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**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS**

**CASE NO. 2009-CC-00859**

**SUN VISTA, INC.**

**PLAINTIFF/APPELLANT**

**V.**

**MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY AND  
DAVID ALFORD**


**DEFENDANT/APPELLEE**

**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, Appellee
2. Honorable LeAnne F. Brady, Esq., Attorney for Appellee
3. Nathan L. Prescott, Esq., Attorney for Appellant, Sun Vista, Inc.
4. Sun Vista, Inc., Employer
5. David Alford, Claimant
6. Honorable W. F. Coleman, Circuit Court Judge

This the 26<sup>th</sup> day of March, 2010.

  
LeAnne F. Brady  
Senior Attorney (MSB #100793)  
Mississippi Department of Employment Security

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### **STATEMENT OF THE ISSUE**

Whether the Board of Review's decision finding that an employer/employee relationship existed between the Claimant, David Alford, and the employer, Sun Vista, Inc., pursuant to Mississippi Code Annotated Section 71-5-11 J(14), should be affirmed.

## STATEMENT OF THE CASE

On April 24, 2007, David Alford [hereafter also referred to as "Claimant"], filed a claim for unemployment benefits with the Mississippi Department of Employment Security [hereafter also referred to as "MDES"]. (R. Vol. 3, p. 1). Mr. Alford claimed wages with Sun Vista, Inc. [also hereafter referred to as "Employer"] for the period of October 1, 2006, through November 22, 2006. (R. Vol. 3, p. 1). Initially, no wages were found for the Employer and the Claimant filed a request for reconsideration. (R. Vol. 3, p. 3-4). Due to the failure of the MDES Benefit Department to locate an account for the Employer, an investigation was conducted by the MDES Tax Department. (R. Vol. 3, p. 6-17). The Chief of the Tax Department issued a decision on September 11, 2007, finding that an employer/employee relationship existed between Sun Vista, the Claimant and others in this class. (R. Vol. 3, p. 18-19).

The Employer filed a Notice of Appeal of this decision on September 17, 2007. (R. Vol. 3, p. 21). A telephonic hearing before the Administrative Law Judge [also hereafter referred to as "ALJ"] was held on December 7, 2007, for the purposes of determining whether an employer/employee relationship existed. (R. Vol. 3, p. 22). Participating in the hearing for the MDES Tax Department was Status Specialist, Noreen Prouty. (R. Vol. 3, p. 42). MDES Tax Field Representative, Larry Ladner, also testified. (R. Vol. 3, p. 79). Fred Mannino represented the Employer and produced two witnesses, James R. Gurley, secretary-treasurer of Sun Vista, Inc.; and Jeffrey Armstrong, an independent contractor who had worked with the Claimant. (R. Vol. 3, p. 53 & 95). The Claimant, David Alford, while subpoenaed by MDES, failed to participate. (R. Vol. 3, p. 109).

After considering all the testimony and the evidence, the ALJ affirmed the decision of the Tax Department and found that an employer/employee relationship did exist between the Employer and the Claimant and that wages paid to all individuals in this class should be reported

and paid. (R. Vol. 3, p. 109-112). The Claimant filed an appeal of the ALJ's decision to the Board of Review on December 27, 2007. (R. Vol. 3, p. 113). On March 2, 2007, the Board of Review adopted the Findings of Fact and Opinion of the ALJ as follows, to wit:

### **FINDINGS OF FACT**

Sun Vista, Inc., Waveland, Mississippi is engaged in the business of building and renovating homes. The company considers all individuals working for the business to be subcontractors and does not pay an unemployment insurance tax on anyone.

On October 20, 2006, David Jeremy Alford contacted the employer seeking work. The company presented the claimant with an independent contractor agreement. The claimant signed the independent contractor agreement. The employer allowed the claimant to begin working as a construction worker. The company did not require that the claimant submit a bid.

The company had another individual, Jose Delacruz, supervise the claimant. Jose Delacruz signed the same independent contractor agreement as did the claimant.

The company was unable to furnish a contact with Jose Delacruz or any documentation to show the Jose Delacruz placed a bid for the jobs. The company did not furnish an address for Jose Delacruz. The employer did not make Jose Delacruz available to testify.

The company did carry Worker's Compensation Insurance on the claimant. The claimant was not required to carry liability or property insurance.

The claimant furnished a hammer, tape, and a nail apron. The claimant also used a hoe, a shovel, and saws. These tools were provided by the employer with no provision as to who would be responsible for the tools if the tools were lost or damaged.

The claimant was not allowed to determine the prices to charge for his services. The claimant was not allowed to delegate his duties or hire a substitute to perform his work.

The claimant performed construct [sic] laborer work on behalf of Sun Vista, Inc., as a rate of pay determined by Sun Vista Inc. The claimant did not submit a bid for the job. The claimant would not have suffered a loss if he decided to stop working. The employer did exercise control and direction through their supervisor Jose Delacruz.

The claimant was required to dig the footings for a concrete driveway and he worked on other job assignments performing various assigned duties.

The claimant does not have a license to engage in the type of work that he performed. The claimant does not advertise his services to the public.

The company required the claimant to work from 8:00 a.m. to 4:00 p.m. Monday through Friday. The claimant was required to take a lunch break at 11:30 a.m. or 12:00 p.m. The claimant was paid \$12.00 per hour for the hours that he worked. The claimant was paid by Sun Vista Inc. Sun Vista Inc. issued a Form 1099 to the claimant for 2006 showing that he was paid \$2,629.00.

## **REASONING AND CONCLUSION**

Section 72-5-22 I (14) of the Law states, in part, that services performed by an individual for wages shall be deemed to be employment subject to this Chapter, unless an until it is shown to the satisfaction of the Agency that such an individual has been and will continue to be free from control and direction over the performance of such service both under his contract of services and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

Agency Regulation TR-11 on independent contractor states, in part, the Law provides that the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant. Generally, the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the service. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

Thus, if two individuals in fact stand in relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.



Whether or not persons performing services, directly or indirectly, for an employing unit are employees depends upon the particular facts in each case. No single test is conclusive and every employing unit claiming the existence of a relationship other than that of employer-employee shall make application to the Agency for determination of its status and shall furnish to the Agency a full and complete statement of all facts concerning its relationship with the person claimed to be an independent contractor, together with a copy of any contract existing between them. All persons performing services for any employing unit shall be deemed employees unless and until this rule shall have been complied with and their status shall have been otherwise determined by the Agency.

The claimant performed construction laborer work on behalf of Sun Vista Inc., at a rate of pay determined by Sun Vista Inc. Services was [sic] performed by the claimant for Sun Vista Inc. for wages. The claimant did not submit a bid for the job. If the claimant decided to stop working he would not have suffered a loss, as would an independent contractor holding himself out to the general public. The employer did exercise control and direction through set wages, hours, duties, and their supervisor Jose Delacruz.

The fact that the claimant signed a contract does not alter the fact that the company had a right to control and direct the claimant as to what and how the work should be performed. The work performed by the claimant was an integral part of the on going operation of the company. The fact that the company issued the claimant a Form 1099 does not change the fact that a master/servant relationship existed.

There existed an employer/employee relationship as defined under Section 71-5-11 I(14) of the Mississippi Employment Security Law. Therefore, the decision of the Chief of the Tax Department is in order.

(R. Vol. 3, p. 109-112).

The Employer then appealed to the Circuit Court of Hinds County. (R. Vol. 1, p. 3). After both parties filed briefs and presented oral argument in this matter, the Honorable W.F. Coleman affirmed the decision of the Board of Review. (R. Vol. 1, p. 15). The Employer then perfected its appeal to this Honorable Court. (R. Vol. 1, p. 22).

## **SUMMARY OF THE ARGUMENT**

Mississippi Code Annotated Section 71-5-11 J(14) provides that services performed by an individual for wages shall be deemed to be employment subject to this Chapter, unless and until it is shown to the satisfaction of the Agency that such an individual has been and will continue to be free from control and direction over the performance of such service both under his contract of services, and in fact; the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

In the present case, the Claimant began working as a construction worker for Sun Vista and was not required to submit a bid. The Employer had another individual, Jose De La Luz Medrano<sup>1</sup>, supervise the claimant. The Employer did not make Mr. Medrano available to testify, nor did the Employer provide any documents evidencing Mr. Medrano's relationship with the employer. The Claimant was provided certain tools, and was required to work from 8:00 a.m. to 4:00 p.m., Monday through Friday. The Claimant was paid \$12.00 an hour for the hours he worked. The Claimant did not have a license to engage in the type of work that he performed, nor did the Claimant advertise his services to the public.

Thus, it is the contention of MDES that the facts found in record prove that the employer controlled the claimant and failed to prove the Claimant was an independent contractor. The decision of the Board of Review finding that the ALJ was correct in determining that an employer/employee relationship existed between the Claimant and Sun Vista, Inc., should be affirmed.

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<sup>1</sup> Mr. Medrano is referred to as Jose Delacruz in the ALJ hearing and also in the ALJ opinion.

## 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. Miss. Employment Sec. Comm'n v. PDN, Inc., 586 So.2d 838, 840 (Miss.1991); 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). The burden of proof in a status case is upon the party seeking to show that the worker is not an employee. Mississippi Emp. Sec. Comm'n v. PDN, Inc., 586 So.2d 838, 840 (Miss. 1991).

II. *The Board of Review's decision should be affirmed, finding that the ALJ's decision was correct in its holding that an employer/employee relationship existed between the Claimant, David Alford, and the employer, Sun Vista, Inc., pursuant to Mississippi Code Annotated Section 71-5-11 J(14)(2007).*

*A. Employer/Employee Relationship*

Mississippi Code Annotated Section 71-5-11 J(14) provides that services performed by an individual for wages shall be deemed to be employment subject to this Chapter, unless and until it is shown to the satisfaction of the Agency that such an individual has been and will continue to be free from control and direction over the performance of such service both under his contract of services and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

In determining the type of employment relationship, whether employee/employer or independent contractor, the factors to consider are:

- (1) The extent of control exercised over the details of the work;
- (2) Whether or not the one employed is engaged in a distinct occupation or business;
- (3) The skill required in the particular occupation;
- (4) Whether the employer supplies the tools and place of work for the person doing the work;
- (5) The length of time for which the person is employed;
- (6) The method of payment, whether by the time or by the job; and
- (7) Whether or not the work is a part of the regular business of the employer.

PDN, Inc., 586 So.2d at 841-42 (citing Miss. Employment Sec. Comm'n v. Plumbing Wholesale Co., 219 Miss. 724, 69 So.2d 814 (1954)). However, the most important factor to be considered in determining whether an individual is an employee or an independent contractor is whether the employer has the right to exercise control over the work of the employee. Estate of Dulaney v. Miss. Employment Sec. Comm'n., 805 So.2d 643, 646 (¶13) (Miss.Ct.App.2002). The Mississippi Supreme Court has previously held that "one may be actually under slight supervision or control but still be an employee where the right of control existed and the service

performed was a part of the regular business of the alleged employer.” Miss. Employment Sec. Comm'n v. Logan, 248 Miss. 595, 600, 159 So.2d 802, 804 (1964).

The Employer in this case argues that the Board’s decision is not supported by substantial evidence, and should be reversed. This argument is based primarily on the fact that the Claimant did not participate in the hearing before the ALJ. Furthermore, the Employer cites a list of “facts” from the record as support for their position that no employer/employee relationship existed between Mr. Alford and Sun Vista.

MDES argues that there is substantial evidence in the record to show that Sun Vista exerted significant control over Mr. Alford. Evidence can also be found in the record which conflicts with many of these “facts” the Employer relies on to support their position.

The Independent Contractor Questionnaire completed by Mr. Alford and submitted into evidence shows that Mr. Alford obtained his job with Sun Vista as a “walk in.” Jim Gurley told the Claimant his rate of pay would be \$12.00 per hour. He had to work from 8:00 a.m. to 4:00 p.m. Monday through Friday and “Jose” was his supervisor. He was given a lunch break and provided some tools by Sun Vista. He was not required to carry liability or property insurance and he had no license to engage in the type of work he did. (See Independent Contractor Questionnaire, (R. Vol. 3, p. 95-97)).

Moreover, this information was bolstered by the testimony of MDES Tax Field Representative, Larry Ladner. Mr. Ladner testified that he interviewed Mr. Alford and was told that Sun Vista told him where to work, what time to be there, and what to do while he was on the job. (R. Vol. 3, p. 80). Mr. Alford also told Mr. Ladner that he was paid by Sun Vista and Sun Vista provided tools to Mr. Alford to complete his work. (R. Vol. 3, p. 81).

The Employer’s Representative, Jim Gurley, also admitted that they carried Worker’s Compensation Insurance on the Claimant and did not require Mr. Alford to carry his own

liability or property insurance. (R. Vol. 3, p. 66-67). Mr. Gurley also admitted that he issued a 1099 to Mr. Alford. (R. Vol. 3, p. 55).

The Employer relies heavily on their contention that Mr. Alford was an independent contractor of a "Mr. Jose De La Luz Medrano." However, the Employer did not produce Mr. Medrano as a witness or provide any documentation to support this claim. Moreover, Mr. Alford signed an independent contractor agreement with Sun Vista, and not Mr. Medrano. (R. Vol. 3, p. 107). He was also issued a 1099 by Sun Vista and not Mr. Medrano. (R. Vol. 3, p. 107)

MDES asserts that the facts found in the record prove that Sun Vista had the right to exercise control over Mr. Alford, and exercised this right on a daily basis. Moreover, Sun Vista failed to show by substantial evidence that Mr. Alford was an independent contractor. MDES asks that this Court affirm the decision of the Board of Review finding that an employer/employee relationship existed between the Claimant, David Alford, and the Employer, Sun Vista, Inc., and that wages should be reported and contributions paid for the Claimant and all similarly situated employees.

*B. Hearsay Evidence*

The Employer asserts that the Board of Review's decision is based largely on hearsay evidence; however, MDES asserts that the Employer did not object to any of this evidence being entered during the hearing, nor did they make this argument to the Board of Review. MDES asserts that Sun Vista has waived its right to argue this issue since it failed to assert it before the ALJ or the Board of Review. This Court has "repeatedly held that an issue not raised before the lower court is deemed waived and is procedurally barred." Public Employee's Retirement System v. Freeman, 868 So. 2d 327 (Miss. 2004); (citing Davis v. State, 684 So. 2d 643, 658 (Miss. 1996); Cole v. State, 525 So. 2d 365, 369 (Miss. 1987)). MDES asserts that since Sun Vista failed to argue this issue before the ALJ or the Board of Review, or circuit court, it is

procedurally barred and cannot be considered now by this Honorable Court. However, MDES will address this issue in its brief if this Honorable Court decides this issue has not been waived.

Hearsay evidence is admissible in an administrative proceeding. The question for this Court to determine is if there was “substantial evidence” in the record to support the Board’s decision. The meaning of “substantial evidence” has been considered by the Mississippi Supreme Court. In Williams v. Mississippi Employment Security Commission & Anderson-Tully Co., the court held:

We are of the opinion the word "evidence" in § 71-5-531 should likewise be construed to mean substantial evidence. Application of the substantial evidence rule to the case on appeal would require reversal because uncorroborated hearsay is not substantial evidence, even though hearsay is admissible in an administrative proceeding.

Williams, 395 So. 2d 964, 966 (Miss. 1981). Also, the Supreme Court has held that:

“Substantial evidence has been defined as ‘such relevant evidence as reasonable minds might accept as adequate to support a conclusion’ or to put it simply, more than a ‘mere scintilla’ of evidence.” Hooks v. George County, 748 So. 2d 678, 680 (¶ 10) (Miss. 1999) (quoting Johnson v. Ferguson, 435 So. 2d 1191, 1195 (Miss.1983)). “Substantial evidence” is not uncorroborated hearsay. Miss. Employment Sec. Comm'n v. Flanagan, 585 So. 2d 783, 785 (Miss. 1991)

Moreover, the Court of Appeals has recently expounded on the meaning of substantial evidence in the case of McClinton v. Mississippi Department of Employment Security, 949 So. 2d 805 (Miss. Ct. App. 2006). In McClinton, the Court of Appeals stated “that if hearsay, even if not corroborated in the traditional sense, is highly probative because it has strong indicia of reliability, it can at least in many situations be substantial evidence.” McClinton, 949 So. 2d at 814-15(¶29). Such hearsay may include properly admitted personal affidavits even where contradicted by the live testimony of a witness, and where there is no corroborative live testimony. Id.

Given this guidance from case law, MDES examines the evidence relied upon by the Board of Review in this matter. First, MDES asserts that the evidence the Employer asserts is hearsay is not hearsay under the law. The Claimant and the Employer completed an independent contractor's questionnaire. These are business documents and are records of regularly conducted activity as defined by Rule 803 of the Mississippi Rules of Evidence. They were made by a person with knowledge, kept in the course of a regularly conducted business activity, and the questionnaires are used in the regular practice of MDES in making status decisions as shown by the testimony of the MDES Tax Specialist Noreen Prouty. As such these documents are not hearsay.

Moreover, the ALJ's Findings of Facts focus on several statements that were corroborated by the Employer's testimony and other documents found in the record. Sun Vista admitted that it carried worker's compensation insurance on Mr. Alford; Sun Vista paid Mr. Alford and issued him a 1099. Thus, based on the holdings in Williams and McClinton, the independent contractor questionnaires, coupled with the testimony of Larry Ladner and Noreen Prouty, and the admissions by the Employer, amount to substantial evidence under the law. Finally, MDES would like to reiterate that the Employer must prove that an employer/employee relationship does not exist. Based on their on admissions during the hearing, they failed to meet this burden. The decision of MDES is supported by the evidence and this Court should affirm.

*III. The Court cannot consider new evidence that was not presented and considered by the Administrative Law Judge or the Board of Review.*

Under Rule 5.01 of the Uniform Circuit and County Court Rules, all administrative cases appealed to circuit court shall be on the record and not a trial de novo. Thus, the official record in this matter is the record made before the agency, and no new evidence can be considered. In the present case, the Employer argues that new evidence has been made available and should be considered by the Court. The Employer has attached to its brief the Independent Contractor



Agreement between Sun Vista, Inc. and Jose De La Luz Medrano; and an affidavit of Mr. Medrano. The Employer argues that MDES should have interviewed Mr. Medrano before making its decision. However, as previously stated, it is the Employer's burden to present any evidence to prove that an employer/employee relationship did not exist. It was the Employer who failed to procure any documents or present Mr. Medrano at the hearing before the ALJ. The Employer provides no reason as to why this document or Mr. Medrano's testimony was unavailable until now. If this evidence was so crucial to proving their case, the Employer should have taken all necessary steps to ensure that it was considered by the ALJ and included in the record. Furthermore, MDES should have the right to cross-examine Mr. Medrano and review the Independent Contractor Agreement. Based on this, MDES argues that this Court cannot consider any of this evidence in making its decision.

Additionally, MDES asserts that even if Mr. Medrano was the Claimant's employer, Sun Vista assumed control and responsibility for the Claimant when it signed an independent contractor agreement with him, signed his paychecks, issued him a 1099 and carried worker's compensation insurance on Mr. Alford. Thus, the argument that Mr. Medrano is responsible for the Claimant is irrelevant.

However, if this Court should find that the Employer had good cause for failing to provide this evidence during the ALJ hearing, MDES asserts that the proper course of action would be to remand this cause back to the Board of Review in order to preserve the due process rights of all parties involved. While MDES maintains that remand is not necessary based on the record, remand would allow Mr. Medrano to give his testimony, it would give MDES the opportunity to cross-examine Mr. Medrano, and it would allow all parties the opportunity to review Mr. Medrano's contract with Sun Vista. If this Court should remand this cause back to the Board for consideration of this evidence, MDES asserts that it is only equitable that the

Board be allowed to attempt to obtain the Claimant's testimony as well.<sup>2</sup> Thus, all relevant parties would be allowed to participate and be cross-examined.

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<sup>2</sup> MDES did subpoena the Claimant, David Alford, to testify at the hearing before the ALJ; however, he failed to appear.

### CONCLUSION

There is substantial evidence to support the findings of fact and the opinion of the Board of Review that an employer/employee relationship existed between the Claimant, David Alford, and the Employer, Sun Vista, Inc., and that wages should be reported and contributions paid for the Claimant and all similarly situated employees. Thus, this Honorable Court should affirm the decision of the Board of Review in this matter.

RESPECTFULLY SUBMITTED this the 26<sup>th</sup> day of March, 2010.

MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY

A handwritten signature in black ink, appearing to read "Leanne F. Brady", is written over a horizontal line.

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**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:

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Hon. Judge W. F. Coleman  
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This the 26<sup>th</sup> day of March, 2010.

Respectfully Submitted,

  
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