

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CC-00013**

RONNIE ALEXANDER, ET AL.

APPELLANTS

VS.

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND
MISSISSIPPI POLYMERS, INC.**

APPELLEES 

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record Appellee, Mississippi Polymers, Inc., 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.

Ronnie Alexander – Appellant

Willie L Barnes – Appellant

John Lewis Barnett – Appellant

Smith L. Benjamin – Appellant

William E. Benjamin – Appellant

Connie M. Bivens – Appellant

Richard A. Bobo – Appellant

Brian M. Bradley – Appellant

Marion V. Brown – Appellant

Johnny B. Bullard – Appellant

Danny R. Burcham – Appellant

Troy A. Burks – Appellant

Phillip Burrese – Appellant

Jasen Carter – Appellant

Mark Casto – Appellant

James L. Cole – Appellant

Richard K. Cook – Appellant

Dennis Corbitt – Appellant

Harold Cornelison – Appellant

Dwight Cummings, Sr. – Appellant

Donald R. Davis – Appellant

Melvin L. Davis – Appellant

Robert C. Dilworth – Appellant

Carla Lynn Edgeston – Appellant

Timothy W. Ellis – Appellant

Ray Ellsworth – Appellant

John W. Emerson – Appellant

William Tommy Farr – Appellant

Kerry Fiveash – Appellant

Rufus Glen Fiveash – Appellant

Amos Flanagan – Appellant

Jacky Forsythe – Appellant

Gerald D. Foster – Appellant

Rodney Franks – Appellant

Tim Green – Appellant

Jerry Gurley – Appellant

Sandra Hale – Appellant

Lewis R. Harris – Appellant

Jeffrey L. Henderson – Appellant

Jackie Hunt – Appellant

T. L. Hurd – Appellant

Chris Hutchins – Appellant

Johnny R. Inlow – Appellant

Jason D. James – Appellant

Billy A. Johnson – Appellant

Jackie D. King – Appellant

George L. Lambert, Jr. – Appellant

Edward K. Laswell – Appellant

Jerry Luster – Appellant

Tammy Maness – Appellant

Kelsey Martindale – Appellant

Brian McCallister – Appellant

Keith McCalla – Appellant

Benjamin D. McCoy – Appellant

John McDonald – Appellant

Sean Meeks – Appellant

James Moore – Appellant

Norman Moore – Appellant

Jeff Morris – Appellant

Billy Newcomb – Appellant

Paul Newton – Appellant

John Owens – Appellant

Robert Palmer -- Appellant

Barbara Patterson -- Appellant

Clyde Patterson -- Appellant

Glenda Patterson -- Appellant

Alonzo Patton -- Appellant

John Peeble -- Appellant

J. W. Perkins -- Appellant

Timothy Phillips -- Appellant

Timothy Pierce -- Appellant

Steven Pippenger -- Appellant

Kenya Prather -- Appellant

Yolanda Ragin -- Appellant

Jeff Robbins -- Appellant

Donney Rorie -- Appellant

Jessie Sappington -- Appellant

Jeff Settlemares -- Appellant

Eddie Sherard -- Appellant

James Sides -- Appellant

Ivan Simmons -- Appellant

Benjamin Smith -- Appellant

John Smith -- Appellant

Randy Spencer -- Appellant

Willie Suggs -- Appellant

Bernard Toomer -- Appellant

Michael Turner – Appellant

Daphene Vance – Appellant

Henry Walker – Appellant

Richard Wallin – Appellant

Anthony Welch – Appellant

Tammy Whitaker – Appellant

David White – Appellant

Ricky Whitfield – Appellant

James Wilbanks – Appellant

Billy Williams – Appellant

David Wilson – Appellant

Joey Young – Appellant

Mississippi Polymers, Inc. – Appellee

Mississippi Department of Employment Security – Appellee

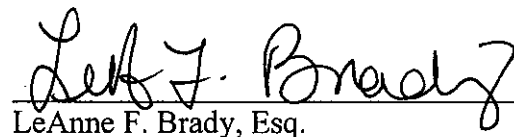
Charles R. Wilbanks, Sr. – Attorney for Appellants

Wendell H. Trapp, Jr. – Attorney for Appellee, Mississippi Polymers, Inc.

Mitchell, McNutt & Sams, P.A. – Attorneys for Appellee, Mississippi Polymers, Inc.

Honorable Paul S. Funderburk – Circuit Court Judge, Alcorn County, Mississippi

This the 25th day of April, 2008.



LeAnne F. Brady, Esq.

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STATEMENT OF ISSUES

- 1) Whether the lower court erred in affirming the Board of Review's decision which adopted the Findings of Fact and Opinion of the Administrative Law Judge finding that the Appellants were prima facie unavailable for work due to a designated vacation or holiday shut down under Mississippi Code Annotated Section 71-5-511(k).

STATEMENT OF THE CASE

This is an appeal by Ronnie Alexander and ninety-five (97) other employees [hereinafter also referred to as "Claimants"] of Mississippi Polymers, Inc. [hereinafter also referred to as "Employer"] of the decision of the Circuit Court of Alcorn County affirming the Board of Review of the Mississippi Department of Employment Security¹ [hereinafter also referred to as "MDES"]. On or about December 18, 2006, ninety-eight (98) employees of Mississippi Polymers filed a claim for unemployment benefits with MDES. (R. p. 1, et al). These Claimants asserted that they were "laid off" for the weeks ending December 23, 2006, and December 30, 2006. (R. p. 1, et al.).

The Claims Examiner investigated the facts and circumstances surrounding this case, and on January 9, 2007, determined that the Claimants were not "laid off," but that these weeks were a "designated holiday recess or vacation period." (R. p. 4, et al). The Claims Examiner disqualified the Claimants because they were not available for work within the meaning of the law. (R. p. 4, et al).

Subsequently, the Claimants asked for a reconsideration of this decision. On February 23, 2007, the Claims Examiner reversed the January 9, 2007, decision and determined that the Employer was closed for "equipment maintenance and inventory," and that the closure was not a "vacation or holiday period" as earlier decided. (R. p. 5, et al). The Claims Examiner allowed benefits for the weeks in question. (R. p. 5, et al).

On February 28, 2007, Mississippi Polymers appealed the decision of the Claims Examiner and a hearing before the Administrative Law Judge [hereinafter also referred to as "ALJ"] was held on April 24, 2007. (R. p. 495-496). Participating in the hearing were the Claimants' representatives, Charles Wilbanks and Larry Bridges; two witnesses for the Claimants, Mark Casto and Alonzo

¹ Pursuant to an official Act of the 2004 Mississippi Legislative Session, the Mississippi Employment Security Commission was re-organized as the Mississippi Department of Employment Security. Thus all references to the Mississippi Employment Security Commission have been changed to Mississippi Department of Employment Security, except as to official case citations or quotations.

Patton; the Employer representative, Donna Weston; and Employer witnesses Jim Jones, David Devon, and Ron Whisenant. (R. p. 500). The ALJ found that the Claimants were “prima facie unavailable for work” because they were off due to a designated holiday or vacation period, and disallowed the claims for the weeks in question. (R. p. 575). The Claimants appealed the ALJ’s decision to the Board of Review on May 17, 2007. (R. p. 579). On July 6, 2007, the Board of Review sent a notice to all parties requesting additional information. (R. p. 581). On July 10, 2008, Mississippi Polymers provided additional information and documentation to the Board of Review. (R. p. 583). After careful review and consideration, the Board of Review adopted the Findings of Fact and Opinion of the ALJ to wit:

FINDINGS OF FACT

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

The ninety-eight claimants who filed a claim for benefits were employed with Mississippi Polymers, Corinth, Mississippi, where they worked in various positions and for varying lengths of time.

The employer closed the plant for a designated maintenance shut down that coincided with the Christmas and New Years holidays. This “Christmas Shutdown”, as it is referred to in the Union Agreement, has occurred every year for at least twenty years. It is standard operating procedure and although the dates may fluctuate, the time frame has remained the same. The employees are paid for two days holiday pay for Christmas and two days holiday pay for New Years.

The plant closed from December 17, 2006, until January 2, 2007. All employees were notified in November 2006, when the dates of the shutdown were posted in advance. The maintenance department worked and the other employees could volunteer to work and conduct inventory. There were not enough positions available for everyone, only approximately thirty, and they were selected based on seniority.

REASONING AND CONCLUSION

Section 71-5-511(k) of the Mississippi Department of Employment Security Law, states that an individual shall be deemed prima facie unavailable for work, and therefore ineligible to receive benefits, during any period which, with respect to his employment status, is found by the department to be a holiday or vacation period.

The claimants who filed claims for unemployment insurance benefits for week(s) ending December 23, 2006, and December 30, were on a regularly scheduled maintenance shutdown which occurs at the same time every year and is standard operating procedure as stated in the Union Agreement. Therefore, the claimants would not be entitled to receipt of benefits during this designated shutdown. The Claims Examiner's decision will be cancelled, and the employer will be afforded a non-charge.

(R. p. 574-575).

The Claimants appealed to the Circuit Court of Alcorn County which affirmed the decision of the Board of Review. The Claimants have now perfected their appeal to this Honorable Court.

SUMMMARY OF THE ARGUMENT

Mississippi Code Annotated Section 71-5-511(k) provides that an individual shall be prima facie unavailable for work and ineligible for benefits during any period during which, with respect to his employment status, is found by the department to be a holiday or vacation period.

In the present case, the ALJ found that the Claimants were prima facie unavailable for work and disqualified them from unemployment benefits. The Appellant argues that this decision is not support by substantial evidence and should be reversed. While there are no case precedents directly on point, there are several cases which offer guidance on this issue. These cases clearly establish one rule regarding employment status. If an employee is "laid off" or the employee is some how separated from the employer, the employee then may be considered for unemployment benefits. If there is no separation, the employee cannot be considered for unemployment benefits.

In the case at bar, the Claimants were not "laid off" nor were they separated from their employment. Each of the Claimants retained their job and returned to work after the scheduled holiday shutdown. Furthermore, their Union Agreement provided for the holiday shutdown and payment for designated holidays. The decision of the lower court affirming the Board of Review is supported by substantial evidence and this Court should affirm.

ARGUMENT

I. Standard of Review

The provisions of Mississippi Code Annotated Section 71-5-531 govern this appeal. That Section states that the appeals court shall consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. Richardson v. Miss. Emp. Sec. Comm'n, 593 So. 2d 31, 34 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n, 583 So. 2d 193, 195 (Miss. 1991); Wheeler v. Arriola, 408 So. 2d 1381, 1384 (Miss. 1982).

In Barnett, the Mississippi Supreme Court held that:

{J}udicial review, under Miss Code Ann. Section 71-5-531 (1972), is in most circumstances, limited to questions of law, to-wit:

In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said shall be confined to questions of law.

Barnett, 583 So. 2d at 195. Furthermore, a rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Miss. Emp. Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994). The appeals court also must not reweigh the facts nor insert its judgment for that of the agency. McLaurin v. Miss. Emp. Sec. Comm'n, 435 So. 2d 1170, 1172 (Miss. 1983).

II. Substantial evidence can be found in the record to support the decision of the lower court to affirm the Board of Review's decision adopting the Findings of Fact and Opinion of the Administrative Law Judge finding that the Appellants were prima facie unavailable for work due to a designated vacation or holiday shut down under Mississippi Code Annotated Section 71-5-511(k).

Mississippi Code Annotated Section 71-5-511(k) provides that an individual shall be prima facie unavailable for work and ineligible for benefits during any period during which, with respect to his employment status, is found by the department to be a holiday or vacation period.

In the present case, the ALJ found that the Claimants were prima facie unavailable for work because the weeks in question were deemed a holiday or vacation period. Since the statute makes it clear that this is not a subjective test, the Court must determine if there was substantial evidence to prove that the weeks in question were, in fact, a holiday or vacation period. MDES submits that the ALJ's decision is supported by substantial evidence.

MDES submits that this is a case of first impression and that there is no case precedent directly on point. However, there are three cases previously decided that can provide some guidance in analyzing the issue: Mississippi Employment Security Commission v. Funches, 782 So. 2d 760 (Miss. Ct. App. 2001); Mississippi State Employment Security Commission v. Jackson, 116 So. 2d 830 (Miss. 1960); Smith v. Mississippi Employment Security Commission, 344 So. 2d 137 (Miss. 1977). These cases clearly establish one rule regarding employment status. If an employee is "laid off" or the employee is some how separated from the employer, the employee then may be considered for unemployment benefits. If there is no separation, the employee cannot be considered for unemployment benefits.

The first case, Mississippi Employment Security Commission v. Jackson, 116 So. 2d 830 (Miss. 1960), is similar to the case at bar. In Jackson, there was a contract between the company and the union that provided for closure of the company facilities during a holiday period. Jackson, So. 2d at 831. The Supreme Court found that during the period of the authorized holiday shutdown, the employees of the company were not "laid off" were not terminated, and that the relationship of employer/employee continued throughout the vacation period. Id. at 832. Therefore, the employees were not entitled to unemployment compensation for that period. Id. The Court emphasized that the status of the employee during a shutdown is the determining factor as to whether the employee is entitled to receive unemployment compensation, specifically finding employees who are not "laid

off” are not entitled to unemployment compensation. In addressing the employees' claims in Jackson, the Supreme Court stated:

It cannot be said that appellees were unemployed within the meaning and purpose of the statute. They were not laid off; their employment had not been terminated, and the relationship of employer and employee continued during the week the plant was closed for the purposes stated. Accordingly, the judgment of the Circuit Court is reversed, and the Order of the Commission denying unemployment compensation benefits to appellees is reinstated.

Id.

In Funches, the employer shut down for a period each summer around the Fourth of July holiday. Funches, So.2d at ¶4. Funches, and other claimants, filed for unemployment benefits for this period asserting that they had been “laid off.” Id. at ¶6. The Court of Appeals looked to the union contract, which specifically stated that certain employees, which included Funches, would be on “lay off” during the summer shut down. Id. at ¶5. The Court of Appeals determined that the claimants were entitled to unemployment benefits holding that, “the agreement provided that active employees without seniority such as Funches would be on ‘lay-off during the shutdown.’” Id. at ¶11. The Court of Appeals held that:

The critical focus must be on whether during the vacation shutdown period, Funches' employment and the employer/employee relationship had already been terminated, or whether it had been just temporarily suspended to be resumed after the shutdown. For us, the answer is clear. According to the Collective Bargaining Agreement, Funches was laid off. Based on the already quoted testimony of company employee, Johnson, Funches' employment and the employer/employee relationship had ended. It came to an end prior to the shutdown, not after, because during the shutdown, Funches was removed from the Delphi Packard Electric's active employment roll.

Id. at ¶18.

Moreover, the Court of Appeals clearly distinguished Funches' status from that of an employee whose employment “had been just temporarily suspended to be resumed after the shutdown.” Id. at ¶11. The Court noted the importance of language found in the Union Contract which specifically provided that active employees without seniority would be on “lay- off” during

the shutdown. The Court of Appeals went further and distinguished Funches from the previous decision of this Honorable Court in Jackson, holding that:

There is one distinct and important difference between our case and Jackson. In Jackson, the union contract was silent on the status of the employees who were not entitled to vacation pay during the shutdown. In our case, Section (101u)(7) of the collective bargaining agreement specifically provides that "[a]n active employee without seniority who is not scheduled to work shall be considered on layoff for the entire shutdown.

Id. at ¶11.

The final case is the most factually distinguishable case from the case *sub judice*. In the Smith case, Ms. Smith was laid off from her job while on a leave of absence due to pregnancy. Smith, So. 2d at 138. She filed a claim for benefits and was denied on the grounds that she had left work due to pregnancy. Id. This decision was affirmed by the Appeals Referree, the Board of Review and the Circuit Court of Hinds County. Id. The Mississippi Supreme Court reversed finding that Mrs. Smith and her employer agreed to continue her employment during her pregnancy, and that her employment was terminated at the end of her leave of absence because of a reduction in the employer's work force. Id. at 141.

This case was distinguished by the Court in Funches, and again the importance of the continuation of the employer/employee relationship was emphasized. The Funches employees had a separation in the employer/employee relationship during the shutdown period. The Court in Smith found that due to the agreement between Ms. Smith and her employer, she continued to be an employee during the leave of absence due to her pregnancy. As such, she was therefore ineligible for unemployment benefits during this period. However, once a separation from her employment occurred due to a reduction in force, Ms. Smith was entitled to benefits.²

² While the Appellant cites to Buse v. Miss. Emp. Sec. Comm'n, 377 So. 2d 600 (Miss. 1979), MDES argues that this case is so factually dissimilar to the case *sub judice* that it offers little guidance for the Court. Therefore, MDES has elected not to cite to Buse in its analysis of the issues.

Clearly from these cases, the Court must look to the evidence from the record that supports the ALJ's decision which deemed the Claimants prima facie unavailable for work. For at least the past thirty (30) years, Mississippi Polymers suspended plant operations during the Christmas & and New Year holiday period. (R. p. 503). This was confirmed not only by the Employer's testimony, but the Claimant's representative as well. (R. p. 528). The notice announcing that the plant would suspend operations from December 17, 2006, through January 3, 2007, is entitled "2006 Christmas and New Year's Holidays." (R. p. 539). This notice specifically stated that plant operations would be suspended on December 17, 2006 and resume on January 3, 2007. (R. p. 539). Following the suspension of plant operations, all of the employees remained employed by Mississippi Polymers. (R. p. 502). The Union Agreement specifically designates a Christmas shutdown. (R. p. 508, 512). Furthermore, the Union Agreement designates payment for certain holidays during this period. (R. p. 563).

Clearly, based on these facts, the Claimants were not "laid off" nor were they separated from their employment. As the Funches Court held, when analyzing employment status, the "critical focus must be on whether during the vacation shutdown period, Funches' employment and the employer/employee relationship had already been terminated, or whether it had been just temporarily suspended to be resumed after the shutdown." Funches, So. 2d at ¶18. This test was also confirmed by the Jackson Court. The notice given by Mississippi Polymers to its employees expressly states that plant operations will be suspended and then resumed. Furthermore, the Union Agreement recognizes the holiday shutdown, and does not classify any of the employees as "laid off" during this period. None of the employees were removed from the active employment rolls and all the Claimants retained their employment and returned to work on January 3, 2007. This was a temporary suspension in the employer/employee relationship, and not a termination of said relationship.

The Claimants make several arguments that the Christmas shutdown did not constitute a holiday or vacation as defined in 75-5-511(k). Mainly, the Claimants contend that the suspension of operations during the period from December 17, 2006, through January 3, 2007, was for "lack of work." The Claimants assert that the Employer has had less work for the employees and uses the term "holiday" to define the shutdown in order to avoid paying unemployment benefits. However, the record does not support this contention.

Mississippi Polymers has had a standard business practice of suspending operations during the Christmas holiday for at least thirty years. The Claimants' witness admitted this fact. Additionally, there were jobs that were made available to the employees during this period based on seniority. There was no separation of employment and all the Claimants retained their positions and returned to work on January 3, 2007. Furthermore, the Union Agreement recognizes the holiday shutdown and provides for holiday pay for the employees during this period. Applying the test from *Funches and Jackson*, there was no termination of the employer/employee relations. This was a temporary holiday or vacation period and as such, these employees were unavailable for work. The record supports the findings of the ALJ as affirmed by the Board of Review and the Circuit Court and this Court should affirm.

III. If the Court finds that the weeks in question were not a designated holiday or vacation period, this case must be remanded to the Board of Review to determine which Claimants should actually receive benefits.

MDES asserts that substantial evidence can be found in the record to support the ALJ's decision that the Claimants were prima facie unavailable for work because the weeks in question were a designated holiday or vacation period. However, if this Court should find that the weeks were, in fact, a "lay off," and the Claimants entitled to unemployment benefits, MDES asks that the Court remand this case to determine which Claimants should actually receive benefits.

There is undisputed testimony and evidence that some of the Claimants did not actually sign up to work during the shutdown period. All of Mississippi Polymers employees were given the opportunity to sign up for work available during the shutdown. While work was not available for everyone that signed up, some of the individuals who filed a Claim for benefits did not volunteer for work. The Employer representative testified that some of the employees who filed an unemployment claim did not sign up for work. (R. p. 519). In fact, some of these very employees had seniority and could have worked. (R. p. 519).

This testimony was confirmed by the Claimants' witness. The ALJ specifically asked the Claimants' witness if some of the individuals who filed claims did not sign up to work during Christmas. (R. p. 529). The Claimants' representative responded, "Yes. There were some that did not sign up to work." (R. p. 529).

Additionally, the Board of Review requested copies of the sign up sheets which were provided by Mississippi Polymers. Several Claimants' names do not appear on any of the sign up sheet as volunteering for work during the shut down. For example, Kerry Fiveash and Rufus Fiveash, are listed as Claimants in this matter, but neither of their names appear on any of the sign-up sheets.

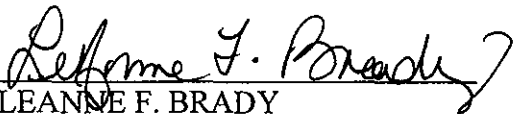
MDES asserts that only those Claimant's who actually signed up and volunteered to work during the shut down should be considered for unemployment benefits. Unemployment benefits are designed for those individuals whose employment is severed through no fault of their own. Any employee who did not sign up for work, clearly did not want to work during this period and refused an offer of suitable work or made themselves unavailable for work and should be disqualified from benefits under the law.

CONCLUSION

The record clearly establishes that the Claimants were prima facie unavailable for work due to a designated holiday or vacation period. There is substantial evidence and law supporting the lower court's decision and this Honorable Court should affirm the Board of Review in this matter. However, if this Court should determine that the weeks in question were not a holiday or vacation period and the Claimants are entitled to unemployment benefits, MDES asks the Court to remand this case to the Board of Review to make a determination as to which Claimants should actually receive those benefits.

RESPECTFULLY SUBMITTED this the 25th day of April, 2008.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY



LEANNE F. BRADY
SENIOR ATTORNEY
MSB NO. [REDACTED]

LEANNE F. BRADY
SENIOR ATTORNEY/MDES
MS. BAR NO. 100793
P.O. BOX 1699
JACKSON, MS 39215-1699
PHONE: (601) 321-6074
FACSIMILE: (601) 321-6076

CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security,
hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing
to:

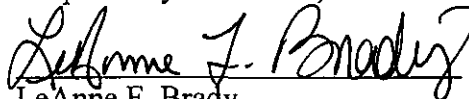
Charles R. Wilbanks, Sr.
Attorney for Appellants
P.O. Box 8020
Corinth, MS 38834

Wendell H. Trapp, Jr.
Attorney for Mississippi Polymers, Inc.
Mitchell, McNutt & Sams, P.A.
P.O. Box 1200
Corinth, MS 38835

The Honorable Paul S. Funderburk
Alcorn County Circuit Court Judge
P.O. Box 1100
Tupelo, MS 38802-1100

This the 25th day of April, 2007.

Respectfully Submitted,



LeAnne F. Brady
Senior Attorney

LEANNE F. BRADY
SENIOR ATTORNEY/MDES
MS. BAR NO. 100793
P.O. BOX 1699
JACKSON, MS 39215-1699
PHONE: (601) 321-6074
FACSIMILE: (601) 321-6076