IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CASE NO. 2010-CC-01249

WILLIAM R. CROMWELL — **APPELLANT**

V. — **CASE NO. 2010-CC-01249**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND BIG M TRANSPORTATION, INC. — **APPELLEES**

BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY
STATE OF MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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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. LeAnne F. Brady, Senior Attorney for Appellee
3. William R. Cromwell, Appellant
4. Big M Transportation, Inc., Employer/Appellee
5. Honorable Andrew K. Howorth, Circuit Court Judge

This the 3rd day of February, 2011.

LeAnne F. Brady
Senior Attorney (MS[redacted]
Mississippi Department of Employment Security

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STATEMENT OF ISSUE

1. Whether the Circuit Court should be affirmed, finding that the Employer, Big M Transportation, proved by substantial evidence that the Claimant, William Cromwell, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(2010).

STATEMENT OF THE CASE

William Cromwell [hereinafter also referred to as "Claimant"] was employed by Big M Transportation, Inc., [hereinafter also referred to as "Employer"] as a truck driver from January 5, 2008, to May 4, 2009, when he was discharged. (R. Vol. 3, p. 1, 38). Mr. Cromwell was terminated for no longer being able to be covered by insurance, due to having too many at fault accidents. (R. Vol. 3, p. 7).

After termination, Mr. Cromwell filed for unemployment benefits on June 10, 2009. (R. Vol. 3, p. 1). The Claims Examiner investigated the facts surrounding the separation, and found that Mr. Cromwell was discharged from his employment after he had an accident and he was dropped from the insurance provider's policy. (R. Vol. 3, p. 15, 17). The reason for his discharge was considered misconduct connected with his work; therefore, the Claims Examiner disqualified Mr. Cromwell from receipt of benefits. (R. Vol. 3, p. 17).

Mr. Cromwell appealed the decision of the Claims Examiner on June 22, 2009. (R. Vol. 3, p. 19). A hearing before the Administrative Law Judge [hereinafter also referred to as the "ALJ"] was held on October 28, 2009, at which the Claimant and Employer representative participated. (R. Vol. 3, p. 25-47, 52). Based upon the testimony and evidence presented at the hearing, the ALJ found the Claimant was disqualified from receipt of unemployment benefits based on his reason for separation from employment. (R. Vol. 3, p. 52-53).

The ALJ's Findings of Fact and Opinion were as follows, to wit:

FINDINGS OF FACT:

> Claimant was employed by the employer as an over-the-road truck driver four about eighteen months. He was discharged May 7, 2009, after having two (2) preventable accidents within thirty-six (36) months which made him uninsurable by the

employer's insurance company. Claimant was aware of the policy of the employer and it's (sic) insurance company upon hire by receipt of the employee handbook and by having gone through a thorough safety orientation by Tommy Johnson, safety director.

Claimant was otherwise an excellent employee and Mr. Johnson did not consider his actions to be misconduct.

REASONING AND CONCLUSION:

Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he has earned remuneration for personal services equal to not less than six (6) times his weekly benefit amount as determined in each case. Section 71-5-513 A (1) (c) provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.

Section 71-5-355 of the Mississippi Employment Security Law provides, in part, that an employer's experience rating record shall be chargeable with benefits paid to a claimant, provided that an employer's experience-rating record shall not be chargeable if the Department finds that the claimant left work voluntarily without good cause connected with the work, was discharged for misconduct connected with the work, or refused an offer of available, suitable work with the employer.

Mississippi Employment Security Regulation 308.00 provides that a claimant will not be found guilty of misconduct for violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonable related to the job environment and job performance; and (3) the rule is fairly and consistently enforced.

While Mr. Johnson did not personally consider claimant's two (2) preventable accidents misconduct, the employer enforces a rule known to claimant that was lawful and reasonably related to claimant's job of an over-the-road truck driver and the rule is fairly and consistently enforced as Mr. Johnson can not and does not even hire an employee who exceeds the limitation of preventable accidents as required by his company's insurance provider. And, while claimant's accidents were not with intent his violation of the employer's policy made him uninsurable and does establish a willful and wanton disregard of the employer's interest or of negligence beyond the ordinary. Claimant was discharged for misconduct connected with the work and the decision of the claims examiner is in order.

DECISION

> The determination of the Mississippi Department of Employment Security is affirmed. The claimant is disqualified from receiving benefits based on this employment separation until reemployed and earned eight (8) times the weekly benefit amount. The employer's experience rating record is awarded a non-charge.

(R. p. 52-53).

The Claimant appealed the decision of the ALJ to the Board of Review on November 6, 2009. (R. Vol. 3, p. 54). After careful review and consideration of the record, the Board of Review affirmed the decision of the ALJ. (R. Vol. 3, p. 61). On December 22, 2009, the Claimant timely appealed the decision to the Circuit Court of Marshall County. (R. Vol. 3, p. 62). Oral argument was conducted in this matter before the Honorable Andrew K. Howorth. (R. Vol. 1, p. 14). After considering the record and arguments from both parties, the circuit court affirmed the decision of the MDES Board of Review. (R. Vol. 1, p. 14). On July 29, 2010, Mr. Cromwell perfected his appeal to this Honorable Court. (R. Vol. 1, p. 24).

SUMMARY OF THE ARGUMENT

In the instant case, Mr. Cromwell was discharged for misconduct for violating the Employer's policy by being involved in an accident that caused him to no longer be covered by the Employer's insurance. (R. Vol. 3, p. 36). The Employer's insurance provider has a policy that states the requirements for insurance coverage are to have no more than one at-fault accident within 36 months. (R. Vol. 3, p. 37). Mr. Cromwell had his first preventable accident on December 2, 2008, and his second on May 4, 2009, as he hit a truck pulling out of a truck stop. (R. Vol. 3, p. 37). This incident caused Mr. Cromwell's termination. (R. p. 36).

Employees are notified of the insurance provider's policy in the Employer's handbook that they receive at the time of their hire. (R. Vol. 3, p. 38). Mr. Cromwell was aware of the policy. (R. Vol. 3, p. 46). Since the testimony substantially supports the Board of Review and Circuit Court Decisions that Mr. Cromwell committed disqualifying misconduct by violating the Employer's policy, this Honorable Court should affirm, based upon the standard of review on appeal.

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. 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).

II. Whether the Circuit Court should be affirmed, finding that the Employer, Big M Transportation, proved by substantial evidence that the Claimant, William Cromwell, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(2010).

Mississippi Code Annotated Section 71-5-513 (A)(1)(b) provides for disqualifying persons

from benefits otherwise eligible for acts of misconduct connected with their work. In the case of Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982), the Supreme Court adopted the following definition of misconduct in unemployment benefit cases, to-wit:

> The meaning of the term "misconduct", as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees . . . .

The case authorities consistently hold that one willful and wanton, or grossly negligent, violation of reasonable Employer policy or standards of behavior may constitute disqualifying misconduct. Miss. Emp. Sec. Comm'n. v. Percy, 641 So.2d 1172 (Miss. 1994); Henry v. Miss. Dept. of Emp. Sec., 962 So. 2d 94 (Miss. Ct. App. 2007); Ray v. Bivens, 562 So. 2d 119 (Miss. 1990).

Also, misconduct imports conduct that reasonable and fair minded external observers would consider wanton disregard of the employer's legitimate interests. Miss. Emp. Sec. Comm'n. v. Phillips, 562 So.2d 115, 118 (Miss. 1990).

In the case *sub judice*, Mr. Cromwell was employed by Big M Transportation, Inc., as a truck driver from January 5, 2008, to May 4, 2009, when his separation occurred. (R. Vol. 3, p. 1, 36, 38). Mr. Cromwell was discharged by the Employer for his inability to be covered under the Employer's insurance due to having multiple accidents. (R. Vol. 3, p. 36).

The Employer's insurance carrier provides that for an employee to maintain coverage, they must not have more than one at-fault accident within 36 months. (R. Vol. 3, p. 37). Employees are notified of the Employer's insurance provider's policy in the Employer's handbook that they receive at the time of their hire. (R. Vol. 3, p. 38). Mr. Cromwell was aware of the policy. (R. Vol. 3, p. 46).

Mr. Cromwell's first preventable accident occurred on December 2, 2008, when he backed into another truck at a truck stop in Jackson, Georgia. (R. Vol. 3, p. 37). Mr. Cromwell's second preventable accident occurred on May 4, 2009, when he hit a truck backing out of a truck stop in Kansas City, Kansas. (R. Vol. 3, p. 38). Consequently, the Employer had no other choice but to discharge Mr. Cromwell in order to comply with its insurance carrier's requirements. (R. p. 41-42).

Mississippi Employment Security Regulation 308.00 provides that a claimant will not be found guilty of misconduct for violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced.

Even though the Employer denies that Mr. Cromwell was discharged due to misconduct, *per se*, the rule was known by the Claimant, and it was fairly and consistently enforced. Additionally, even though Mr. Cromwell's accidents were not with intent, they were preventable. Moreover, his violation of the Employer's policy made him uninsurable and therefore, unemployable for Big M's purposes. Even if this does not establish a willful and wanton disregard of the Employer's interest, it is at least meets the gross negligence standard for misconduct.

The instant case is akin to the misconduct line of cases involving a grossly negligent, or willful and wanton, and substantial or serious disregard of an employee's job duties, and the employer's interest. In these cases, if the behavior causing termination is within the capacity and control of the employee, it is a serious disregard of work-related duties and constitutes misconduct. See Henry v. Miss. Dept. of Emp. Sec., 962 So. 2d 94 (Miss. Ct. App. 2007) (security guard's disregard of duties justified termination for misconduct); Miss. Emp. Sec. Comm'n. v. Percy, 641 So.2d 1172 (Miss. 1994) (a nurse was terminated for violating the employer's policy requiring that he

appropriately complete time sheets); Sojourner v. Miss. Emp. Sec. Comm'n., 744 So. 2d 796 (Miss. Ct. App. 1999) (security guard's failure to follow policy prohibiting remaining on property after shift hours constituted misconduct); Young v. Miss. Emp. Sec. Comm'n., 754 So. 2d 464 (Miss.1999) (employee's refusal to turn in his employee identification badge during a suspension constituted insubordination); Halbert v. City of Columbus, 722 So. 2d 522 (Miss. 1998) (an employee's refusal to submit to a random drug test constituted insubordination).

Mr. Cromwell argues that the Employer failed to meet its burden of proof because they admitted his acts were not misconduct. However, this argument is misplaced. The definition of misconduct is defined by law, not by the Employer. In this case the evidence presented by the Employer, shows that at the very least, Mr. Cromwell actions were grossly negligent. He knew that if he had more than one at fault accident, he would not be insurable. The record shows that the accidents were preventable, which means Mr. Cromwell could have taken steps to avoid the accident. His actions showed a disregard of the employer's interest, a violation of the employer's rules, and a disregard of the standard of behavior which an employer has the right to expect from an employee. Therefore, pursuant to the definition of misconduct as defined by statute and by Wheeler, the Claimant was guilty of misconduct connected with his employment.

CONCLUSION

The testimony and evidence presented to MDES shows that the Claimant displayed a disregard of the standard of behavior which an employer has the right to expect from an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer. The Claimant's conduct falls under the definition of misconduct as set forth by Wheeler v. Arriola, and the Board of Review was correct when the decision to deny benefits to the Claimant was rendered.

The Board of Review correctly applied the relevant law to the facts at hand, and correctly concluded that unemployment benefits should be denied to the Claimant. Thus, this Honorable Court should affirm the Circuit Court's decision, based upon the Standard of Review.

RESPECTFULLY SUBMITTED, this the 9th day of February, 2011.

MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY

BY: _____
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CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for Appellee Mississippi Department of Employment Security, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following:

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Big M Transportation
6341B Highway 15
Blue Mountain, MS 38610

Honorable Andrew K. Howworth
District 3 Circuit Court Judge
1 Courthouse Square, Ste. 201
Oxford, MS 38635

THIS, the 4th day of February, 2011.

LEANNE F. BRADY