, and became final. Alternatively, should this Honorable Court find that the Product Connections ruling, based on some legal principle, entitles EMC to reconsideration of the facts in this case, since such factual determinations are within the purview of the Department, this matter should be remanded to the MDES with instructions to make factual findings as to EMC's demonstrators in light of Product Connections, and a subsequent determination by the MDES.

ARGUMENT

Standard of Review

EMC 's appeal to this Honorable Court is governed by 71-5-355(2)(b)(ix)(Rev. 1995), which provides for an appeal to the Circuit Court by any party aggrieved by a status decision of the Department. In a contributions liability, or status issue, case on appeal, the Mississippi Supreme

Court has stated that there is a restricted standard of review. Mississippi Employment Security Commission v. PDN, Inc., 586 So.2d 838 (Miss. 1991). In PDN, the Court further stated that absent fraud, an Order from the Board of Review [*i.e.* Commission] ... on the facts is conclusive ... if supported by substantial evidence. Id. 840. (emphasis added). M.C.A. Section 71-5-355(2)(b)(ix) further provides that "**Any such appeal shall be on the record** before said designated hearing officer, and the decision of said commission...."

Facts and Authorities as to the Status Issue

Pursuant to M.C.A. Section 71-5-355(2)(b)(ix), the subject matter of EMC's appeal is solely upon the record made before the Department. This statute's subsection provides for an administrative remedy for any employer challenging **liability** for contributions. The applicable statutory subsection specifically provides as follows, to-wit:

> ... No employer shall be allowed, in any proceeding involving his rate of contributions **or contribution liability**, to contest the chargeability to his account; except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for him.... The employer shall be properly notified of the denial of this application or of the redetermination, **both of which shall become final unless, within ten (10) days after the date of mailing of such notice thereof there shall be an appeal** to the commission itself. (Emphasis added).

Pursuant to Section 71-5-117 (1972, as amended), the Department is granted authority to adopt general rules regarding the operation of the Agency; and it did so in *Unemployment Insurance Regulation 11* (July 1, 1998). This regulation specifies that... " the **employer** will be notified in writing by mail. The **employer** has, within **ten days** from the mailing date of this decision, the right to protest...". (emphasis added). Thus, pursuant to both the statute and the regulation, an employer

unhappy with a Department status decision has ten (10) days from the date of the Department's initial decision to appeal.

In the instant case, EMC alleges that the Department's failure to notify its attorney establishes good cause for it late filing. A hearing was held on this issue and Brian Bosarge represented the Department, and Attorney David Grishman represented EMC. (R. Vol. 2 p. S-69-96). As to whether the Department had been previously requested to mail decisions to EMC's attorney, Mr. Brian Bosarge, Field Tax Representative, testified for the Department. (R. Vol. 2 p. S-72-78). Mr. Bosarge investigated the facts surrounding whether an employer/employee relationship existed between EMC and Mr. Chatham.

Mr. Bosarge stated that he was familiar with the Contribution & Status' (hereinafter "C & S") decision dated July 21, 2004. The decision was mailed to EMC at the address on file for it. All correspondence with EMC went to that address. (R. Vol. 2 p. S-73). A copy of the agency's letter dated July 21, 2004, was tendered into evidence as Agency Exhibit 1. (R. Vol. 2 p. S-74-75).

Mr. Bosarge further testified that when the Department did not receive an appeal, he mailed a letter to EMC on August 9, 2004, sending forms for them to report employees and wages. (R. Vol. 2 p. S-76). Subsequently, on August 11, 2004, Mr. Grishman's appeal was received. (R. Vol. 2 p. S-76).

Mr. David Grishman, EMC's attorney, testified on its behalf. (R. Vol. 2 p. S-79-91). Mr. Grishman stated that Ms. Watson did not participate in the status hearing, because she had nothing to add his statements. (R. Vol. 2 p. S-86).

Mr. Grishman confirmed that the address for EMC in the record was correct. (R. Vol. 2 p. S-79). He also stated that EMC received the July 21st letter, but he did not know what date. Mr.

Grishman was not made aware of the letter until August 11th. (R. Vol. 2 p. S-79-80). On that date, he received a telephone call from Sandra Watson (incorrectly stated Sandra Wilson). She asked if Mr. Grishman had received a copy of the decision, and whether he had filed an appeal. (R. Vol. 2 p. S-80). He replied that he had not received it, and had no knowledge of it prior to that date. (R. Vol. 2 p. S-81).

Mr. Grishman was questioned as to why EMC did not appeal earlier. Ms. Watson gave him no explanation, except that EMC thought that Mr. Grishman had received a copy, and had appealed on its behalf. (R. Vol. 2 p. S-84).

The Hearing Officer stated that it was not uncommon for the Appeals Department to notify attorneys of decisions, particularly where an attorney, or the third party representative, has written the Department requesting notification. The Hearing Officer also noted that the prior decisions by the Department were sent to the employer only, even though Mr. Grishman appeared at the Donis Chatham hearing held by Mr. Bob Cummings. (R. Vol. 2 p. S-81-84, S-88-89).

In closing statements by Mr. Bosarge, he stated that the Department never received a request to mail notices of decisions to Mr. Grishman. (R. Vol. 2 p. S-91). Mr. Grishman stated that he and EMC were surprised that Mr. Grishman did not receive a copy of the Department's July 21, 2004, letter. Thus, Mr. Grishman stated that EMC should be entitled to an appeal, because he was not notified. (R. Vol. 2 p. S-91).

Regarding due process in administrative hearings, the appellate courts have addressed the issue in cases involving the timeliness of an appeal, considering the statutorily mandated time frames. In Wilkerson vs. Mississippi Employment Security Commission 630 So. 2d 1000 (Miss. 1994), the Mississippi Supreme Court addressed the notice issue. In Wilkerson, the Court gave

credence to the statutory deadlines to appeal; and concluded that notice **mailed** to the parties' last known address was adequate.

In Booth v. Mississippi Employment Security Commission, 588 So.2d 422, 427-28 (Miss. 1991), the Court considered whether notice to a party alone, and not the party's attorney, met constitutionally required due process. The Court held that notice to the party alone did satisfy constitutionally required due process. In so holding, the Court stated that in appeals before administrative agencies, "minimum" due process rights required **"...notice reasonably calculated, under all the circumstances, to apprize interested parties...and afford them an opportunity to present objections"**.

EMC's attorney cites Booth, supra for the proposition that the Supreme Court "...disregarded the clear notice violations in Booth and ruled in favor of the MDES". (Appellant's Brief p. 16). However, this is an erroneous statement of the law as set out in that case. The Court in Booth actually held that since the *Mississippi Rules of Civil Procedure* [hereinafter "M.R.C.P."] are inapplicable to administrative proceedings, and since the Employment Security Law specifies notice to the party, sufficient notice was given to satisfy constitutional due process requirements, by giving notice to the party. Booth, supra at 428. Further, the Supreme Court has recently had an opportunity to address whether the M.R.C.P. are applicable to the Department. In Mississippi Employment Security Comm'n v. Parker, 903 So. 2d 42 (Miss. 2005), the Supreme Court reversed the Court of Appeals' application of the M.R.C.P. to give a claimant relief from missing an appeal deadline. In Parker, the issue was whether Rule 6(e) regarding the additional time for service by mail afforded the claimant three additional days to appeal. Citing State Oil & Gas Board v.

McGowan, 542 So. 2d 244, 247 (Miss. 1989), the Parker Court held that since the Department is not a circuit, chancery or county court, the M.R.C.P. are inapplicable.

In the instant case, Counsel for EMC argued that the Department should have enacted a regulation after the Booth, supra, decision; and once again, argues that the Department's failure to do so violated EMC's due process rights. However, the Parker, supra, case again confirmed that the Department has no constitutional due process requirement to do so. Id. Nevertheless, the Hearing Officer stated that the Department has a practice of giving notice to third party representatives, such as attorneys, when the Department is notified in writing to do so. (R. Vol. 2 p. S-82-83, S-88-89). This is consistent with the Department's Appeal Regulations D. 3. through 7. (A copy of which is attached hereto as Exhibit "A"). Nevertheless, there was no written document in the Department's files advising that he would be representing EMC in all matters before the Department, and that all notices should provided to him and EMC. (R. Vol. 2 p. S-84). Such a letter should also have been written not only to the Appeals department, but the Contributions & Status, *i.e.* tax, department. Notwithstanding no notice to its attorney, EMC had all of the notice to which it was entitled; and had sufficient notice to timely appeal this matter. Booth, supra.

In the instant case, EMC further argues that the Department should not be entitled to apply its decision as to Donis Chatham to all similarly situated persons by "default", based upon the limitations of, and requirement that, *res judicata* and/or collateral estoppel should only apply where a full factual hearing and determination has occurred. However, the cases cited by EMC do not concern application of employment tax status pursuant to Employment Security Law. Further, this argument ignores the principle that final decisions of the Department should be given full force and effect, when such decision has became final due to a party's failure to exhaust administrative

remedies. *See* Suddith v. University of Southern Mississippi, 977 So. 2d 1158, 1178-79 (Miss. COA 2007)(Because plaintiff failed to file a grievance within a timely manner, he failed to exhaust his administrative remedies, such that Circuit Court's summary dismissal of plaintiff's state court action was proper); A & F Properties, LLC v. Madison County Board of Supervisors, 933 So. 2d 296 (Miss. 2006)(*res judicata* and collateral estoppel precludes relitigation of an administrative decision that has become final due to failure to timely appeal); Midland Hotel Corporation v. Director of Employment Security, 282 Ill. App. 3d 312, 668 N. E. 2d 82 (Ill. App. Ct 1996)(an administrative decision becomes final where a party fails to timely exhaust administrative remedies, such that *res judicata* applies to all parties affected, and issues determined by that decision).

Notwithstanding EMC's failure to exhaust administrative remedies, the issue regarding the applicability of collateral estoppel is whether the facts and issues were previously addressed. In the instant case, Donis Chatham and the other demonstrators have no factual dissimilarity in the manner and method by which they perform their jobs for EMC. Thus, since EMC had an opportunity to present evidence to the Contribution & Status department, and since a decision was made on that information, the facts have been addressed as to all similarly situated individuals.

Regarding application of the ten (10) day appeal deadline, while there are no precedents directly interpreting or applying the appeal time deadlines in M.C.A. Section 71-5-355(2)(b)(ix), the Court of Appeals has recently had an opportunity to consider this matter in two cases. In O & J Tire Loading Service v. Mississippi Department of Employment Security, 971 So. 2d 597 (Miss. COA 2007), Court of Appeals, and Supreme Court by denial of Writ of Certiorari, affirmed the Department's decision dismissing O & J Tire Loading Service's [hereinafter "O & J"] appeal of a status determination, because O &J untimely appealed the Departments initial determination. In this

case, the Court affirmed that the ten (10) appeal deadline applied to status determinations pursuant to the applicable statute; and that claimant and all similar situated persons were effectively employees by O & J's failure to timely appeal. Id.

The Supreme Court has also applied appeal deadlines in unemployment benefit cases on several occasions, which cases are instructive. In Wilkerson, supra, a claimant had fourteen days to appeal an adverse decision pursuant to statute. The Supreme Court held that **when notification is by mail, the fourteen day time period began running from the mailing date**. Id. at 1002. Further, holding that an appeal filed **one** day late was untimely, the Court in Wilkerson stated that **the fourteen day time period as set by statute is to be strictly construed**. Id; Booth, supra.

Regarding the good cause issue, the Supreme Court and Court of Appeals have addressed that issue. In Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. App Ct. 1998), the Court stated that good cause must be established by affirmative proof. The Court in Holt also indicated that a "good cause" showing must provide sufficient legal basis to excuse the late filing. *See also* City of Tupelo v. Mississippi Employment Security Commission, 748 So.2d 151 (Miss. 1999) (the Court held that the City did not show good cause for filing an appeal late simply because the notice was mailed to one of several addresses for the City); Powell v. Mississippi Employment Security Commission, 787 So.2d 1277 (Miss. 2001) (Circuit Court's allowance of untimely appeal based upon claimant's assertion of "unforeseen circumstances" was insufficient proof of good cause); Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979) (where notice is not mailed to the last known address good cause for late filing is shown).

Facts and Authorities as to Assessment Issue

At the November 30, 2004, hearing, Brian Bosarge testified that when the Department did not receive an appeal of its July 21, 2004 decision, he sent EMC a status report form requesting that it identify all employees similarly situated to Mr. Donis Chatham. Mr. Bosarge's letter dated August 9, 2004, also instructed EMC to file wage reports through June 30, 2004. (R. Vol. 2 p. S-61, S-76).

At the hearing regarding whether the Department appropriately assessed EMC for unpaid taxes, Greg Boggan, Field Tax Representative, testified for the Department. (R. Vol. 2 p. A-27-49). Mr. Boggan testified that EMC failed to file quarterly wage reports for the quarters ending June 30, 2004, and September 30, 2004; and first and final notices of assessment were sent to EMC. (R. Vol. 2 p. A-30-31). A copy of the final notices were tendered into evidence as Agency Exhibits 1 and 2. (R. Vol. 2 p. A-31-32, A-101-102).

Regarding how assessments are made, Mr. Boggan testified that assessments are made when the Agency has no employee or wage information from an employer. To do so, the Department consults the North American Industrial Code Classification for the class of worker, *i.e.* in this case demonstrator, in the local county areas. (R. Vol. 2 p. A-29, 35-36). If no employer is found in the local counties, then the computer system checks statewide. If none, then it checks nationwide. The system then determines the highest number of employees during the applicable quarters. (R. Vol. 2 p. A-29, A-35). In this case, the Department determined that the highest number of employees for a given quarter was 63. (R. Vol. 2 p. A-35-36). Wages subject to taxation in the amount of $7,000.00 per employee was then multiplied times 63 for total taxable wages of $441,000.00. The tax rate assigned to EMC was 2.7%. Thus, taxes assessed to EMC totaled $11,907.00, plus interest and penalties, for the quarter ending June 30, 2004. (R. Vol. 2 p. A-35-36).

Since EMC failed to file wage reports for the following quarter, since the Agency was unable to determine the actual number of employees and wages, an assessment was made for the following quarter ending September 30, 2004. (R. Vol. 2 p. A-36). Mr. Boggan further testified that EMC could remedy the assessments by filing tax reports, which would tell the Department how much EMC actually owes, and which would probably be much less than the assessment. (R. Vol. 2 p. A-37). Mr. Boggan further stated that filing wage reports would not affect EMC's right to continue pursuing its appeal. (R. Vol. 2 p. A-37). Mr. Boggan recommended that EMC file wage reports and pay employment taxes to stop interest and penalties from accruing during the course of their appeal. (R. Vol. 2 p. A-38).

During cross-examination of Mr. Boggan, EMC's attorney, David Grishman, attempted to question Mr. Boggan regarding his knowledge of other demonstration companies that had been held to be employers by the Department. After a lengthy discussion, the Hearing Officer determined that Mr. Grishman would be allowed to question Mr. Boggan insofar as his questioning was to determine the number of classified workers relevant to determining the tax rate applicable to other such businesses. (R. Vol. 2 p. A-40). However, the Hearing Officer stated that it did not have jurisdiction over the status issue of whether an employer/employee relationship existed between demonstrators and EMC. (R. Vol. 2 p. A-41-46).

After this ruling by the Hearing Officer, Mr. Grishman stated that he had no further questions for Mr. Boggan; and he moved for adjournment of the hearing until after the Board of Review ruled upon whether EMC's appeal of the status issue had been timely filed. (R. Vol. 2 p. A-46). The Hearing Officer overruled Mr. Grishman's motion, stating that the Board of Review was well aware of the other matters on appeal before it, and this hearing had been scheduled at Mr. Grishman's

requests. (R. Vol. 2 p. A-46-47). At that point, Mr. Grishman moved that the hearing be determined a denial of EMC's due process, because of the limitation placed upon it. (R. Vol. 2 p. A-47). Mr. Grishman made this motion even though the extensive correspondence between the Department and Mr. Grishman made it very clear that the hearing would be limited to whether the assessments made on the employer's failure to file quarterly wage contribution reports was correct. (R. Vol. 2 p. A-3, A-4-6, A-7-8, A-15-16, A-19, A-20, and A-21-22). After making this motion, Mr. Grishman was asked who he would call as a witness for the employer, to which he replied Sandra Watson. (R. Vol. 2 p. A-47). Mr. Grishman also tendered two large tabbed volumes as Employer Exhibits 1 and 2. (R. Vol. 2 p. A-48).

Ms. Sandra Watson stated that she had been employed by EMC for eight years; and that for the last two years, she has been employed as vice-president of operations. (R. Vol. 2 p. A-51). Ms. Watson briefly described EMC's business. (R. Vol. 2 p. A-52-54). She acknowledged that she was familiar with the Department's assessments; and stated that she had not received an assessment for the quarter ending December 31, 2004. (R. Vol. 2 p. A-55-56).

Ms. Watson was questioned as to its list of demonstrators, which was identified as contained at Tab 8 of Employer Exhibit 1. (R. Vol. 2 p. A-57). However, Ms. Watson also stated that this list contained other vendors providing services to EMC, such as utilities, etc. (R. Vol. 2 p. A-57-58). Mr. Grishman was questioned by the Hearing Officer as to this list, to which he stated that he purposely concealed the different demonstrators names and part of their social security number. (R. Vol. 2 p. A-62).

Ms. Watson was also questioned as to why EMC had not completed the quarterly wage reports sent to it by the Department. Ms. Watson stated that it did not complete the wage reports

because EMC did not have any demonstrator employees, and it had appealed the Department's determination in that regard. (R. Vol. 2 p. A-58). Ms. Watson was asked whether EMC had any information or evidence to offer to show that the Department's assessment was incorrect, other than her statement that EMC did not consider any demonstrators employees. (R. Vol. 2 p. A-63-64). Ms. Watson replied that she did not. Ms. Watson stated that she did not have anything to add to the record at this time in that regard. (R. Vol. 2 p. A-64). Ms. Watson was also asked whether she had any information to offer to show that Mr. Boggan's assessment based upon 63 workers was inaccurate. (R. Vol. 2 p. A-64). Ms. Watson replied that she did not understand the question. (R. Vol. 2 p. A-65). Ms. Watson then stated that the only other things she had to offer were various case studies or other documents indicating that demonstrators should not be considered employees. (R. Vol. 2 p. A-65).

At this point, an objection was made to admission of Employer Exhibits 1 and 2 into evidence insofar as it contained argument that demonstrators are not employees, which the Hearing Officer had previously ruled was not relevant to the assessment hearing. (R. Vol. 2 p. A-68). Mr. Grishman was questioned in that regard; and stated that other than Tab D and Tab 8 and the pages behind Tab 8 identifying vendors, the remainder of Employer Exhibit 1 and 2 consisted of argument. (R. Vol. 2 p. A-68-70). Thus, the Hearing Officer ruled that the documents found at Tab 8 and D of Employer Exhibit 1 would be admitted into evidence as Employer Exhibits 3 and 4. (R. Vol. 2 p. A-71-72). The Hearing Officer also stated that letters between Mr. Grishman and the Department contained in Employer Exhibit 1 would also be admitted into evidence. (R. Vol. 2 p. A-72-74).

Mr. Grishman again attempted to question Ms. Watson about facts relating to the status issue. (R. Vol. 2 p. A-76). When an objection was made, the Hearing Officer sustained the objection stating

that the status issue was on separate appeal to the Board of Review, although based upon the timeliness of that appeal. (R. Vol. 2 p. A-78).

On cross-examination, Ms. Watson was questioned regarding the efforts that were made to determine wages paid to Mississippi demonstrators. (R. Vol. 2 p. A-83-90). Ms. Watson acknowledged that EMC does have addresses on Mississippi demonstrators, and that she could determine amounts paid to those demonstrators during the year 2004 over $600.00 by going through the 1099s issued to them. (R. Vol. 2 p. A-85). However, Ms. Watson stated that she had not done that, because the Department requested wage reports on a quarterly basis; and EMC did not keep pay records in that manner. (R. Vol. 2 p. A-85-86). However, she stated that she could identify those persons receiving checks during 2004; and there were other persons in the company that could assist her. However, she insisted that her accounting system was not set up to calculate wage reports in this manner.

In closing statements, Mr. Grishman alleged that he and EMC had been "blind-sided" by the Department. In rebuttal, it was pointed out that the General Counsel, John Garrett, wrote Mr. Grishman a letter dated February 10, 2005, identifying the statutes under which the hearing would be conducted. Further, it was pointed out that EMC has had since April of 2004, almost a year earlier, to put together wage information, even if they had not previously kept that information in their system in a format to easily compile that information. Mr. Garrett's letter to Mr. Grishman dated February 10, 2005, is contained within Employer Exhibit 1 at Tab F. (R. Vol. 2 p. A-96-98, Employer Exhibit 1, Tab F).

In Counsel for EMC's Brief, EMC argues for ten pages of EMC's Brief that the Department violated EMC's due process rights by failing to follow proper administrative procedures.

(Appellant's Brief p. 15-26). However, the record in this matter reflects that EMC was given notices reasonably calculated to apprize it of decisions and hearings, and fair opportunities to be heard on both the untimeliness of its appeal of the status issue, and the appropriateness of the assessment issue. In that regard, EMC presents no case authorities that expand the Supreme Court's ruling in Booth and Wilkerson, supra. Further, the cases cited by Counsel for EMC categorically stand for the proposition that notice and a fair hearing is what is required.

The fact the EMC and its attorneys are frustrated over the Department's notices to EMC alone, and handling of this matter does not violate due process requirements. Their, and EMC's frustration, stems from EMC's failure to timely appeal the Department's decision that its demonstrators are employees of EMC, not any alleged arbitrary or capricious handling of this case by the Department. Counsel for EMC cannot understand that the *Mississippi Rules of Civil Procedure* do not apply to administrative procedures; and that due to the number of employer representatives with whom the Department deals in and number of notices to employers regarding employee's claims, and notices to employers regarding claims, charges or non-charges, tax rates, quarterly wage reporting, and appeals notices and determinations, it is neither practical for the Department to send every determination to a person or entity that claims to be a representative of an employer, nor would the Department know to do so without specific instructions. Further, contrary to EMC's counsel's assertions, the Department has no provision for notice to representatives or attorneys for an employer, the Appeal Regulations in effect at the time of the July 21, 2004 determination, *i.e.* Appeal Regulations D. 3. through 7., deal with notice to representatives, and the requirement that the Department be given notice of parties in interest, Entry of Appearance, and address changes.

Regarding the assessment issue, the primary criticism of the Department was that it delayed in scheduling the hearing on EMC's objection to tax assessments. In that regard, the Department explained in its February 10, 2005 letter that as of July 1, 2004 it was re-organized as a department of the Governor's office. This re-organization also resulted in new management personnel, and necessitated a re-organization of departments, and management and staff personnel within the Department. One particular significant change was that the Commissioners were abolished, and the Board of Review with new members and duties supplanted the Commission. Thus, the Department acknowledged that some delay in scheduling this hearing occurred. (R. Employer Exhibit 1, Tab F). Nevertheless, the sordid picture of alleged delay, delay, delay painted by counsel for EMC in his Brief is not an actuality. In fact, much of the characterization of delay comes from the tone of counsel for EMC's letters to the Department, and his frustration that things are not moving as fast as he would like for them to do so.

Further, delay was, at least in part, caused by EMC failing to respond to the Department's requests for quarterly wage reports for the quarters ending June 30 and September 30, 2004. First notice of assessments were mailed, and subsequently final notice of assessments were December 2, 2004. EMC objected to the assessments and requested a review by letters dated December 6, 2004, and December 9, 2004. (R. Vol. 2 p. A-3-6). Thereafter, EMC's attorney wrote several letters to the Department complaining that the Department had failed to timely set this matter for hearing. (R. Vol. 2 p. A-7-14). **John Garrett, General Counsel, responded on February 10, 2005, explaining the cause for the delay in setting this matter for hearing, and citing the statutes under which the hearing would proceed.** (R. Vol. 2 p. A-15-16). **The hearing was then noticed for March 16,**

2005, stating that the issue to be determined was assessments made regarding EMC's failure to file quarterly contribution reports. (R. Vol. 2 p. A-19).

Certainly these time frames do not justify a finding that the Department violated EMC's due process by a undue delay. Even if there was some delay in conducting the assessment hearing, this delay does not justify the Court in reversing the Department's decisions in this matter. Such delay does not establish that the Department's hearings or decisions were arbitrary or capricious. At worst, the delay may have resulted in EMC being charged some additional interest or penalties, because the length of time for which it has failed to file quarterly wage reports and pay taxes may have been prolonged by a few months. If the Court so rules, interest or penalties can be adjusted during the offensive time frame. However, any unnecessary calculation of interest or penalties is essentially, and ultimately, due to EMC's failure to file quarterly wage reports, and pay taxes, pending its appeal.

Further, once the assessment hearing was held, neither counsel for EMC, nor EMC, made any effort to rectify the assessments. The entire basis of counsel for EMC's defense to the assessments was EMC's difficulty with filing quarterly wage reports, due to its accounting system. Counsel for EMC further defended the assessments based simply on grounds that the demonstrators were not employees, which was not the issue at hand. Pursuant to statute, the assessment hearing was limited to the basis and correctness of the assessments; and the Referee correctly so ruled. As explained herein, the status challenge proceeded separately.

EMC also asserted that Referee Rush did not address counsel for EMC's letter requesting documents. The Appeal Regulations enforce at that time provided that documents may be requested and produced pursuant to M.C.A. Section 71-5-127 (1972, as amended). Since such requests are typically referred to the Legal Department for compliance with this statute, Referee Rush acted

appropriately in referring that request to the Chief of Appeals. Subsequently, the complete Contributions & Status department, *i.e.* tax department file, was given to counsel for EMC prior to the hearing. The complete file was subsequently made part of the record in this matter. Inquiry was made as to information regarding the letter to an attorney for EMC dated February 5, 1996; and none was found. In fact, the Department no longer had this letter; and only became aware of it by EMC's production of the letter.

Counsel for EMC also argued that the Department inappropriately applied Tax Regulation 71 [hereinafter "TR 71"] (A copy is attached to the Department's Brief filed with the Circuit Court as Exhibit "B"). As to applicability of TR 71, and Counsel's argument that the Department had no authority to restrict the scope of the hearing, the Department referred EMC's attorney to TR 71 in response to his requests as to the procedure of the assessment hearing, not the substance of that hearing. Department further informed said attorney that the substance and scope of that hearing was governed by M.C.A. Section 71-5-365 (1972, as amended). The only procedural change or variation from TR 71 was that pursuant to this statute the former Commissioners, no the Board of Review, was designated to make the decision after the assessment hearing, and not the Hearing Officer. Id. Counsel for EMC was informed of these matters in the Department's General Counsel's letter dated February 10, 2005. (R. Vol. 2, Employer Exhibit 1, Tab F).

Regarding the 1996 letter from the Commission to counsel for EMC, interestingly this letter demonstrates that the Department, and former Commission, gives attorneys for employers notices, when requested. Further, regarding whether this letter should be given the effect of *res judicata*, EMC never presented this argument to the Circuit Court; and thus, such an argument was effectively waived; and should **not** be considered by this Honorable Court. Forest Hill Nursing Center, Inc. v.

McFarlan, 2008 WL 852581 (Miss. COA 2008); Smith v. State, —So. 2d—, 2008 WL 2522467 (Miss. 2008); N. Alamo Water Supply Corp. v. City of San Juan, 90 F. 3d 910, 916 (5th Cir. 1996). Further, counsel for EMC's argument that the Department is barred from making the July 21, 2004 determination based upon applying *res judicata* to the 1996 letter is inconsistent. EMC wants the Court not to apply *res judicata* to the July 21, 2004 letter, but to apply *res judicata* to the 1996 letter.

In that regard, based on the very arguments made by counsel for EMC in its Brief, *res judicata* should not apply to the 1996 letter. The 1996 letter does not indicate that any factual determination had been made, but that the EMC case was in the investigative stage, and based upon documents submitted by counsel for EMC, and the Commission's determination that another similar company's workers were not employees, the Chief of the tax department is notifying EMC that its workers would not be considered employees, **at that time**. (R. Vol. 2 Employer Exhibit 1 tab 3, G, last page). Based upon counsel for EMC's arguments and cases cited in its Brief, if any letter should **not** have the effect of *res judicata*, it should be the 1996 letter. Certainly, this letter should not preclude the Department from making a different decision eight (8) years later, when it does not appear to be in the nature of a final decision; and the Department had been reorganized under a different arm of government, and different management and control. Nevertheless, this issue and argument was not presented to the Circuit Court in the manner presented to this appellate Court; and thus, was effectively waived; and should not be allowed to be presented as an issue in this appeal. Id.

CONCLUSION

EMC 's appeal of the Department's July 21, 2004 decision in this matter was filed **eleven (11) days late, being on August 11, 2004**. The date of filing is not disputed. Since there is ample

evidence to support the decision of the Department holding that EMC did not timely file its appeal, and did not establish good cause for untimely appealing, the Department's dismissal of EMC's appeal should be affirmed by this Honorable Court. Further, the Product Connections decision should not apply to this case, since the issue here is failure to exhaust administrative remedies; and Product Connections was decided by the Court of Appeals long after EMC failed to exhaust its administrative remedies. For the same reason, EMC should be precluded from asserting that the July 21, 2004 Department decision does not apply to all persons similarly situated to Donis Chatham, claimant, as so aptly recognized by Circuit Court Judge Tomie Green. Further, the 1996 letter should not bar the Department's decision in this matter, because it was not in the nature of a final decision, and because EMC argues that *res judicata* should apply to that decision for the first time on this appeal to this Court.

Regarding the Department's assessment of EMC for unpaid employment taxes for the quarters ending June 30 and September 30, 2004, the Department was authorized to make this determination by statute. M.C.A. Section 71-5-365 (1972, as amended). Further, the Department made this determination based upon its general procedures; and clearly explained this process at the assessment hearing. Conversely, EMC failed to offer any proof indicating that the Department's assessment determination was incorrect. Thus, the Department's determination upon the assessments was correct and should be affirmed.

Regarding the Hearing Officer's refusal to allow testimony upon and consider the merits of this case at the hearing, the notice of hearing letter clearly stated that the hearing would be limited to whether EMC's appeal was timely filed. The Hearing Officer explained that circumstance in

detail before the hearing began. Further, the Hearing Officer informed Mr. Grishman that the Department did not have jurisdiction to consider the merits of the case.

In that regard, in the event that this Honorable Court ruled in EMC 's favor on the timeliness issue, or any other issues entitling EMC to a hearing on the merits of the status issue, the Court should remand this matter for a hearing on the merits, pursuant to the Department's authority to make the initial decision on such matters. M. C. A. Section 71-5-355(2)(b)(1972, as amended). Thus, even though counsel for EMC addressed the merits of this case in its Brief, counsel for the Department is not addressing the merits of the case in this Brief.

RESPECTFULLY SUBMITTED, this the 8th day of August, 2008.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

BY Albert Bozeman White
ALBERT BOZEMAN WHITE

OF COUNSEL:

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CERTIFICATE OF SERVICE

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

David B. Grishman, Esq.
Benjamin C. Windham, Esq.
Watkins Ludlam Winter & Stennis, P.A.
Attorney for Appellant, EMC Enterprises, Inc.
633 North State Street
Jackson, MS 39202

Honorable Tomie T. Green
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

This, the 8th day of August, 2008.

ALBERT BOZEMAN WHITE

APPEALS REGULATIONS

OF

THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

SECTION

TR-57

BOARD OF REVIEW

TR-65

TR-21

As amended by the Board of Review through

October 13, 2000

Administered By

Mississippi Employment Security Commission

1520 West Capitol Street

Jackson, Mississippi

Exhibit "A"

71-5-533, Miss. Code 1972, the provisions of the next preceding sentence herein shall apply insofar as they may be applicable.

D. GENERAL REGULATIONS APPLICABLE TO ALL APPEALS.

1. Subpoenas.

(a) Subpoenas to compel the attendance of witnesses and the production of records for a hearing may be issued by a member of the Board of Review or by a Referee before whom the hearing is held. A Referee will determine during the hearing if a necessity has been shown for the issuance of a subpoena.

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

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

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

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

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

3. **Representation before Referees and Board of Review.**

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

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

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

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

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

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

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

(4) In any case in which the claimant and his counsel believe the fee as approved in subsection (1) or (2) above for representation in proceedings before the Referee or the Board of Review is insufficient, the amount of the fee may be appealed by giving notice in writing to the Referee or the Board of Review at the hearing and filing within ten days thereafter a sworn statement, signed by the claimant and his

counsel, of the facts upon which they base their contention. In addition to the written notice and sworn statement, the contention for a larger fee may be presented in person if the proceeding is before the Board of Review, or if the proceeding before the Referee is appealed to the Board of Review on its merits. The Board of Review will render its final decision on any such appeal on the amount of fee at its next regular meeting after receipt of the sworn statement. In appeals on the amount of fee for representation in proceedings before the Referee, the Board of Review may request a statement from the Referee on the reasonableness of the fee being requested.

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

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

4. Waiver of Notice and Entry of Appearance.

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

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

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

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

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

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

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

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

7. **Notices from the Appeals Department.**

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

8. **Postponements.**

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

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

9. **Failure to Appear Timely at a Hearing.**

(a) A party shall be deemed to have failed to timely appear at a scheduled hearing before the Referee or Board of Review when such party fails to appear at the location of the hearing within 10 minutes after the scheduled time for such hearing. For purposes of this section, a party to a telephone hearing shall appear by telephoning the designated Appeals Department