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

#2

BRIEF OF APPELLEE, MISSISSIPPI POLYMERS, INC.

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for 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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Ronnie Alexander - Appellant

Willie L. Barnes - Appellant

John Louis 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 Burress - 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 Settlemires – 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

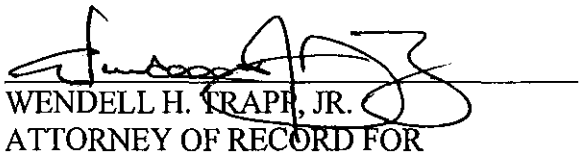
Mississippi Department of Employment Security - Appellee

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.

LeAnne F. Brady, Attorney for Mississippi Department of Employment Security



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ATTORNEY OF RECORD FOR
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STATEMENT OF ISSUES

(1) Can the Appellees (employees) demonstrate that the decision of the Board of Review denying the employees unemployment compensation is not supported by evidence as required by Section 71-5-531, Mississippi Code (1972 as amended).

(2) Can the Appellees (employees) prove that they were laid off, terminated, or that the employer/employee relationship was severed for the period of December 17, 2006, through January 2, 2007, or are the employees disqualified from receiving unemployment compensation by Section 71-5-511(k), Mississippi Code (1972 as amended).

STATEMENT OF CASE

This case is an effort by 96 employees of Mississippi Polymers, Inc. to obtain unemployment compensation for the period of December 17, 2006, to January 3, 2007 (R. 501). Initially, the employees' claims for benefits were denied (R. Vol. I, p. 4). On application by the employees for reconsideration, the original denial of benefits was reversed, and the employees were awarded unemployment compensation (R. Vol. I, p. 5). The employer sought a hearing by an Administrative Law Judge. The Administrative Law Judge received testimony and proof, and rendered a decision on May 22, 2007, reversing the award of benefits to the employees, ruling that the employees were not entitled to unemployment compensation (R. Vol. I, pp. 6-11, 574). The employees sought review. The Board of Review affirmed the decision of the Administrative Law Judge (Vol. I, pp. 12-35). Appeal was taken by the employees to Alcorn County Circuit Court where the rulings of the Administrative Law Judge and Board of Review were affirmed (R. Vol. I, p. 52).

Appellants are 96 employees (employees) of Appellee, Mississippi Polymers, Inc. On November 29, 2006, Mississippi Polymers posted a notice announcing suspension of operations during the Christmas and New Year's Holidays entitled, "2006 Christmas and New Year's Holidays." (R. 539, Appendix). The notice advised that plant operations would be "suspended" from December 17, 2006, to January 3, 2007 (R. 539). Suspension of plant operations during the Christmas/New Year's Holiday period in 2006 was consistent with suspension of operations during the Christmas/New Year's Holiday for the preceding 30 years (R. 503). None of the employees were laid off or terminated. The employer/employee relationship was not severed. All of the employees remained employees of Mississippi Polymers after January 3, 2007 (R. 502, 514). The suspension of operations during the Christmas/New Year's Holiday period was not caused by "lack of work" (R. 508), though there had, at other times of the year, been plant closures due to lack of

work (R. 508, 522, 532). Notices of plant closures for "lack of work" were different than the November 29, 2006, "Christmas and New Year's Holidays" notice (R. 564, 567, 569).

SUMMARY OF ARGUMENT

As the Board of Review found that the employees were not entitled to unemployment compensation, in accordance with §71-5-531, Mississippi Code (1972 as amended), in the absence of fraud, the findings of the Board of Review cannot be overturned as to facts if supported by evidence. Those findings are conclusive. The Board of Review found, as a fact, that the employees were not laid off, and that the period of time at issue was a "holiday" as discussed in §71-5-11(k), Mississippi Code (1972 as amended). That finding is supported by evidence and is certainly not the result of fraud.

Mississippi Polymers, Inc., established a 30 year continuous history of suspending plant operations during the Christmas/New Year's Holidays each year. Suspension of operations during Christmas/New Year's of 2006/2007 was consistent with prior practice. Following the conclusion of the Christmas/New Year's Holiday period, all of the employees returned to work. None of the employees were laid off or terminated. The employer/employee relationship was not severed. The employees, therefore, are not entitled to unemployment compensation and the rulings of the Administrative Law Judge, Board of Review and Circuit Court were appropriate and should be affirmed.

FACTS

Mississippi Polymers, Inc. is a union plant. For in excess of 30 years there has been a suspension of plant operations during the Christmas/New Year's Holiday season (R. 492, Ex. 1). For the 2006/2007 Holiday Season, a notice was posted entitled "2006 Christmas and New Year's Holidays." Appendix. The notice advised employees that continuous operating schedules will be "suspended" on December 17, 2006 and will "resume" on January 3, 2007 (Ex. 1, R. 539). Similar

notices had been posted in previous years for the Christmas/New Year's Holidays (Ex. 1, R. 539-559). Appellants (employees of Mississippi Polymers) applied for unemployment compensation for the period during which plant operations were suspended. In response, Mississippi Polymers submitted a letter to the Mississippi Department of Employment Security discussing the situation (R. 492). The letter specifically discussed a prior conversation between the Mississippi Department of Employment Security and Mississippi Polymers personnel. The letter stated:

> "This is not a lack of work situation. We have had these type shut-downs for 30-plus years. (R. 492)

The employees' claims were initially denied on January 9, 2007. That decision, however, was reversed on February 23, 2007 with the claims being found to be compensable. Mississippi Polymers appealed that decision. The Administrative Law Judge reversed the ruling, and found that the claims submitted by the employees were not compensable. The ruling of the Administrative Law Judge was appealed to the Board of Review. The Board of Review affirmed the ruling of the Administrative Law Judge. From that ruling, the employees appealed to Circuit Court. The Circuit Court affirmed the rulings of the Administrative Law Judge and the Board of Review, from which ruling the employees have taken this appeal.

ARGUMENT

A. Standard of Review:

The Administrative Law Judge found as a fact that Section 71-5-511(k), Mississippi Code (1972 as amended) barred the claims of the employees, which finding of fact was affirmed by the Board of Review and the Circuit Court.

Section 71-5-531, Mississippi Code (1972 as amended) establishes the standard by which that ruling is to be reviewed:

> "In any judicial proceedings under this section, the findings of the Board of Review as to the facts, if supported by evidence, and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."

In Piggy Wiggly of Bay Springs v. Mississippi Employment Security Commission, 465 So.2d 1062 (Miss. 1985), the focus of judicial review is stated as follows:

> "It has long been well settled in this state, that judicial review of an Employment Security Commission Board of Review ruling is limited".

On appeal, an unemployment benefits claimant challenging the Mississippi Employment Security Commission Board of Review's decision has the burden of overcoming a rebuttable presumption in favor of the Board's decision. Hodge v. Mississippi Employment Security Commission, 757 So.2d 268 (Miss. 2000).

Neither a Circuit Court nor a Court of Appeals can reweigh the facts of the case, or insert its judgment for that of the Employment Security Commission. Mississippi Unemployment Security Commission v. Noil, 878 So.2d 1089 (Miss. App. 2004).

Stated similarly is the following passage from Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (Miss. 1992):

> "The principle is well settled that an Order of the Board of Review on the facts is conclusive on the lower court, if supported by substantial evidence and if absent fraud (citations omitted). Where there is the required substantial evidence, this Court has no authority to reverse the Circuit Court's affirmance of the decision of the Board of Review."

B. The Period at Issue Was a Holiday/Vacation Period:

The foregoing makes it clear that a significant legal hurdle must be overcome by the employees in order to obtain the relief they seek. It is respectfully submitted that the Order of the Board of Review, affirmed by the Circuit Court, is supported by the evidence required by §71-5-531. Essentially, the Administrative Law Judge found that §71-5-511(k) foreclosed the efforts of the employees to recover unemployment compensation by finding that the period at issue (December 17, 2006 to January 3, 2007) was a holiday period. That is a finding of fact that was

affirmed by the Board of Review and by the Circuit Court. That finding of fact is supported by evidence in this case, including the following:

(1) The notice announcing that the plant would suspend operations from December 17, 2006 until January 3, 2007 is entitled "2006 Christmas and New Year's Holidays" (R. 539, Appendix).

(2) Mississippi Polymers had a history for at least 30 consecutive years of suspension of plant operations during the Christmas/New Year's Holiday period, though the exact number of days varied from year to year (R503).

(3) The employees' own representative at the hearing admitted that for the 15 year period he had been employed, the plant always had a "shutdown" during the Christmas/New Year's Holiday period (R528).

(4) In the letter from Mississippi Polymers to Dale Groves of the Mississippi Department of Employment Security the period was specifically described as "this is not a lack of work situation" (R492).

(5) Following the suspension of plant operations, all of the employees remained employed by Mississippi Polymers (R502).

(6) The employees were expected to report back to work following January 2, 2007 (R514).

(7) In the "2006 Christmas and New Year's Holidays" notice it was specifically stated that "operations . . . will be suspended," and that operations will "resume." (R. 539, Appendix).

(8) Equally important is the lack of evidence to the contrary. There was no proof offered that any of the employees was terminated, laid-off, or that the employer/employee relationship was severed.

The Administrative Law Judge (as affirmed by the Board of Review and Circuit Court) has already found as a fact that the period from December 17, 2006 through January 2, 2007 was a "holiday or vacation period." According to § 71-5-531, Mississippi Code, 1972, as amended, "the findings of the Board of Review as to facts, if supported by evidence, and in the absence of fraud, shall be conclusive and the jurisdiction of said court shall be confined to questions of law." This provision of law has been uniformly applied. Hoerner Boxes, Inc. v. Miss. Employment Security Comm., 693 So.2d 1343 (Miss. 1997); Melody Manor, Inc. v. McLeod, 511 So.2d 1383 (Miss. 1987); Miss. Employment Security Comm. v. Sellers, 505 So.2d 281 (Miss. 1987); Miss. Employment Security Comm. v. Fortenberry, 193 So.2d 142 (Miss. 1966); Miss. Employment Security Comm. v. Blasingame, 116 So.2d 213 (Miss. 1959); Miss. Employment Security Comm. v. Avent, 4 So.2d 684 (Miss. 1941). As the Board of Review has found as a fact that the period from December 17, 2006 to January 3, 2007 was a "holiday or vacation period," that finding of fact is conclusive if supported by the evidence.

Specific evidence was provided to distinguish between "lack of work," and the "Christmas shutdown" (the time which is at issue in this case).

> "We have had lack of work situations, you know, to where our customer demands were lower, and, you know, we didn't have a choice but to shut down due to lack of work, but our contention is this; these shutdowns at this time of year were not the same as those. There are several references to Christmas shutdowns in the labor agreement." (R. 508)

There were also documents admitted into evidence to point out the distinction between "lack of work" and the suspension of operations during the Christmas/New Year's Holidays (R. 512-513). It was also made crystal clear that the employees were expected to return to work after the suspension of operations:

> "Q. All right. And you always give the dates of return that **all employees are expected to report back for work** as per the memos state for each year for the Christmas and New Year's Holidays?

A. Yes." (R. 514).

The Collective Bargaining Agreement clearly differentiates the Christmas/New Years period from a layoff. At page 70 of the Collective Bargaining Agreement, the following is stated:

> "(e) If the Plant is closed for vacation, or Christmas shutdown, or employee is on vacation they will receive three (3) days funeral pay". (Employer's Exhibit 2, R563).

If the "Christmas shutdown" period were a layoff, an employee would not be entitled to funeral pay. The foregoing provision of the Collective Bargaining Agreement clearly establishes that employees are not "laid off" during the Christmas/New Years Holiday period. In fact, the Christmas/New Years Holiday period is equated to an employee vacation.

Once it is established, as a fact, that the employees were on "holiday" or "vacation", nothing remains other than application of the law. Section 71-5-511(k) of the Mississippi Code (1972 as amended) specifically disqualifies employees from receiving unemployment compensation during "holiday" or "vacation" periods.

> "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."

Section 71-5-511(k) Mississippi Code (1972 as amended). Not only are the terms "holiday" and "vacation" words of import in the above statute; so also is the term "employment status". Can it be said the employees' status was "unemployed?" Can it be said that the employees' were "unemployed" during the Christmas/New Year's Holiday period? By using the term "employment status", it is clear that the statute recognizes as crucial the determination as to whether or not the employee is laid off, terminated, or the employer/employee relationship severed. This, too, has been adjudicated to be determinative by case law.

C. The Employees Were Not Laid Off or Terminated

There is a constant discernible theme in the cases that have been decided with regard to the issue presented by this appeal. The employees have cited Mississippi Employment Security Commission v. Funches, 782 So.2d 760 (Miss. 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); and Buse v. Mississippi Employment Security Commission, 377 So.2d 600 (Miss. 1979). It is respectfully submitted that the Buse case has little, or no, applicability to the case sub judice. The other cases clearly establish a decisive point. If an employee is "laid off" or the employer/employee relationship is severed, or the employee is terminated, the employee is then a candidate for receipt of unemployment compensation. If, on the other hand, an employee is not "laid off," or terminated, and the employer/employee relationship is not severed, the employee is not entitled to such compensation.

In Mississippi Employment Security Commission v. Funches, supra, a case was presented involving a union contract which provided for a shutdown during the summer of each year (around July 4). The union contract expressly provided that certain employees (including Funches) would be on "layoff" during that period of time. Funches and those situated similarly filed claims for unemployment compensation for the period during the summer that they, by union contract, were on "layoff." The Court of Appeals ultimately determined that Funches and the other employees were entitled to unemployment compensation. The ruling of the court however, was clearly based upon the express language contained in the union contract which clearly designated Funches' status as "layoff." In its decision, the Court of Appeals emphasized the import of this express contractual provision:

> "The agreement provided that active employees without seniority such as Funches would be on 'lay-off' during the shutdown."

Further:

> "In our case, Section (101)(u)(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.'"

Based upon the clearly defined contractural status of Funches (on layoff during the summer shutdown), the Court concluded that Funches, and those similarly situated were entitled to unemployment compensation because the employer/employee relationship had been severed, and because Funches and the others had been removed from the employer's active employment roll during that period of time.

> "As stated, Johnson's testimony makes clear that **the relationship of employer and employee between the part-time non-seniority employees is severed** during the shutdown **because they are removed from the active employment roll**. Consequently, for Funches and the others, **post-shutdown work was neither guaranteed nor expected. Therefore, these employees are either laid-off employees as specified in the Collective Bargaining Agreement, or laid-off employees by virtue of being removed from the active roll** as classified by Johnson.
>
> We have already pointed out that **Funches and the others were removed from Delphi Packard Electric's active employment roll during the shutdown.**" (Emphasis added).

In addressing this key issue, the Court stated:

> "**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." (Emphasis added)

The foregoing quotation clearly provides a bright line of demarkation in cases such as these. The Funches Court specifically concluded that if Funches were laid off or terminated during the summer shutdown, Funches was entitled to unemployment compensation. The Court went further however, and clearly distinguished such status from that of an employee whose employment "had been just temporarily suspended to be resumed after the shutdown." Clearly, the Court concluded that during

a temporary suspension of employment during a shutdown, the employee is not entitled to unemployment compensation.

The importance of the language contained in the union contract in the Funches case wherein it was specifically provided by contract that active employees without seniority would be on "lay-off" during the shutdown was emphasized. In fact, that provision was deemed "district and important" in distinguishing the Funches decision from the Supreme Court's prior decision in Mississippi Employment Security Commission v. Jackson, 237 Miss. 897, 116 So.2d 830 (1960).

> "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*'." (Emphasis added).

The Funches Court spoke further of the employees in Jackson, differentiating them from the employees in Funches as follows:

> "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."

Contrary to the employees in *Funches*, the employees in the case sub judice did not have the employment relationship severed, were not removed from the active employment rolls of Mississippi Polymers, were expected to return to work following the holidays, and hence, were not "laid-off". The "2006 Christmas and New Year's Holidays" notice makes it clear that the December 27, 2006 – January 3, 2007 period is a temporary "suspension" of operations by providing the date on which operations are to "resume". Contrary to the employees in Funches, work was available to the employees in the case sub judice in the post-holiday or vacation shutdown period.

The importance of the continuation of the employer/employee relationship was discussed at length by the Funches Court when it distinguished its Funches decision from its decision in Smith v.

Mississippi Employment Security Commission, 344 So.2d 137 (Miss 1977). Though the employer/employee relationship did not continue for the Funches employees during the holiday/vacation period, the employer/employee relationship for Ms. Smith was found to have continued during the period of her pregnancy leave. Whereas Smith was found not to be entitled to benefits during her pregnancy leave (because the employer/employee relationship had not terminated) such distinguished Smith from the Funches employees for whom the employer/employee relationship had been severed. Accordingly, because of that distinction, the Funches employees were deemed entitled to unemployment compensation, whereas Smith was deemed unentitled. The employees in the case sub judice fall within the category of Smith, not Funches. The employer/employee relationship was never severed for the employees in the case sub judice, and they are therefore not entitled to unemployment compensation.

If ever there were any doubt as to the importance of the continuation of the employer/employee relationship during the holiday/vacation shutdown, as the determinative factor in cases such as this, such doubt was succinctly removed by the Funches Court when it labeled such factor as "critical."

> "The critical focus must be on whether during the vacation shutdown period, Funches's employment and the employer/employee relationship had already been terminated or whether it had been just temporarily suspended[1] to be resumed after the shutdown."

The Funches Court specifically found that the employer/employee relationship between Funches and his employer had ended, and accordingly Funches (and similarly situated employees) were entitled to unemployment compensation. The case sub judice, however, presents a polar opposite. Clearly the employer/employee relationship between the employees and Mississippi Polymers was not terminated as clearly established by the evidence, and therefore the employees in the case sub

[1]The "2006 Christmas and New Year's Holidays" notice expressly states that plant operations will be "suspended" and employee schedules will "resume" following the suspension of operations.

judice are not entitled to unemployment compensation. To hold otherwise is to ignore the factor labeled by the Funches Court as "the critical focus" and as "distinct and important."

The Funches case was also distinguished by the Supreme Court in the Funches decision from Mississippi Employment Security Commission v. Jackson, 116 So.2d 830 (Miss. 1960). In Jackson, similar to the case sub judice and similar to the Funches case, there was a contract between the company and the union that provided for closure of the company facilities during a holiday period. 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. Therefore, the employees were not entitled to unemployment compensation for that period.

Jackson, like Funches, also emphasizes 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."

Once again, the critical factor in determining entitlement to unemployment compensation was the determination as to whether or not the applicant for unemployment compensation was laid off/terminated/the employer and employee relationship severed.

In its Jackson decision, the Supreme Court cited cases from other jurisdictions. One such case is Moen v. Director of Division of Unemployment Security, 324 Mass. 246, 85 N.E.2d 779, 8 A.L.R.2d 429 (1949). In that case, the union contract did not designate the status of the employees during a period of shutdown (to be contrasted with union contract in Funches, which expressly defined the status of the employees as being on "layoff"). In Moen, the employees were denied benefits during the period of shutdown with the Massachusetts Court finding those employees to be essentially on vacation without pay. Another case cited by the Jackson Court was Golubski v. Unemployment Compensation Board of Review, 171 Pa. Super. 634, 91 A.2d 315, 30 A.L.R.2d 362 (1952). That case (like Funches) involved a union contract which specifically designated the status of employees during vacation shutdown to be "layoff." For that reason, like Funches, the laid off employees were found to be entitled to benefits. These cases demonstrate the defining factor, i.e., the status of the employees. Are they laid off/terminated? If so, they have the right to propound a claim for unemployment compensation. Are the plant operations simply temporarily suspended with the understanding that the employees will return to work? If so, the employees are not entitled to unemployment compensation benefits.

Another case cited by the employees, Smith v. Mississippi Employment Security Commission, 344 So.2d 137 (Miss. 1977), has less applicability to the case sub judice, though Smith also emphasizes that the deciding factor in cases such as these is whether the employee is on lay-off status. In Smith, the plaintiff (Smith) went on pregnancy leave on August 30, 1974. Her pregnancy leave was scheduled to expire on December 3, 1974. During her pregnancy leave (prior to December 3, 1974), Smith was laid off. Smith filed a claim for unemployment compensation. The court held that Smith was not entitled to unemployment compensation during the period of pregnancy leave, but was entitled to unemployment compensation beginning December 3, 1974, since beginning on that date, Smith was "laid off."

> "Her employer informed the Commission that it was company policy to grant a three-month leave of absence for pregnancy **without terminating the employment**. Pursuant to their agreement, Ms. Smith was supposed to return from leave on December 3, 1974. However, prior to that time, she was informed that because of declining business conditions **her position had been temporarily eliminated, and she was being 'involuntarily' laid off**." (Emphasis added).

Smith claimed that she was involuntarily laid off beginning December 3, 1974. The Court further stated:

> "On August 30, 1974, she and her employer agreed that she would not work until December 3, 1974, and that she would not be paid for that time. Like the employees in Jackson, supra., she was entitled to return to work at the end of that period only if there was work available. As in Jackson, **it cannot be said that she was laid off, and it cannot be said that her employment was terminated.** When there was no work for her at the end of the agreed period, she was entitled to unemployment benefits . . . ." (Emphasis added).

The Court further stated:

> "In this opinion, we hold only that Ms. Smith's employment continued during her pregnancy, by virtue of an explicit agreement with her employer that she would be on leave of absence for three months, and that she would have a job when she returned at the end of that period.
>
> . . .
>
> **Her employment was terminated involuntarily** at the end of her leave of absence **because of the reduction in her employer's workforce**." (Emphasis added).

Based upon the fact that Ms. Smith's employment was terminated (rather than temporarily suspended) as documented by the fact that she had no job at the end of her pregnancy leave, Smith was deemed entitled to unemployment compensation once her pregnancy leave ended. Her situation however, is directly opposite of that of the employees in this case. At the end of the Christmas shutdown, all of the employees in this case had jobs to which they returned. None were laid off. None were terminated. None had the employer/employee relationship severed.

Buse v. Mississippi Employment Security Commission, 377 So.2d 600 (Miss. 1978), a case cited by the employees, has little, if any, applicability to the case sub judice and no comment will be made upon that case.

From the foregoing, it is clearly apparent that a definitive standard exists. If employees lose their jobs, if they are laid off, if they are terminated, if the employer/employee relationship is severed, the employees have the right to propound a claim for benefits. If, on the other hand, a period of shutdown/suspension of operations such as the "Christmas shutdown" in the case sub judice is simply a temporary suspension of operations wherein it is contemplated that the employees will return to their jobs, the employees are not entitled to benefits. Clearly, the employees in the case sub judice fall within the latter category. None of them were terminated or laid off. All of them returned to work for the employer as documented by the record in this case. They do not have the benefit of contract language designating their status as "layoff" to "save" their claims.

With the standard established by the foregoing cases, the only matter remaining is to determine whether or not the employees were "laid off" or their employment terminated. Clearly the evidence establishes that the employees were not laid off; rather the "Christmas shutdown" was merely a temporary suspension of operations as discussed in the cases cited hereinabove. The communication from Mississippi Polymers to the Mississippi Department of Employment Security clearly establishes this fact.

> "This is not a lack of work situation. We have had these type shutdowns for thirty-plus years." (R. 492).

Further, the notice to the employees is entitled, "2006 Christmas and New Year's Holidays." That notice, without any equivocation whatsoever, clarifies that no employees are being terminated

or laid off but rather that the work schedule is being "suspended"[2] and after the "Christmas shutdown" will "resume."

> Continuous operating schedules for the Calendar Laboratory Quality Control, Shipping, Plant, Service and Materials Departments will be **suspended** at 7:00 P.M., Sunday, December 17, 2006 and will **resume** at 7:00 P.M., Tuesday, January 2, 2007.
>
> Non-continuous operations . . . will be **suspended** at 3:00 P.M. . . . and will **resume** schedules at 7:00 A.M., Wednesday, January 3, 2007. Ex. 1 (R539, Appendix).

Similar suspension of operations during Christmas/New Year's had occurred on a consistent basis for at least 30 consecutive years (R. 503). Is it reasonable to assume that there was a lack of work each and every year around the Christmas/New Year's Holiday period for 30 consecutive years? Additional evidence was provided that the "Christmas shutdown" was not a "lack of work" situation, and in fact was distinguished from a "lack of work" "situation.

> "We have had lack of work situations, you know, to where our customer's demands were lower, and, you know, we didn't have a choice but to shutdown due to lack of work, but our contention is this; these shutdowns at this time of year were not the same as those. There are several references to Christmas shutdowns in the labor agreement." (R. 508).

It was made crystal clear by the evidence presented at the hearing that employees were expected to return to work after the "Christmas shutdown."

> "All right. Did you always give the dates of return that **all employees are expected to report back for work** as per the memos state for each year for the Christmas and New Year's holidays?
>
> Yes." (R. 514).

Further, the contract between the union and Mississippi Polymers refers to "Christmas shutdown maintenance clean-up" (R508). Article VII. in paragraphs 12 and 16 refer to the "Christmas shutdown." At no location in the contract is it stated that individuals are "laid off"

[2]In Mississippi Employment Security Commission v. Funches, 782 So.2d 760 (Miss. App. 2001), the term "suspended" was used as the polar opposite of "laid off."

during the "Christmas shutdown." There is nothing contained in the contract to suggest that the employer/employee relationship terminates during the "Christmas shutdown."

D. The Employees' Arguments are Insufficient to Meet Their Burden

The employees argue that the suspension of plant operations did not constitute "holiday" or "vacation" as contemplated by §71-5-511(k). The employees have attempted to support that position by making several arguments.

First, the employees have argued that they were not paid "holiday pay" for the entire period of December 17, 2006 – January 3, 2007, and refer to the Collective Bargaining Agreement which provides holiday pay for Christmas Day, Christmas Eve, New Year's Day and New Year's Eve. It is argued by the employees that those are the only days that therefore can be deemed to be "holidays". Such an argument ignores the distinction between holidays with pay and holidays without pay. Though the employees were entitled by the Collective Bargaining Agreement to pay for four of the days, such does not mean that the remaining days between December 17, 2006 and January 3, 2007 were not holidays or vacation. In fact, the Collective Bargaining Agreement is silent as to the status of the employees during the period at issue, a critical distinction between the case sub judice and the Funches case cited hereinabove. Had the Collective Bargaining Agreement provided that the employees would be considered on "layoff" during the period from December 17, 2006 to January 3, 2007, then, consistent with Funches, the employees would have an argument of entitlement to unemployment compensation. The language of the Collective Bargaining Agreement dictated a finding by the court that the employees in Funches were on "layoff" during the period pertinent to the Funches decision. For the Funches Court to have held otherwise would have been judicially to rewrite the contract between the employees and their employer. In Funches the Court did nothing more than apply the specific language of the Collective Bargaining Agreement which, in crystal clear language, specified that the employees were on "layoff". In the case sub judice, the

employees do not have such language on which to rely and unlike the Funches Court, this Court does not have precise contractual language that dictates the status of the employees for the period at issue. As such, in the absence of contractual language specifying the status of the employees, it is necessary to resort to the statutes and case law. As set forth hereinabove, under such circumstances the pertinent issue is whether or not the employees were laid off, terminated, or the employer/employee relationship was severed. There is absolutely no proof of such in the case sub judice, and therefore, the employees' argument fails.

Secondly, the employees contend that the Administrative Law Judge made inconsistent statements by defining the period as a "holiday" or "vacation" period and by also recognizing that maintenance was performed during that period. There is no contradiction in such language. Though the general plant was on "holiday" the company took the holiday period as an opportunity for certain designated maintenance to be performed. The fact that some maintenance was performed during the "holiday" period does not deprive the period of that status. By analogy there are certain individuals in our society who are required, by their job, to work on holidays, even Christmas Day. The fact that one or more employees work on Christmas Day is not tantamount to finding that Christmas Day is not a "holiday" for those employees who are fortunate enough to be off work on Christmas Day. As to the employees in the case sub judice, the period of time at issue would be no different whether maintenance was performed by the company or not, or whether maintenance was performed by company employees or by third party independent contractors. Whether some maintenance was performed, or not, has nothing to do with whether or not the employees were laid off, terminated, or the employer/employee relationship severed. In fact, the issue of maintenance serves no purpose other than to direct one's attention from the fundamental issue.

Thirdly, the employees contend that the suspension of operations from December 17, 2006 to January 3, 2007 was for "lack of work". This argument, however, is clearly without any proof

whatsoever. No testimony or documentary evidence was presented by the employees to document their claim that the suspension of operations from December 17, 2006, to January 3, 2007, was for lack of work. To the contrary, the employer submitted proof that the suspension of operations was not for lack of work. (R 492, 508).

The employees cite Mississippi State Employment Security Commission v. Jackson, 237 Miss. 897, 116 So.2d 830 (1960). In that case, the company closed for three weeks during the Christmas season. The union contract between the company and its employees provided certain employees with a right to take paid vacation for one week during the week of Christmas. In the Jackson case however, the company closed for three weeks during the Christmas Season "in order to reduce inventory," which was contrary to its typical procedure of closing only one week for Christmas. Obviously, therefore, because the company was closing "to reduce inventory," the company was closing for "lack of work." Such distinguishes Jackson from the case sub judice. There is no proof whatsoever that Mississippi Polymers closed during the 2006/2007 Christmas/New Year's Holidays for a period of time much different than in prior years. Further, there is absolutely no proof that the suspension of plant operations in the case sub judice was due to "lack of work," and in fact, the proof is uncontradictedly to the contrary. Jackson, therefore, is not supportive of the position of the employees. Further, the Jackson case is simply a case in which the Supreme Court found that the Circuit Court should not have taken the extraordinary step of overruling the Board of Review. In other words, the Supreme Court's ruling simply stands for the proposition that the Board of Review's ruling was supported by evidence and not the result of fraud, the standard of review specified by §71-5-531, Mississippi Code (1972 as amended). In fact, virtually the entire Jackson opinion is devoted to confirming the position asserted by Mississippi Polymers in this case, i.e.; that the determinative factor in cases such as these is whether or not the employees have been laid off, terminated, or the employer/employee relationship severed.

CONCLUSION

Both law and fact support the Opinion of the Administrative Law Judge, Board of Review and Circuit Court. It was factually found that the period from December 17, 2006 to January 3, 2007 was holiday/vacation as that term is defined by § 71-5-511(k). Only if there was an absence of evidence to support that finding of fact may it be challenged on appeal. As demonstrated hereinabove, there is a wealth of evidence to support that factual finding, and it is therefore conclusively established and not subject to review.

Likewise, the law is clear. A review of the cases pertinent to this issue reveals that employees are not entitled to unemployment compensation in circumstances such as those presented by the case sub judice. Only when an employee is laid off, or terminated, or the employer/employee relationship is severed, is that employee entitled to unemployment compensation. The cases make it clear that such is the standard. The cases refer to this as "distinct and important" and "critical". There is no proof whatsoever that any of the employees were laid off, or terminated, or that the employer/employe relationship was severed. In fact, the only proof on the subject reveals that all of the employees returned to their employment on January 3, 2007. In fact, the very notice announcing the suspension of plant operations advised employees that the period of time was a "suspension" and gave the employees the date on which they were to "resume" their work schedules. In the face of such proof, it will be necessary to depart from the line of case cited herein to overturn the findings of the Administrative Law Judge, Board of Review and Circuit Court.

It is respectfully submitted that the decision of the Administrative Law Judge, Board of Review, and Circuit Court should be affirmed as same is factually based and properly applies existing law.

This 13th day of March, 2008.

RESPECTFULLY SUBMITTED,

MITCHELL, McNUTT & SAMS, P.A.

BY: _____
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CERTIFICATE OF SERVICE

I, Wendell H. Trapp, Jr., one of the attorneys of record for Defendant, Mississippi Polymers, Inc., do hereby certify that I have this day mailed in the United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, Mississippi Polymers, Inc., to Charles Wilbanks, Esquire, attorney for Petitioners, at his usual mailing address, addressed as follows:

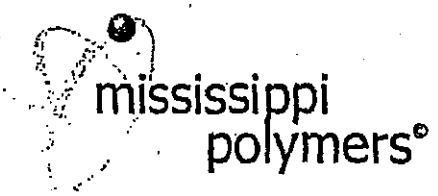
Charles R. Wilbanks, Sr.
Attorney for Petitioners
Post Office Box 8020
Corinth, Mississippi 38834
Miss. Bar No.: [redacted]

Mississippi Department of Employment Security
Legal Department
Post Office Box 1699
Jackson, Mississippi 39215-1699

This the 13th day of March, 2008.

WENDELL H. TRAPP, JR.

Docket 30085 thru
30182-R-07-01-T



EMP. EX.
No. 1

To: All Employees

From: Human Resources

Date: 11/29/2006

Re: **2006 Christmas and New Year's Holidays**

Continuous operating schedules for the Calender, Laboratory, Quality Control, Shipping, Plant Service and Materials Departments will be suspended at 7:00 p.m., Sunday, December 17, 2006 and will resume at 7:00 p.m., Tuesday, January 2, 2007.

Non-continuous operations, including **Laminating, Print, Inspection, Laboratory, Quality Control, Plant Service, and Shipping**, will be suspended at 3:00 p.m., and **Materials** at 11 p.m. on Friday, December 15, 2006 and will resume schedules at 7:00 a.m., Wednesday, January 3, 2007.

The **Maintenance Department** will be scheduled during the shutdown according to the posting in the Maintenance department.

Inventory will be taken on Monday, December 18, 2006 and if necessary on Tuesday, December 19, 2006.

Sign-up lists for volunteers needed to work Inventory, Plant Service and Maintenance will be posted in the guardhouse today.

Paychecks for week ending December 17, 2006 will be available in the Guardhouse after 9:00 a.m. on Tuesday, December 19, 2006. Paychecks for week ending December 24, 2006 will be available in the Guardhouse after 9:00 a.m. on Wednesday, December 27, 2006. Paychecks for week ending December 31, 2006 will be available in the Guardhouse or in your department after 9:00 a.m. on Wednesday, January 3, 2007.

NOTE: *Friday, December 22 and Monday, December 25 will be observed as the Christmas Holidays. Friday, December 29 and Monday, January 1 will be observed as the New Year's Holidays.*

Employer's Exhibit 1
1 of 21 Pages

2733 South Harper Road Corinth MS 38834 TEL (662) 287-1401