

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI GAMING COMMISSION

APPELLANT

v.

CAUSE NO. 2008-SA-02066

EDWARD SIMON

APPELLEE

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MISSISSIPPI GAMING COMMISSION'S APPEAL FROM FINAL DECISION OF  
THE TUNICA COUNTY CIRCUIT COURT FINDING COMMISSION'S DENIAL  
OF A WORK PERMIT TO EDWARD SIMON TO ARBITRARY AND CAPRICIOUS

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REPLY BRIEF OF APPELLANT

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STATE OF MISSISSIPPI and  
MISSISSIPPI GAMING COMMISSION

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## ARGUMENT

Simon's arguments before this Court are flawed in numerous ways and are the epitome of what can happen when the law is not followed. Simon goes to great lengths in his brief to circumvent the sole issue before this Court and distract the Court therefrom. While Simon speculates about unfounded conspiracy theories of extortion and unsavory dealings, he fails to cite any authority whatsoever to support his unsubstantiated generalizations. Not once does he discuss Miss. Code Ann. § 75-76-131(5), the very basis of this appeal, or argue that the Commission has incorrectly interpreted applicable statutes or regulations.

### **I. STANDARD OF REVIEW**

Though Simon begins his brief by stating that he makes "no argument against the strict standard which governs the review of administrative agency decisions, and those of the Mississippi Gaming Commission" [Appellee's Brief, page 6], he nonetheless spends the vast majority of his brief attacking the *any evidence* portion of the standard of review. In fact, Simon goes so far in his attack of the *any evidence* standard that he submits his own proposed definitions and examples of what *any evidence* would encompass with absolutely no reference to case law or statutory authority to substantiate his positions.

Despite Simon's meager attempts to convince this Court that "any just cannot simply mean any", the law is clear and well settled in this area. The *any evidence* standard and the *arbitrary or capricious* standard are obviously related. "An administrative agency's

decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *American Legion Post #134 v. Mississippi Gaming Comm'n*, 798 So.2d 445, 450 (¶26)(Miss. 2001)(citations omitted). Similarly, "an action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Id.* Miss. Code Ann. § 75-76-125(3)(a)-(e)(emphasis added) provides as follows:

The reviewing court may affirm the decision and order of the commission, or it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the commission;
- (c) Made upon unlawful procedure;
- (d) Unsupported by *any evidence*; or
- (e) Arbitrary or capricious or otherwise not in accordance with law.

This Court has long recognized the *any evidence* standard set forth by the legislature as it relates to reviewing actions of the Gaming Commission. See *Mississippi Gaming Comm'n v. Freeman*, 747 So.2d 231, 240 (¶ 40)(Miss. 1999); *IGT v. Kelly*, 778 So.2d 773, 775-776 (¶ 8)(Miss. 2001); *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 131 (¶28)(Miss. 2001); *Mississippi Gaming Comm'n v. Pennebaker*, 824 So.2d 552, 555-556 (¶ 10)(Miss. 2002); *Pickle v. IGT*, 830 So.2d 1214, 1219 (¶ 1)(Miss. 2002); *Eash v. Imperial Palace of*

*Mississippi, LLC*, 4 So.3d 1042, 1045 (¶ 9)(Miss. 2009). Accordingly, *any evidence* is the appropriate standard to be utilized upon review.

And while Simon focuses so intensely on the word “any” he fails to acknowledge the word “evidence.” There is more than ample evidence in the record to fulfill the *any evidence* standard and the Circuit Court agreed that the Commission had reason and authority to deny Simon’s application. A well-reasoned decision, by definition, cannot be arbitrary or capricious. The basis for denying Simon’s work permit is his commission of a felony offense. Simon has never contested that he entered a plea of guilty to a felony offense. The court documents reflecting Simon’s entry of a guilty plea to a felony drug offense have been gathered and entered into evidence [Commission ROR Exhibits, pgs. 28-30], along with the Hearing Examiner’s Decision citing case law that neither the Circuit Court nor Simon contest [Commission ROR, pg. 000008-000015]. In fact, the Commission does not know what additional evidence could be more compelling to support its basis for denial than the court documents evidencing Simon’s guilty plea. All applications, other administrative documents, and Commission decisions have additionally been included and entered into evidence.

The statutory language of Miss. Code Ann. § 75-76-131(5) bars the Executive Director from issuing a work permit to a person who has committed a felony offense and the evidence clearly establishes that Simon committed a felony offense. As such, there is no further interpretation necessary. The Commission clearly met the standard of review

and simply carried out its statutorily mandated duties in denying Simon's request for a work permit.

## **II. SIMON HAS NO VESTED RIGHT TO HOLD A GAMING WORK PERMIT**

Simon's argument is fundamentally flawed throughout because it relies on the incorrect assumption that Simon has a constitutional right to a gaming work permit. Furthermore, Simon consistently ignores the fact that each work permit is only valid for three (3) years, expires on its own terms and that a new investigation occurs upon submission of each application. Simon further argues that "reversing the lower court would set a precedent which would grant the Gaming Commission unbridled power over individual Mississippians with no safeguards of due process, rules of evidence, or security in their chosen vocations" and further asserts that it is arbitrary for the Commission to deny Simon a work permit "after thirteen years on the job." [Appellee's Brief, pages 9 and 12-13].

The law is clear and unambiguous. "No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter is a revocable privilege, and no holder acquires any vested right therein or thereunder." Miss. Code Ann. § 75-76-3(5); *see also* Miss. Code Ann. § 75-76-29(4). Simon has previously held work permits but those work permits have long since expired. Each gaming work permit issued is a for a finite period. "No work permit shall be effective for



more than three years from the date of issue.” Mississippi Gaming Regulation II. J. Section 1(b). “[An] application for a work permit is to be made to the executive director and may be granted or denied for any cause deemed reasonable by the commission.” Miss. Code Ann. § 75-76-131(4); *see also* Miss. Code Ann. § 75-76-29(2).

Mississippi Gaming Regulations and the Gaming Control Act clearly state that each work permit is issued for a certain period of time, is not subject to automatic renewal or extension, and that the applicant acquires no vested rights therein. As such, Simon’s assertions that the Commission acted in an arbitrary or capricious manner because Simon has worked in the industry under previous permits are without merit. A gaming work permit is a revocable privilege and no vested right exists therein.

### **III. THE COMMISSION CANNOT ACT IN CONTRAVENTION TO STATUTE**

In his brief, Simon effectively asks this Court to disregard the law. In fact, he takes the State to task for “arguing that it is merely following statutory law.” [Appellee’s Brief, page 4]. His argument can be summarized as a request that the Commission ignore state mandate and be forced to abide by past mistakes. Simon alleges throughout his brief that “there is a total absence of explanation from the Commission” as to why Simon’s most recent request for a work permit was denied when previous requests for work permits had been granted. Although actions taken on previous applications should be immaterial, the Commission will briefly discuss same. In 1998, Simon was denied a work permit by the Commission. In his decision, the Hearing Examiner addressed only the issue of

constructive custody and did not address the issue of commission of a felony despite it also being alleged as the Executive Director's basis for denial. Once a work permit has been denied by the Commission, an applicant may only obtain a work permit thru the unanimous approval process. See Miss. Code Ann. § 75-76-137(3). Unlike Simon's misrepresentation in his brief that the "local gaming official authority" actually requests unanimous approval of an applicant, it is the applicant himself who must make the request for unanimous approval. Specifically, the applicant fills out an application for a work permit at the local field office and it is then submitted for direct review by the Commissioners. The Commissioners review the application and either grant or deny the unanimous approval request.

While the Commission can only speculate now as to why the Commissioners in 1998 granted Simon's request for unanimous approval, it is possible the Commissioners reviewed the Hearing Examiner's decision (which only addressed the constructive custody basis) and granted Simon's request for a work permit because he was no longer in constructive custody of law enforcement. It is likely the Commissioners were simply unaware that the offense committed by Simon rose to the level of a felony offense. In both 2000 and 2003, Simon again requested and received work permits, though it should be noted that he failed to disclose on the 2000 application information relating to his 1997 entry of a guilty plea and answered falsely to questions regarding having been previously denied a work permit by the Commission.

Finding, as the lower court has, the decision of the Commission to be arbitrary and capricious yet in compliance with applicable law, effectively prevents the Commission from carrying out its statutory duties and flies in the face of reason. The overall result penalizes this agency for recognizing a mistake and taking action to correct it. Simon alleges this Court's decision could have "far-reaching implications for gaming in Mississippi" and he is partially right. Should this Court find that the Commission's actions are arbitrary and capricious, it would open a flood gate of applicants who have been rightfully denied to now argue that they too are entitled to a work permit. It would also function to prevent the Commission from rectifying prior mistakes, even where those mistakes are contrary to well-defined statutes, regulations and case law. "Officers of the state ... have no power to authorize the *continuance* of any act or business which is in violation of law ...." *Eastman Oil Mills v. State*, 93 So. 484, 486 (1922)(emphasis added).

In its brief and throughout this process, the Commission has readily admitted that it mistakenly issued Simon work permits after he committed a felony offense. Simon nonetheless argues that the Commission is acting in a capricious manner because it is unable to speculate now about how or why an agent failed to realize Simon pled guilty to a felony offense when processing his previous work permit applications. The Commission strives to maintain consistency with respect to work permit applications, especially with respect to the one instance in the Gaming Control Act where the Executive Director is statutorily barred from issuing a work permit. And while the Commission would like to

assert that mistakes are never made during the application process, human errors occur. As Simon acknowledges, thousands of gaming work permit applications come through the Gaming Commission offices each year. [Appellee's Brief, page 9]. While the Commission is certainly mindful that prior work permits were mistakenly issued, it should not now be estopped from complying with the law.

The statutory language of Miss. Code Ann. § 75-76-131(5) is somewhat unique in that the legislature did not require the applicant to have a *conviction* for a felony offense. Instead, the statute provides that *commission of a felony offense* is sufficient to bar the Commission from being allowed to issue a work permit. In line with that language, the Commission again respectfully points this Court to several Mississippi cases that have been handed down since 1998 that have clarified the law and provided additional guidance to the Commission in how to handle issues relating to non-adjudicated and expunged offenses where the defendant enters a plea of guilty to a felony offense. See *Board on Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1091 (Miss. Ct. App. 1999), cert. denied (2000). See also *Mississippi Bar v. Shelton*, 890 So. 2d 827 (Miss. 2003); *Mississippi Bar v. Baldwin*, 752 So. 2d 996 (Miss. 1999). And while there are no specific cases of non-adjudicated, expunged felonies in relation to a gaming work permit in Mississippi, our sister state has addressed these very issues and ruled in line with *Rushing*, *Shelton* and *Baldwin*. See *Waddell v. State of Louisiana*, 757 So. 2d 680 (La. App. 1st Cir. 1999); *Catanese v. Louisiana Gaming Control Board*, 712 So. 2d 666 (La. App.

1st Cir. 1998); *Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Division*, 710 So. 2d 799 (La. App. 1<sup>st</sup> Cir. 1998), *writ denied* May 8, 1998. So while the Commission may have mistakenly issued Simon work permits in the past, the law has been extensively clarified since Simon's original application.

### CONCLUSION

The final decision of the Commission was neither arbitrary nor capricious. The Commission found a past error and attempted to correct that mistake based upon statutory mandate. See Miss. Code Ann. § 75-76-131(5) Mississippi Gaming Regulation II. J. Section 2(d)(1). There is no hidden agenda, as Simon repeatedly suggests, nor is there a hope by the Commission "to set a precedent and broaden its power and discretion." [Appellee's Brief, page 11]. Simon is by no means the first individual who has been denied a work permit by this Commission because he entered a plea of guilty to commission of a felony offense.

It is important to remember that each work permit is issued only for a finite period of time (3 years), that possession of a work permit is a privilege, and that no rights vest therein. Though it is easy to shift focus to the prior work permits issued, the very basis of this appeal is not whether the past permits were issued in error but whether the Commission's most recent decision was correct. The fact that Simon was issued work permits in the past, in contravention of law, simply does not entitle him to the issuance of future work permits.

This is not a case where the Commission has discretion in issuing Simon a work permit. The Commission is statutorily barred from issuing work permits to those individuals who have "committed, attempted or conspired to commit a crime which is a felony in this state or an offense in another state or jurisdiction which would be a felony if committed in this state." Miss. Code Ann. § 75-76-131(5) and Mississippi Gaming Regulation II. J. Section 2(d)(1). The lower court found that the Commission was within its statutory authority and that no constitutional rights were violated but nonetheless held the decision of the Commission to be arbitrary and capricious. The Mississippi Supreme Court has previously held that, "if a decision is one which could be considered 'fairly debatable', then it could not be considered arbitrary or capricious." *Pennebaker*, 824 So.2d at 556 (¶ 12)(citing *City of Biloxi v. Hilbert*, 597 So. 2d 1276, 1280-1281 (Miss. 1992)). The Commission's decision to deny Simon's work permit was more than fairly debatable. The decision was made according to reason and in accordance with all applicable statutes and case law. As such, the Commission's decision to deny the work permit of Edward Simon for commission of a felony offense was neither arbitrary nor capricious.

WHEREFORE, PREMISES CONSIDERED, the Mississippi Gaming Commission hereby requests this Honorable Court reverse the Order of the Circuit Court of Tunica County, Mississippi, finding the denial of a work permit to Edward Simon to be arbitrary and capricious.

RESPECTFULLY SUBMITTED, this the 14<sup>th</sup> day of August, 2009.

**STATE OF MISSISSIPPI and  
MISSISSIPPI GAMING COMMISSION**

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**CERTIFICATE OF SERVICE**

I, Deanne Brodrick Saltzman, Special Assistant Attorney General, of counsel for the Mississippi Gaming Commission, do hereby certify that I have this day caused to be mailed via U. S. mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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So certified, this the 14<sup>th</sup> day of August, 2009.

  
DEANNE BRODRICK SALTZMAN