

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

CAUSE NO. 2010-CC-01018

JOHN THOMAS

APPELLANT

VS.

CAUSE NO. 2010-CC-01018

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

**BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

**APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY
STATE OF MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

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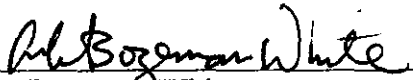
APPELLEE

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. Albert Bozeman White, Assistant General Counsel for Appellee
3. John Thomas, Appellant
5. Honorable Lee J. Howard., Circuit Court Judge

This the 27th day of September, 2010.



Albert Bozeman White
Assistant General Counsel (MSI [REDACTED])
Mississippi Department of Employment Security

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STATEMENT OF ISSUE

1. Whether the Board of Review and Circuit Court decisions finding that Appellant, John Thomas ("Claimant"), failed to timely file his appeal from the Nonmonetary Decision to the Administrative Law Judge, pursuant to *Mississippi Code Annotated* Section 71-5-517 (Rev. 2009), was supported by the evidence, and should be affirmed.

2. Whether the Board of Review and Circuit Court decisions that John Thomas failed to appeal the Nonmonetary Decision timely, and failed to prove good cause for filing his appeal untimely, were supported by substantial evidence.

STATEMENT OF THE CASE

John Thomas [hereinafter also "Claimant"] was employed by Bigbee Transportation, Inc. for approximately one (1) year and two (2) months until his separation on October 31, 2008. (R. Vol 2. p.1). On November 10, 2008, the Claimant filed for unemployment benefits with the Mississippi Department Employment Security [hereinafter also "MDES"]. (R. Vol 2. p.1). An investigation was conducted to determine his eligibility. (R. Vol 2. p. 11-14). The investigation revealed that the Claimant, a truck driver, was discharged for repeatedly refusing to perform his job duty by refusing to deliver an assigned load, after having been previously warned. (R. Vol 2. p. 11-14).

After an investigation, the Claims Examiner determined that the Claimant was discharged from Bigbee for misconduct, because he refused to take a load, after being previously warned, which constituted misconduct. Accordingly, the Claimant was disqualified from receiving unemployment benefits. (R. Vol. 2, p. 17).

A Notice of Nonmonetary Determination Decision was mailed to Mr. Thomas on **January 27, 2009**. The Notice informed the Claimant that if he disagreed with the decision, an appeal or reconsideration must be filed no later than **14 calendar days** from the date the decision was mailed, which was February 10, 2009. (R. Vol. 2, p. 17). Mr. Thomas did not file his Appeal of the Claims Examiner's decision until **October 19, 2009**. (R. Vol. 2, p. 19).

A hearing was held before the Administrative Law Judge [hereafter also "ALJ"] on November 13, 2009, to determine whether the appeal was timely filed to the ALJ, or whether he had good cause for late filing. (R. Vol. 2, p. 29-35). Based upon the testimony and evidence presented at the hearing, the ALJ found the Claimant failed to establish good cause for not filing his appeal within the time limit prescribed by law. (R. Vol. 2, p.44).

The Claimant appealed the decision of the ALJ 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:

In this case, the determination was mailed to the last known address on 01/27/2009. The appeal was filed on 10/19/2009, which was not within the time limit prescribed in the Law, and good cause for failing to meet that time limit has not been established.

REASONING AND CONCLUSION

The determination contained a printed statement notifying any interested party wishing to protest the decision, that a Request for Reconsideration or a Notice of Appeal must be filed within fourteen (14) days of the mail date on the decision.

Section 71-5-517 of the Mississippi Employment Security Law provides that a claimant or any party to the initial determination or amended initial determination may file an appeal within fourteen (14) days after the date such notification was mailed to the last known address.

DECISION

The decision of the Mississippi Department of Employment Security has become final and the Administrative Law Judge is without jurisdiction in the matter. The appeal is consequently DISMISSED.

(R. Vol 2. p.44).

The Claimant then appealed to the Circuit Court of Lowndes County, Mississippi. (R. Vol. 1, p. 2-15). After Briefs were filed, the Circuit Court affirmed MDES's decision on May 28, 2010. (R. Vol. 1, p. 30). Claimant then appealed to this Honorable Court.

SUMMMARY OF THE ARGUMENT

Procedure in a MDES unemployment benefit case is governed by *Mississippi Code Annotated* Section 71-5-517 (Rev. 2009) et.seq. A claimant or employer unhappy with MDES's initial decision has fourteen days from the dated mailed to appeal. Miss. Code Ann. Section 71-5-517 (Rev. 2009); Wilkerson v. Miss. Emp. Sec. Comm'n. 630 So. 2d 1000 (Miss. 1994); Cane v. Miss. Emp. Sec. Comm'n., 368 So.2d 1263 (Miss. 1979).

In the present case, the Claimant failed to timely file his appeal to the Administrative Law Judge. The Claimant does not provide a reason that can be considered good cause for filing his appeal late. Based on the testimony of the Claimant, the Administrative Law Judge found that Mr. Thomas did not have good cause for failing to file his appeal within the prescribed time limit. Therefore, this Honorable Court should affirm the decision of the Board of Review.

ARGUMENT

The provisions of *Mississippi Code Annotated* Section 71-5-531 (Rev. 2009), govern this appeal. That section provides that the Circuit Court will consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, will accept the Findings of Fact if supported by substantial evidence. Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So. 2d 193 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982).

In Barnett, the Mississippi Supreme Court stated 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, if the Board's findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing court must affirm. Id.

In the case *sub judice*, the Claims Examiner determined that the Claimant was not qualified to receive unemployment benefits because he refused a load after being previously warned; and this was considered misconduct connected with the Claimant's work. (R. Vol. 2, p. 17). A Notice of Nonmonetary Determination Decision was mailed to Mr. Thomas on January 27, 2009, making him aware of that decision. In the Notice, there are instructions for filing an appeal and the deadline to do so. (R. Vol. 2, p. 17). Mr. Thomas did not file his appeal until October 19, 2009, approximately eight (8) months after the Notice of Determination Decision was mailed to him. (R. Vol. 2, p. 19).

Mississippi Code Annotated Section 71-5-517 sets forth the applicable appeal time providing, in pertinent part, to wit:

The claimant or any party to the initial determination or amended initial determination **may file an appeal from such initial determination within fourteen (14) days after notification thereof**, or after the date such notification was mailed to his last known address.

Miss. Code Ann. Section 71-5-517 (Emphasis added).

Mr. Thomas testified in his hearing before the ALJ that he remembered receiving the Notice of Nonmonetary Determination. (R. Vol. 2, p. 32). Mr. Thomas did not offer any testimony or evidence establishing good cause for filing his appeal late. (R. Vol. 2, p. 29-35).

Mr. Thomas was afforded all of the notice of the nonmonetary determination to which he was entitled. Since notification was sent by mail to the last known address provided by him, the case of Wilkerson v. Miss. Emp. Sec. Comm'n., 630 So. 2d 1000 (Miss. 1994), is on point and controls as to calculating the appeal deadline. In Wilkerson, the Mississippi Supreme Court held that when notification is by mail, the fourteen (14) day time period begins running from the mailing date. Id. at 1002. Furthermore, while holding that an appeal filed one day late was untimely, the Court stated that the fourteen (14) day time period as set by statute is to be strictly construed. Id. (Emphasis added).

Mr. Thomas has failed to present evidence that would show he had good cause for failing to file his appeal within the prescribed time limit imposed by law. The Board of Review's decision should be affirmed.

CONCLUSION

Mr. Thomas did not file his appeal of the Claims Examiner's decision within the time frame allowed by law and failed to show evidence that he had good cause for his failure. The Board of Review's decision was supported by substantial evidence and this Honorable Court should affirm.

This the 27th day of September, 2010.

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

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CERTIFICATE OF SERVICE

I, Albert Bozeman White, 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 Brief of the Appellee to:

Mr. John E. Thomas
593 Chat-Chew Road
Columbus, MS 39701

Honorable Lee J. Howard
Circuit Court Judge
P.O. Box 1344
Starkville, MS 39760-1344

This the 27th day of September, 2010.



Albert Bozeman White
Assistant General Counsel