IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CAUSE NO. 2010-CC-01313

JIMMY MAGEE — **APPELLANT**

VS. — **CAUSE NO. 2010-CC-01313**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY — **APPELLEE**

BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

APPEAL FROM THE CIRCUIT COURT OF RANKIN 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. Albert Bozeman White, Assistant General Counsel for Appellee
3. Jimmy Magee, Appellant
4. Lydia Roberta Blackmon, Esq., Attorney for Appellant
5. Central Transport, Inc., Employer
5. Honorable William E. Chapman, III, Rankin Circuit Court Judge

This the 22nd day of April, 2011.

Albert Bozeman White
Assistant General Counsel (MSB #[redacted])
Mississippi Department of Employment Security

OTHER AUTHORITIES PAGE

STATEMENT OF ISSUE

1. Whether the Board of Review and Circuit Court decisions should be affirmed finding that the Employer, Central Transport Inc., proved by substantial evidence that the Claimant, Jimmy Magee, a commercial truck driver, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(Rev. 2010), by willfully and wantonly violating the Employer's vehicle accident policy.

Mr. Magee again appealed. (TR p. 112). After carefully reviewing the record, the Board of Review affirmed, adopting the ALJ's fact findings and conclusion. (TR p. 116). The ALJ's Fact Findings and Reasoning and Conclusion were as follows, in pertinent part, to-wit:

> FINDINGS OF FACT:
>
> The claimant worked as a local delivery driver for Central Transport, Inc., Jackson, Mississippi, from February 5, 2007, to October 21, 2008. The employer discharged the claimant for violation of the employer's accident policy.
>
> The employer had a progressive accident policy in which a written warning is issued on the first offense, a written warning on the second offense, and a final warning written on the third offense; or immediate termination based on the severity of an accident. **The claimant was advised of the policy at time of hire.** (emphasis added).
>
> The employer issued a written warning to the claimant for an accident which occurred on April 4, 2008. The claimant was considered to have made an improper turn in which he struck another vehicle. The employer issued a second written warning for an accident on April 12, 2008, in which a report was submitted to the employer stating the claimant backed into a parked vehicle at a local country club. **The employer placed the claimant on probation on September 9, 2008, due to an accident with a dump truck. He was advised that any further incident would result in his termination.** (emphasis added).
>
> On October 21, 2008, the claimant struck a dolly in the yard, while backing up, and was subsequently discharged.
>
> 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,... 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 shall not be chargeable if the Department finds that the claimant... was discharged for misconduct

connected with the work...

In the Mississippi Supreme Court, in the case of Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982), the Court held that:

"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. **Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability ..., and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations, to his employer, came within the term....** ". (emphasis added).

The employer discharged the claimant for violation of an established safety and accident policy. **His involvement in four accidents within approximately six months would show carelessness and negligence to such a degree to warrant misconduct as defined by law.** (Emphasis added).

The decision is in order

(TR p. 109-110).

Mr. Magee then appealed to the Circuit Court of Rankin County, Mississippi. (R. Vol. 1, p. 5-8). On July 23, 2009, MDES filed a transcript of the record and Answer. Afterwards, Briefs were filed on behalf of the Claimant and MDES. (R. Vol. 1, p. 11-41). On April 27, 2010, the Circuit Court affirmed the decision of MDES. In so doing, the Circuit Court noted that the ALJ affirmed the Claims Examiner's decision, and the Board of Review affirmed the ALJ's decision. The Court also noted that it reviewed the entire record, and found that the evidence supported the decision of the Board of Review. (R. Vol. 1, p. 42).

A Motion to Reconsider was also filed on behalf of Mr. Magee. (R. Vol. 1, p. 43-46). MDES filed a Response. (R. Vol. 1, p. 47-50). Afterwards, on July 6, 2010, the Circuit Court denied the Motion. (R. Vol. 1, p. 57). Counsel for Mr. Magee then appealed to his Honorable Court.

SUMMARY OF THE ARGUMENT

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. **Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability ..., and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations, to his employer, came within the term....** ". (emphasis added).

In the instant case, Mr. Magee, an experienced truck driver, was discharged for willful and wanton repeated violation of the Employer's accident prevention policy, justifying immediate discharge. The Employer policy provided for discharge if a truck driver had four Grade III "chargeable" accidents within one year. The Employer representative's testimony and supporting documents established that Mr. Magee was involved in four avoidable, preventable accidents occurring between April 4, 2008, and October 21, 2008, approximately six months, which violated the policy. Mr. Magee was also progressively warned according to the policy. The evidence established that Mr. Magee had the ability to drive his truck safely; but due to his disregard, he continued to have accidents even after being placed on probation and after being told that his job was in jeopardy.

Since Mr. Magee was progressively disciplined, and since he continued in the same errors, *i.e.* to drive unsafely, his negligence was analogous to the conduct recognized in the case authorities as rising to the level of misconduct. Shavers v. Miss. Emp. Sec. Comm'n., 763 So. 2d 183 (Miss. Ct. App. 2000); Kellar v. Miss. Emp. Sec. Comm'n., 756 So. 2d 840 (Miss. Ct. App. 2000); Reeves v. Miss. Emp. Sec. Comm'n., 806 So. 2d 1178 (Miss. Ct. App. 2002);

Johnson v. Miss. Emp. Sec. Comm'n., 767 So. 2d 1088 (Miss. Ct. App. 2000); Claiborne v. Miss. Emp. Sec. Comm'n., 872 So. 2d 698 (Miss. Ct. App. 2004).

The testimony and documentary evidence substantially supports the Board of Review and Circuit Court decisions finding that Mr. Magee committed disqualifying misconduct by willfully and wantonly violating the Employer's accident prevention policy. Thus, this Honorable Court should affirm based upon the standard of review on appeal. Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (1992); Booth v. Miss. Emp. Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

ARGUMENT

Standard of Review

Mr. Magee's appeal is governed by Mississippi Code Annotated Section 71-5-531 (Rev. 2010), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. (emphasis added). Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So. 2d 193 (Miss. 1991); Booth v. Miss. Emp. Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

Further, a rebuttal 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 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Further, 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).

Record Evidence

In the instant case, Ted Matthews, Safety Director, testified on behalf of the Employer. (TR p. 39-53). Mr. Matthews testified that Mr. Magee was employed as a tractor-trailer truck driver from February 5, 2007, to October, 21, 2008. Mr. Matthews discharged Mr. Magee because he violated the company's accident prevention progressive disciplinary policy, due to four chargeable accidents in less than a year. (TR p. 40).

Mr. Matthews explained that the company policy provided that any chargeable accidents within a twelve-month period were treated with progressive steps. (TR p. 40). He explained that after the first and second offense, the driver is given a written warning. The third offense results in termination, or in the event of a major accident, immediate termination. (TR p. 41). A copy of the policy was tendered into evidence as **Employer Exhibit 2**. (TR p. 44, 77).

The portion of the policy tendered into evidence provides as follows, to-wit:

> 1. **Accidents (within any contiguous 12-month period)**:
> (a) Minor chargeable accident after full investigation*. 1st Offense-Final Written Warning*
>
> * depending on severity and nature of accident.

(TR p. 77). The policy also sets out several additional disciplinary measures that would result from violation of safety issues, such as failing to report an accident timely, hauling freight safely, inspections, reckless driving, and complying with DOT hours of service requirements. (TR p. 77). As to reckless driving, the policy provides for a final written warning for a first offense, or immediate termination based upon the accident circumstances. (TR p. 77).

Mr. Matthews also testified that Mr. Magee violated the policy due to involvement in four accidents within one year. **First**, on **April 4, 2008**, he struck another vehicle while making a right turn. **Second**, on **April 12, 2008**, Mr. Magee stuck a stationary vehicle while backing up.

Third, on **September 9, 2008**, Mr. Magee struck the side of a turning vehicle while he was turning, damaging the side of his trailer. **Fourth**, the final accident occurred on **October 21, 2008**, when Mr. Magee struck a dolly on company premises, damaging the front of the trailer. (TR p. 41).

On September 9, 2008, Mr. Magee was placed on probation after his third accident occurred. (TR p. 41). **Mr. Magee signed an Incident Action Report acknowledging that any future accident would result in termination,** which was entered into evidence as part of Employer Exhibit 10. (TR p. 93). The Incident Action Report provided as follows, to-wit

> Comments or Corrective Action:
> Jimmy this is your 3rd grade 111 accident in 5 months.
> **The company is placing you on probation. If you have an accident before April 9th (2011) you will be relieved of your duty as CTI.**
> Jimmy you will need to ride with the trainer so you can make some right turns to make sure you are protecting the lanes you are turning onto. (Emphasis added).

(TR p. 93-94). Mr. Magee of course indicated on the Incident Action Report that the accident was not his fault. However, the investigation indicated that while making a wide turn, his rig trailer crossed into the opposite lane, and came in contact with a dump truck turning in the opposite direction. (TR p. 96-97). As a result, Mr. Magee was required to participate in defensive driving instruction, including use of mirrors and cornering. (TR p. 98). He was also given a Road Test. (TR p. 99). These documents were entered into evidence collectively as **Employer Exhibit #10**. (TR p. 48-49, 92-99).

Regarding each of Mr. Magee's accidents and progressive discipline, Mr. Matthews submitted several documents into evidence. The first, **Employer Exhibit #1**, was an accident report listing all four accidents with their dates, as well as an accident on **April 4, 2007**. (TR p. 44, 76). As noted above, a copy of the company accident policy was submitted as **Employer**

Exhibit #2. (TR p. 44, 77). Ms. Matthews testified that Mr. Magee was involved in five accidents, but the last four occurring within one year were the cause of his discharge.

Regarding the April 4, 2008 accident, being the **first accident, Employer Exhibits #3, #4, #5, #6, and #7** were submitted, and included the Safety Department's Accident Determination, Incident Action Report, Telephone Report of Accident, Accident Report, and State of Mississippi Uniform Crash Report, respectively. (TR p. 44-47, 78-85). In the Incident Action Report, Mr. Magee was instructed to . . . "**[M]ake sure when making a right turn block the right lane and use the next lane to make your turn, check the lanes and make sure you don't' allow for someone to get between you and the turning lane**." (TR p. 79).

Based upon these instructions, it is apparent that the Employer concluded that Mr. Magee could have avoided the accident by completely blocking the right lane, or waiting for the other vehicle to pass in the right lane before completing his turn. Further, the State of Mississippi Uniform Crash Report indicates that when Mr. Magee moved to the left lane on a four-lane road, and turned back across the right lane while making a left hand turn, he turned across the path of the right hand lane, creating the situation causing the accident. (TR p. 84-84).

Regarding the April 12, 2008 accident, being the **second accident**, Mr. Matthews also submitted several documents. An Accident Determination was entered as **Employer Exhibit #8.** (TR p. 47, 86). **Employer Exhibit #9** included an Incident Action Report, Accident Report, and email from Larry Webb, Supervisor for Central Transport, to Andrea Franey regarding the witness's statement. (TR p. 47-48, 87-91). The Incident Action Report indicated as follows, to-wit:

> WHEN PULLING AWAY FROM A CUSTOMER DOCK, A WITNESS SAID THE REAR OF THE TRAILER CAME AROUND AND HIT THE HEADLIGHT OF A PARKED TRUCK

(TR p. 87).

Mr. Magee was given instructions on how to avoid such accidents in the future. The Incident Action Report and the email regarding the accident also indicated that a Glenn Phillips witnessed the accident, was interviewed, and stated that Mr. Magee hit the parked car while turning right, which was due to the rear of the trailer swinging out. (R.Vol. 2, P. 87, 91). Although this was a parked car, Mr. Magee again refused to take any responsibility for the accident; and incredulously even indicated that it did not actually happen. (TR p. 87).

Regarding the September 9, 2008 accident, being the **third accident**, the circumstances of that accident are discussed above. Exhibits submitted into evidence regarding that accident were an Accident Determination, Incident Action Report, Telephone Report of Accident, Accident Report, an email from Mr. Webb regarding re-certifying Mr. Magee, and a Road Test. (TR p. 92-99).

Regarding the fourth and final accident occurring on October 21, 2008, and resulting in discharge, Mr. Matthews submitted an Accident Determination, Incident Action Report, Telephone Report of Accident, Accident Report and photos. These documents were entered as **Employer Exhibit #11**, and included two photos of the damage to the vehicle. (TR p. 49-50, 100-106). These documents indicated that Mr. Magee ran over a dolly while moving his truck on the Employer's yard. The Employer determined this to be a third Grade III chargeable accident. (TR p. 100-104). Mr. Magee again did not accept any responsibility for the accident, but blamed it on the night driver for allegedly leaving the dolly in the "middle of the yard". (TR p. 104). The Employer found that the dolly had been apparently accidentally dropped and left on the yard. (TR p. 102).

Mr. Matthews was also questioned about the term "**chargeable accidents**." He explained that chargeable accidents were preventable or avoidable accidents. Mr. Matthews further stated that the company looked to the nature of the accident; and if the driver could have done anything within reason to prevent the accident, and did not do so, the driver is charged with the accident. (TR p. 50).

Mr. Matthews was also questioned about whether Mr. Magee had been advised of the Employer's policy. Ms. Matthews stated that Mr. Magee received a written copy of the company policy when he was hired, and a copy of the policy was posted in the office by the time clock. (TR p. 42). Obviously, Mr. Magee was also informed of the policy with each warning or corrective action. He was specifically informed of further consequences of unsafe driving at that time that he was placed on probation. (TR p. 93.) Mr. Matthews also testified that the Employer's accident policy was discussed in company meetings, and posted around the facility. (TR p. 50).

Certainly it is apparent from the record that an emphasis was placed upon truck driving safety. It also certainly stands to reason, since the Employer's insurance rates, and insurability, would be affected by unsafe driving, and accident occurrence. Further, since the record reflects that Mr. Magee was given instructions on safety at the time of each occurrence, and required to undergo driving instruction and test after the third occurrence, he cannot persuasively deny knowing the policy. Further, the record indicates that he was specifically told after the third occurrence of the consequences of another accident.

Mr. Magee also cross-examined Mr. Matthews. (TR p. 51-53). Regarding the Employer's policy on contacting witnesses, Mr. Matthews explained that typically a witness will forward information to the Employer, and statements are taken directly from witnesses. (TR p.

51). Regarding the April 4, 2008 accident, Mr. Matthews also explained that they did not contact the witness, Dixie Harmon, because the Employer had the police statement, which was considered credible. (TR p. 52).

Mr. Magee testified next. (TR p. 54-68). He stated that he worked as a local delivery truck driver for Central Transport, Inc. from November 2005 through October 21, 2008, when he was discharged for excessive accidents. While he admitted to the dates and number of accidents, he denied the accidents were his fault. (TR p. 54).

Mr. Magee was first questioned about the April 4, 2008 accident. (TR p. 54-56). He testified that he was making a right turn when another vehicle tried to pass him. He made a wide turn on a four-lane road, taking his truck into the left lane before straightening back and turning across the right lane. As he was making his turn, another vehicle tried to pass him in the right lane, and Mr. Magee struck it. (TR p. 55). A City of Jackson Jatran driver witnessed the accident. (TR p. 56).

Mr. Magee was next questioned about the April 12, 2008 accident. (TR p. 56-58). He completely denied hitting a parked vehicle at the Jackson Country Club, even though there was an eye-witness that reported the accident to the Employer. (TR p. 57, , Employer Exhibit 9, p. 87, 91).

Mr. Magee was then questioned about the September 9, 2008 accident. (TR p. 58-59). Contrary to the Incident Accident Report, he alleged that a dump truck stopped in front of him as he was making a left turn. However, he admitted that the collision occurred, resulting in a half-inch scrape on the dump truck. Mr. Magee also acknowledged that the dump truck driver called the Employer later in the day to report that Mr. Magee had hit him. (TR p. 58). Mr. Magee

testified that no police report was made, indicating that he and the other driver left the accident scene without calling the police. (TR p. 59).

Finally, Mr. Magee was questioned about the October 21, 2008 accident. (TR p. 60-62). Mr. Magee admitted to hitting the dolly, but denied that the accident caused as much damage as seen in the pictures, presumably suggesting that the pictures were somehow altered without any substantiation. (TR p. 60-62).

Regarding whether he knew that involvement in another chargeable accident prior to April 4, 2009, would result in his discharge, he denied being so informed. He denied being informed that his job was in jeopardy, even though he signed the Incident Action Report putting him on probation due to the September 9, 2008 accident, and informing him that his job was in jeopardy. In spite of the Employer's testimony regarding training and meetings, he also denied being given a copy of the company handbook, as well as having knowledge of the policy being posted in the office. (TR p. 62-63).

On cross examination, Mr. Matthews questioned Mr. Magee about the April 4, 2008 accident. (TR p. 64-69). Mr. Magee testified that when he was making the turn, he was part in the right and part in the left lane, and the vehicle that was passing him was part in the right lane and part on the curb. (TR p. 64-65). However, the State of Mississippi Uniform Crash Report diagram and notes indicated that the other vehicle was properly in the right-hand lane, and Mr. Magee was entirely in the left-hand lane and turning across the right-hand lane. (TR p. 84-85, Employer Exhibit 7).

Mr. Matthews also questioned Mr. Magee on the use of a "button hook turn." Mr. Magee acknowledged that if he had made a button hook turn, it would not have been necessary to leave the right-hand lane to do so. However, he insisted that he could not accomplish the turn due to

the traffic. (TR p. 65).

Mr. Matthews then questioned Mr. Magee about the April 12, 2008 accident, in which a witness reported that Mr. Magee's truck hit his tail light. Mr. Magee was asked whether that impact would leave paint on the tail light. (TR p. 65). Mr. Magee insisted that there would be a scratch on the trailer, even though Mr. Matthews pointed out that it had probably been hit with a side rail. In spite of eye-witness identification, Mr. Magee continued to maintain that he had not hit the truck. (TR p. 66).

Mr. Magee was also questioned about his assertion that he had never been warned or given any type of written notice regarding his placement on probation. Mr. Matthews pointed out that the Incident Accident Report dated September 9, 2008, signed by Mr. Magee, stated: "**Jimmy, this is your third Grade III accident in 5 months. The company is placing you on probation. If you have an accident before April 9th, you will be relieved of your duty at CTI...**" (TR p. 66).

Mr. Magee again denied having being informed that he was being placed on probation, instead insisting that the supervisor, Larry Welch, made him sign the document. (TR p. 66-67). Mr. Magee apparently did not take the time, or listen to what his supervisor was telling him, admitting that he signed the document **without reading** it, because he was angry. (TR p. 68-69). Thus, the record reflected that Mr. Magee was reprimanded on this occasion, signed the reprimand, was placed on probation, and was re-trained, such that his failure to pay attention to, or heed, the reprimand is insufficient to deny that it occurred, or deny constructive knowledge of his probation.

After Mr. Magee testified, Mr. Matthews was again questioned by the ALJ. (TR p. 69-73). Mr. Matthews stated that he concluded that the April 4, 2008 accident was due to Mr.

Magee making an improper turn. He also stated that Mr. Magee should have made a button hook turn, which would have protected the right lane. (TR p. 69-70).

Regarding the April 12, 2008 accident, Mr. Matthews stated that a statement was taken from Mr. Glenn Phillips, a witness. Mr. Phillips reported that Mr. Magee was making a right turn, and the left rear of the trailer stuck a parked vehicle's taillight. Mr. Phillips also reported that the driver apparently was unaware of the accident. (TR p. 70). Mr. Matthews did not know if the witness was the owner of the vehicle, but believed it was owned by a contractor who was doing work at the facility. (TR p. 70-71).

Regarding the September 9, 2008 accident, Mr. Matthews testified that the accident resulted in a scratch and crack in the fiberglass of the Employer's trailer. (TR p. 71).

Regarding the October 21, 2008 accident, Mr. Matthews testified that the pictures submitted into evidence showed the damage to the truck. Mr. Matthews also stated that a 12" long crack was found in the fiberglass on the trailer, and a piece was missing. Mr. Matthews also opined that the broken fiberglass was removed for safe driving. The damage did not prevent Mr. Magee from completing his route. (TR p. 71-73).

There was also testimony as to whether a second driver may have caused the damage. Mr. Matthews stated that the damage from the dolly was consistent with the missing piece of fiberglass; and the second driver did not cause the damage. Mr. Magee caused the damage by hitting the dolly. (TR p. 73).

Mr. Magee was then allowed to make a final statement; and the hearing was then concluded. (TR p. 74).

Argument and Authorities

The instant case is akin to the misconduct line of cases involving a willful and wanton, and substantial or serious disregard of the employer's interest, and standards of behavior, which it is entitled to expect from an employee. *See* Shavers v. Miss. Emp. Sec. Comm'n., 763 So. 2d 183 (Miss. Ct. App. 2000) (Repeated disregard of job duties after warnings may rise to the level of misconduct.); Kellar v. Miss. Emp. Sec. Comm'n., 756 So. 2d 840 (Miss. Ct. App. 2000) (pattern of errors in job performance and refusal to comply with instructions is misconduct); Reeves v. Miss. Emp. Sec. Comm'n., 806 So. 2d 1178 (Miss. Ct. App. 2002) (failure to clean up parts after repeated instructions is misconduct); Johnson v. Miss. Emp. Sec. Comm'n., 767 So. 2d 1088 (Miss. Ct. App. 2000) (postal workers failure to complete route after being instructed to do so is misconduct); Claiborne v. Miss. Emp. Sec. Comm'n., 872 So. 2d 698 (Miss. Ct. App. 2004) (prolonged and persistent failure to perform routine duties, especially after repeated warnings, constitutes misconduct). These case differ from, and is distinguishable from, the Foster v. Miss. Emp. Sec. Comm'n., 632 So. 2d 926 (Miss. 1994).

In the instant case, the Employer had a legitimate interest in employing only safe, well-trained drivers. This interest included not only the Employer's interest in keeping insurance, maintenance, and repair costs to equipment low, but also extends to members of the community that share the road with tractor trailer drivers. Mr. Magee admitted to three of the four accidents; and it is likely that he simply was not aware of the April 12, 2008 accident when it occurred. Further, his excuses for each of the accidents simply appear inadequate.

The circumstances of the first accident and documentary evidence indicated that Mr. Magee could have avoided the accident, if he had not driven entirely into the left-hand lane, allowing a car to enter the right-hand lane beside his truck, and then turning across the right-hand

lane into the path of the other driver. As to the second accident, he clipped the tail light of a parked car. How could that be anyone else's fault? As to the circumstances of the third accident, he turned too sharply causing his trailer to cross into the lane of on-coming traffic, and clipped a truck turning in the opposite direction. And as to the fourth, due to inattention, he ran over a dolly, obviously being a rather large, visible object, on the Employer lot. This damaged the Employer's truck; and again was a chargeable accident.

The instant case is analogous to Kimble v. Ark. Emp. Sec. Dept., 959 S.W. 66 (Ark. Ct. App.1997). In this case, the Arkansas Court of Appeals found misconduct where a truck driver had five "preventable" accidents within approximate six months. Two of the accidents were with stationary objects. The Court also noted that the Employer's policy provided for disciplinary action due to such accidents; and the employee was progressively disciplined, being put on probation, before having another accident resulting in his termination. Further, despite the driver's protest that the accidents were not deliberate, or mere ordinary negligence, the Court held that the number of accidents, frequency and nature of the circumstances indicated a willful and wanton disregard. The Court noted that the evidence reflected a recurring pattern of carelessness manifesting indifference, and rising to the level of misconduct. Id. at 68-69. *See also* Raheem v. Unemployment Compensation Board of Review, 431 A. 2d 112 (Pa. Commw. Ct. 1981) (continued reckless driving by truck driver, after warnings, causing damage to truck constituted misconduct.)

Similarly, in the instant case Mr. Magee had four preventable accidents within approximately six months, two with stationary objects, and two under circumstances indicating the accidents were preventable, if not entirely his fault. Further, similar to the facts of Kimble, Mr. Magee was progressively disciplined, being warned twice, put on probation, and told that

another accident would result in discharge.

Counsel for claimant cited Foster v. Miss. Emp. Sec. Comm'n., 632 So. 2d 926 (Miss. 1994) for the proposition that multiple accidents should not be grounds for finding misconduct. However, in Foster, the claimant was employed to wash UPS truck, not as a commercial truck driver. Mr. Foster did not have a commercial driving license. He drove trucks only on the employer's property to wash them. Mr. Foster apparently had a propensity for backing trucks into other vehicles or stationary objects while preparing to wash them, causing only very minor inconsequential damage. While he was trained to wash the trucks, his training driving the trucks was limited to supervised practice in his own passenger car. Mr. Foster was also only employed for six months. Mr. Foster argued, and the Court found, that these accidents were not due to willful and wanton carelessness or disregard, but his **inability or ineptitude** for driving big trucks.

The inability or ineptitude of Mr. Foster, a car washer, to drive trucks differs significantly from Mr. Magee's obvious ability to properly drive tractor-trailer trucks, but repeatedly failing to take proper care to do so. There is no allegation by Mr. Magee that he was inept. The evidence indicates that he drove his truck satisfactorily at time for months. Further, the record reflects that Mr. Magee was hired for the sole purpose of driving safely; he had a Commercial Drivers License; he had been trained and certified; he drove properly for many months without incident; and he simply failed to exercise the proper care on the occasions in question, obviously due to inattention or carelessness. The evidence also indicates that the Employer suffered actual financial loss due to repairing others' vehicles, and repairing Mr. Foster's truck or trailer.

Counsel for claimant also cites Karpe v. Unemployment Compensation Board of Review, 401 A. 2d 868 (Pa. Commw. Ct. 1979). This case also differs from the instant case.

In Karpe, the claimant was a taxi driver discharged due to involvement in seven accidents within one year. The Court noted that the record indicated that causes of three accidents were in question, and three others were due to getting stuck in the snow. Id. at 879-70. The Court also noted that there was no evidence of financial loss to the employer, but just concern over effect upon insurance rates. The Court then concluded that the accidents were due to ineptness, not a conscious indifference. Id.

Conversely, Mr. Magee had the ability to perform his job as a commercial truck driver properly, but failed to do so due to willful and wanton disregard. Contrary to the facts of Karpe, from the Employer's investigation of each incident, the Employer determined culpability on Mr. Magee's part. The Employer's representative testified as to circumstances of each incident and the policy; and tendered supporting documents into evidence establishing the policy, and warnings to Mr. Magee. Since Mr. Magee's primary job duty was driving safely, repeated failures to do so on his part, after progressive discipline, evidences culpable negligence, or a willful and wanton disregard of the employer's legitimate interests; and as such, constitutes misconduct. His failure to even pay attention to being placed on probation, or pay attention to the Employer's policy, also reflects willful and wanton disregard.

CONCLUSION

The record evidence indicates that Mr. Magee, a commercial truck driver, was involved in four accidents within a six month period. In each of these accidents, he was wholly or partially at fault, due to his disregard, such the accidents were chargeable accidents. Further, despite Mr. Magee's assertions, the testimony and documents indicate that Mr. Magee was aware, or should have been aware, of the company policy regarding multiple accidents. The record also establishes that he was progressively disciplined. Based upon the record, there is substantial evidence supporting MDES and Circuit Court decisions finding that Mr. Magee's repeated negligent operation of his truck, after warnings, violated the Employer's policy, and rose to the level of misconduct. Thus, this Honorable Court should accept the Board of Review and Circuit Court decisions; and affirm.

RESPECTFULLY SUBMITTED, this the 22nd day of April, 2011.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

By: _____
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CERTIFICATE OF SERVICE

I, Albert Bozeman White, 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 pleading to:

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Honorable William E. Chapman, III
Rankin County Circuit Court Judge
Post Office Box 1626
Canton, MS 39046

THIS, the 22nd day of April, 2011

ALBERT BOZEMAN WHITE