

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD TUCKER

APPELLANT

VS.

CASE NO.2008-CC-00329

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND
CLEAN SOURCE, INC.**

APPELLEES

**APPEAL TO THE SUPREME COURT OF MISSISSIPPI FROM THE CIRCUIT
COURT OF MADISON COUNTY**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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I. INTRODUCTION

After Richard Tucker (hereinafter “Mr. Tucker”) was terminated for an undisclosed reason by Betty Tucker (hereinafter “Ms. Tucker”) from Clean Source, Inc. (hereinafter “Clean Source”), Mr. Tucker filed for unemployment benefits with Mississippi Department of Employment Security (hereinafter “MDES” and/or “the agency”). MDES issued a Notice of Nonmonetary Decision with respect to Mr. Tucker’s application, which Mr. Tucker appealed for hearing before an administrative law judge. During the telephone hearing, Ms. Tucker demonstrated a propensity to make false statements and committed fraud upon the proceeding, and the issues now before the Court are whether:

1. The Circuit Court erred in finding that MDES’s factual finding that Mr. Tucker voluntarily left the employment of Clean Source was supported by the evidence, was not made in the presence of fraud, and was not arbitrary and capricious, and;
2. MDES’s consideration of Ms. Tucker’s testimony was beyond the scope of the agency’s power and in violation of the Plaintiff’s constitutional rights as Ms. Tucker committed fraud by offering false information to MDES at the hearing.

II. ARGUMENT

STANDARD OF REVIEW

Review by the Supreme Court of MDES’s decision is limited to questions of law unless it is shown that the facts found by the Department are not supported by the evidence and/or fraud has been committed. Miss. Code Ann. § 71-5-531 (1972 as amended). The Mississippi Supreme Court has stated, “the board’s finding of facts are conclusive if supported by substantial evidence and without fraud.” *Broome v. Miss. Emp. Sec. Comm’n.*, 921 So.2d 334, 337 (Miss. 2006).

Substantial evidence has been defined as evidence which is substantial, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Administrative Law, Encyclopedia of Mississippi Law § 2:97 (West 2001). However, the Supreme Court reviews constitutional and legal decisions of administrative agencies *de novo*. *Clark Printing Co., Inc. v. Miss. Employment Security Comm.*, 681 So.2d 1238 (Miss. 1996).

MDES'S FINDINGS WERE ARBITRARY AND CAPRICIOUS

It is respectfully submitted that Mr. Tucker does not come to this Court seeking a reweighing of the facts of his case, but instead seeks an application of the law to facts that is in accord with the Mr. Tucker's right to due process. While MDES, through its brief, speaks of three witnesses extraneous of Ms. Tucker, those witnesses are Mr. Thomas Tucker, *the husband of Ms. Tucker*, Ms. Sheryl Jones,¹ *Mr. Tucker's ex-wife*, and Silas Stapleton, *an employee of Clean Source, Inc.* It is respectfully submitted that to believe these witnesses are unbiased stretches credulity. The evidence before MDES presented a person who had worked for Clean Source loyally several years, and to find that Mr. Tucker arbitrarily walked away from his job while "pouting" (as described by Ms. Tucker at T.P. 33) is a decision that could only be made on a whim and is arbitrary and capricious.

By ignoring Mr. Tucker's testimony, MDES relied upon the tainted testimony of Ms. Tucker and one of the biased witnesses. MDES's conclusion that Mr. Tucker voluntarily left his employment with Clean Source was not supported by the evidence and was arbitrary and capricious.

¹Ms. Jones and Mr. Tucker have, at best, a difficult relationship, with current contempt and counter-contempt proceedings pending in the Chancery Court of Rankin County.

In its brief, MDES relies upon *Hodge v. Mississippi Employment Security Commission*, 757 So.2d 268 (Miss. 2000); however, this reliance is misplaced. In *Hodge*, there was only disagreement between an employer and the employee about whether the employee voluntarily quit his job. In the present case, in addition to disagreement between the employer and the employee, the employer, Ms. Tucker, demonstrated a willingness to deliberately mislead the ALJ at the hearing. Therefore, in this case, there is more than simple disagreement as to a fact to be determined by the ALJ, and for the ALJ to disregard the testimony of Mr. Tucker while accepting the tainted testimony of Ms. Tucker was arbitrary and capricious.

MDES alleges that Mr. Tucker failed to take action to resolve any issues with his employer. It is respectfully submitted that this is incorrect, as on the evening Ms. Tucker claims Mr. Tucker gave his two-weeks notice, Mr. Tucker went to Ms. Tucker in an attempt to work out any problems Ms. Tucker may have had with him regarding his employment.

T.19.

**MDES'S CONSIDERATION OF BETTY TUCKER'S TESTIMONY WAS BEYOND
THE SCOPE OF THE AGENCY'S POWER AND IN VIOLATION OF THE
APPELLANT'S CONSTITUTIONAL RIGHTS**

MDES's consideration of Ms. Tucker's testimony after it was informed she gave false information at the hearing violated Mr. Tucker's right to a fair and impartial hearing. Miss. Const. Art. 3 § 14 (1890). MDES asserts that because, *inter alia*, the ALJ faxed the disputed documents to Ms. Tucker, the ALJ's consideration of Ms. Tucker's testimony had no residual effect on Mr. Tucker's rights. However, by making that statement, MDES is willing to accept that Ms. Tucker openly misled the ALJ and refuses to concede that her propensity to make statements that are less than fully truthful would affect Mr. Tucker's right to a fair hearing.

The ALJ's consideration of Ms. Tucker's testimony after being informed of Ms. Tucker's deceit was not harmless error. Given that Mr. Tucker bore the burden of proof in the hearing before the ALJ, the truthfulness of the employer must be a paramount concern for the MDES, and the ALJ's consideration of Ms. Tucker's testimony, after being made aware that she blatantly misled MDES, demonstrated that the ALJ held a disparate view of the parties, denying Mr. Tucker an evenhanded, fair hearing. Therefore, the testimony of Ms. Tucker should not be considered, and this Court should determine that Mr. Tucker did not voluntarily leave his employment, and Mr. Tucker should be awarded his due unemployment benefits.

III. CONCLUSION

It is respectfully submitted that the decision of the lower court and the MDES was in error and should be reversed as MDES's decision was not supported by the evidence, was made in the presence of fraud, and was arbitrary and capricious. Further, it is respectfully submitted that the decision of MDES was in violation of Mr. Tucker's right to due process. Upon reversal of MDES's decision, Mr. Tucker should be awarded his due unemployment benefits.

Respectfully submitted, this the 2nd day of September, 2008.

RICHARD A. TUCKER, Appellant

BY: 

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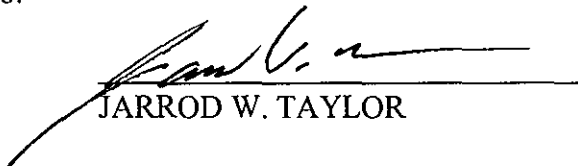
CERTIFICATE OF SERVICE

I, JARROD W. TAYLOR, attorney for the Appellant, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and forgoing to:

LeAnne F. Brady, Esq.
Mississippi Department of Employment Security Commission
1235 Echelon Parkway
Jackson, MS 39213

Hon. William E. Chapman, III
Circuit Court Judge for the Twentieth Circuit Court District
P.O. 1885
Brandon, Mississippi 39043

THIS, the 2nd day of September, 2008.


JARROD W. TAYLOR

IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

CASE NO. 2008-CC-00329

RICHARD TUCKER

APPELLANT

VS.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY and
CLEAN SOURCE, INC.

APPELLEES

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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security "MDES", Appellee
2. Richard Tucker, Petitioner – Appellant
3. Mark C. Baker, Sr., Esq. – Attorney for Appellant
4. Jarrod W. Taylor, Esq. – Attorney for Appellant
5. Clean Source, Inc. – Employer
6. Honorable William E. Chapman, III – Circuit Court Judge for the 12th Judicial District

This the 20th day of August 2008.


LeAnne F. Brady, Esq.

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I. STATEMENT OF THE ISSUE

The Plaintiff/Appellant, Richard Tucker, should be disqualified from receiving unemployment benefits pursuant to Mississippi Code Annotated Section 71-5-513 (1)(a) (2007) because he voluntarily quit his employment with Clean Source without good cause.

II. STATEMENT OF THE CASE

Richard Tucker [also hereafter referred to as "Claimant"] was employed by Clean Source [hereinafter also referred to as "Employer"], as a General Manager/Sales Representative, until his separation in March of 2007. (Vol. 2, R. p. 31-32). The Claimant filed for unemployment benefits, and after investigating the facts and circumstances surrounding this case, the Claims Examiner found that the Claimant voluntarily left his employment without good cause and was disqualified from receiving unemployment benefits. (Vol. 2, R. p. 2-6). Mr. Tucker appealed and a hearing was held before the Administrative Law Judge [hereafter also referred to as "ALJ"] on June 8, 2007. (Vol. 2, R. p. 8-68).

Based upon the testimony and evidence presented at the hearing, the ALJ found the Claimant was disqualified from receiving benefits for voluntarily quitting his position without good cause. (Vol. 2, R. p. 69-71). The Claimant timely appealed to the Board of Review, and after careful review and consideration of the record, the Board of Review affirmed the ALJ's decision, adopting the ALJ's Findings of Fact and Opinion as follows, to wit:

FINDINGS OF FACT

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

The claimant was employed for approximately twelve years last working as a manager/sales representative with Clean Source, Inc., Flowood, Mississippi, ending on March 27, 2007. The claimant voluntarily quit his job this day after having submitted a verbal resignation to the owner, who is also his mother, two weeks earlier.

The claimant went to the owner's home approximately two weeks earlier and advised her that he was submitting his resignation because he could not make it on the money that he was be paid. [sic]

The resignation followed the owner's decision to no longer allow him to clean an account at night.

The claimant advised the owner approximately three months earlier that he needed to earn more money. The claimant requested that he be allowed to clean a certain

account at night. The owner agreed to allow him to do this. They decided that they would consider the claimant's wife as an independent contractor, and she would be paid \$2,000 per month for the cleaning services that the claimant rendered at this account.

The owner discovered that the buildings that claimant was responsible for were not being properly cleaned, so the owner advised that she was no longer going to allow him to clean the account at night.

The claimant maintains he did not voluntarily quit his job. The employer did produce a witness who testified that the claimant told her that he had quit his job.

REASONING AND CONCLUSION

Section 71-51-513A(1)(a) of the Law provides that an individual shall be disqualified for benefits if he left work voluntarily without good cause.

The claimant voluntarily quit his job because the employer decided to no longer allow him to clean a certain account at night as an independent contractor. The claimant went to the owner's home in an attempt to persuade the owner to allow him to continue cleaning the account, and when the owner refused to change her decision, the claimant quit in anger.

The claimant has not shown good cause under the provisions of the Law for voluntarily leaving his job. Therefore, the decisions of the Claims Examiner is in order.

(Vol. 2, R. p. 68-70).

The Claimant appealed the decision of the Board to the Circuit Court of Madison County. (Vol. 1, R. p. 4). The Honorable William E. Chapman affirmed the decision of the Board of Review on January 18, 2008. (Vol. 1, R. p. 20). The Claimant then perfected his appeal to this Honorable Court. (Vol. 1, R. p. 21-28).

III. SUMMARY OF THE ARGUMENT

The primary issue in this case concerns whether the Plaintiff/Appellant, Richard Tucker, voluntarily quit his employment without good cause. While Mr. Tucker disputes that he voluntarily left his job with Clean Source, four witnesses testified that he told them that he had voluntarily left his position.

Mississippi Code Annotated Section 71-5-513 (A)(1)(a) provides for disqualifying persons from benefits otherwise eligible for such acts as leaving work voluntarily without good cause. It is clear from the record that the Claimant voluntarily quit his job. This Honorable Court should affirm the decision of the Board of Review and deny the Claimant unemployment benefits.

IV. ARGUMENT

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).

Mississippi Code Annotated Section 71-5-513 (A)(1)(a) provides for disqualifying persons from benefits otherwise eligible for such acts as leaving work voluntarily without good cause. It will be the employee's, and not the employer's, duty to prove that the reason for the separation from employment amounted to good cause. Miss Code Ann. § 71-5-513 (A)(1)(c) (2007). The statute further provides that quitting work due to "marital, filial, and domestic circumstances and obligations" are not good cause. Miss Code Ann. Section 71-5-513 (A)(1)(a)(2007). The question of whether the claimant voluntarily quit or was terminated is a question of fact to be determined by the

ALJ and Board of Review. Mississippi Employment Security Commission vs. Fortenberry, 193 So. 2d 142, 143 (Miss. 1966).

Although the statute does not define "good cause," it provides that the ALJ shall consider the degree of risk to an employee's health, safety and morals in determining suitability of the work. Miss. Code Ann. § 71-5-513 (A)(3)(a) (2007). Thus, other than provided in this statute, what circumstances constitute good cause must be decided on a case by case basis.

In the case *sub judice*, Mr. Tucker failed to prove that he left his employment for good cause. During the hearing, Ms. Betty Tucker testified for the Employer, along with three other Employer witnesses. Ms. Tucker testified that the Claimant came to her home and gave her his two weeks notice because he could not live on \$100,000 a year. (Vol. 2, R. p 32-33). Mr. Thomas Tucker, who is not affiliated with Clean Source, testified that he was present when Mr. Tucker gave his two-week notice to Betty Tucker. (Vol. 2, R. p. 39). Silas Stapleton, Clean Source's operations manager, testified that the Claimant called him and told him he resigned. (Vol. 2, R. p. 41). Finally, Sheryl Jones, the Claimant's ex-wife, testified that the Claimant told her that he had quit. (Vol. 2, R. p. 45)

While the Claimant contends that he was terminated and did not quit, the record does not support this claim. Four witnesses with firsthand knowledge testified that the Claimant had voluntarily quit his job. This is substantial evidence under the law and Mr. Tucker failed to prove that he was either terminated, or had good cause to voluntarily leave his employment with Clean Source. The facts of this case are similar to those in Hodge vs. Mississippi Employment Security Commission, 757 So. 2d 268 (Miss. Ct. App. 2000). In that case the testimony of the claimant and the employer were in conflict. Hodge, 757 So. 2d at 268. The claimant argued that he was going on an authorized break from work. Hodge, 757 So. 2d at 268. The employer testified that he told the claimant that it was not time for the break and that if he left work, he would consider that the claimant had quit. Id. Both of these accounts were considered by the Board of Review and the

claimant was denied benefits. Id. The court affirmed, holding that the claimant had not overcome the rebuttable presumption in favor of the Board of Review's decision that he had quit his employment without good cause. Id.

Finally, while Mr. Tucker testified about numerous problems he had with his employer, he did nothing to try and resolve these issues. In Hudson v. Miss. Emp. Sec. Comm'n, 869 So. 2d 1065, 1068-69 (Miss. Ct. App. 2004), the Court noted that an employee's negligible effort to resolve a problem with an employer prior to quitting further supported the Board of Review's decision that Hudson failed to prove he had good cause for leaving employment. This again supports the finding of the Board of Review.

The Appellant argues that the Employer's witness, Ms. Betty Tucker, was impeached to the extent that her testimony should be rendered highly improbably or incredible and that her testimony should be deprived of any probative value. The Claimant asserts that due to this facet, he was not given a fair hearing and that his constitutional rights were violated. However, the testimony in question was regarding the receipt of documents sent to the Employer. According to the record, Ms. Tucker's statements that she did not receive the documents were taken off the record, they were not sworn testimony, and were not made part of the hearing. (Vol. 2, R. p. 12). Furthermore, while it seems clear that the Claimant did send a copy of the documents to her (Vol. 2, R. p. 66), there is no receipt date by Clean Source on the return receipt.

The record also shows that the ALJ faxed those documents to the Employer, so any error that the Agency may have committed was harmless, in that both parties had the documents and had a chance to review them. Furthermore, the documents were admitted into evidence and considered by the ALJ. Finally, the content of these documents appears to have been irrelevant, as they did not provide any evidence regarding the Claimant's separation from his Employment. MDES fails to see how this was prejudicial towards the Claimant.

Even if this Court were to find that Ms. Tucker's testimony lacks any "probative value" and should not be considered, at least three other witnesses testified that the Claimant told them he voluntarily quit his job. The testimony of these other witnesses, even without the testimony of Ms. Tucker, meets the substantial evidence test and supports the decision of the Board.

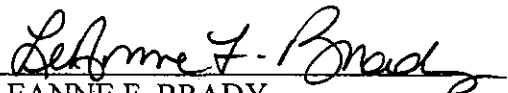
It is clear from the record and under the law that Mr. Tucker did not have good cause to voluntarily leave his job and this Honorable Court should affirm the decision of the Board of Review.

V. CONCLUSION

There is substantial evidence in the record to support the findings of fact and the opinion of the Board that the Claimant did voluntarily quit his job without good cause and is disqualified from receiving unemployment benefits under the Mississippi Employment Security Law. Thus, this Honorable Court should affirm the decision of the Board of Review in this matter.

RESPECTFULLY SUBMITTED this the 20th day of August, 2008.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY


LEANNE F. BRADY
SENIOR ATTORNEY
MS BAR NO. [REDACTED]

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:

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This the 20th day of August, 2008.


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