IN THE SUPREME COURT OF MISSISSIPPI

JIMMY MAGEE **APPELLANT**

V. **DOCKET NO. 2010-CC-01313**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND CENTRAL TRANSPORT, INC. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Jimmy Magee, Appellant;
2. Lydia Roberta Blackmon, Attorney for Appellant Jimmy Magee;
3. LeAnne F. Brady, Attorney for Appellee MDES;
4. Hon. William H. Chapman, Rankin County Circuit Court Judge;
5. Ted Matthews, Safety Director, Central Transport, Inc., Appellee;
6. Laura Ray, Human Resources, Central Transport, Inc., Appellee;
7. Larry Webb, Central Transport, Inc., Appellee;
8. Andrea Franny, Central Transport, Inc., Appellee; and
9. Hon. Shari Wright, Administrative Law Judge, MDES .

THIS the 31st day of January 2010.

Lydia R. Blackmon

LYDIA ROBERTA BLACKMON
M.S.B. [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARTICLES

CASES

RULES

STATUTES

I. STATEMENT OF THE ISSUES

A. WHETHER THE DECISION OF THE BOARD OF REVIEW IS SUPPORTED BY SUBSTANTIAL EVIDENCE?

B. WHETHER THE DECISION OF THE BOARD OF REVIEW IS ARBITRARY AND CAPRICIOUS?

C. WHETHER THE DECISION OF THE BOARD OF REVIEW VIOLATES THE APPELLANT'S DUE PROCESS RIGHTS IN THAT THE APPELLEE CENTRAL TRANSPORT FAILED TO ADEQUATELY ESTABLISH THE EXISTENCE OF A COMPANY POLICY REGARDING ACCIDENTS AND FAILED TO PROVIDE NOTICE TO THE APPELLANT OF THE FINALITY OF ITS DECISION?

II. STATEMENT OF THE CASE–PROCEDURAL HISTORY

The appellant, Jimmy Magee, was employed as a truck driver with Central Transport, Incorporated (hereinafter referred to as "Central Transport") in Pearl, Mississippi, from February 5, 2007 until October 21, 2008. On October 21, 2008, Mr. Magee was discharged from his position for allegedly being involved in four chargeable accidents in less than a year's period of time.

On or about November 2, 2008, Appellant Magee filed an initial claim for benefits with the Mississippi Department of Employment Security. (TR. 1, 2; RE. 5-6) According to the employer, Central Transport, "Mr. Magee was discharged due to excessive accidents within a one year period..." (TR. 7-16; RE. 7) Said claim was denied and a Notice of Monetary Decision was issued by the MDES on January 28, 2009. (TR. 27; RE.20) The appellant timely appealed, and a telephonic hearing was conducted on April 6, 2009 before an Administrative Law Judge. The Administrative Law Judge, in a decision dated April 13, 2009, found that the appellant's "involvement in four accidents within approximately six months" constituted misconduct as defined by law, and therefore, upheld the Department's decision. (TR. 109, 110; RE.21-23)

The appellant then appealed the decision of the Administrative Law Judge and, on May 20, 2009, the MDES Board of Review issued a decision adopting the Findings of Fact and Opinion of the Administrative Law Judge and affirming the decision. (TR. 115, 116; RE.24-25). The appellant then appealed the final decision of the Mississippi Department of Employment Security to the Circuit Court of Rankin County. (RE. 26-29) Thereafter, in an opinion and order dated April 27, 2010, the Rankin County Circuit Court Judge, the Honorable William E. Chapman, affirmed the decision of the Board of Review finding that the Board of Review properly applied the law to the facts. (RE. 3) Appellant Magee filed a Motion to Reconsider and/or Vacate Order (RE. 61-64), which was subsequently denied on July 6, 2010 (R.E. 4). The appellant, Jimmy Magee, timely appealed to this court to reverse the decision of the Circuit Court and the MDES Board of Review. (RE. 75-77)

III. STATEMENT OF THE FACTS

A. Accident #1

According to the employer, Appellee Central Transport, Inc., the first "chargeable" accident took place on April 4, 2008, when the employer claims that the appellant made a right turn and hit the vehicle beside him. The appellant stated in the incident action report and at the hearing before the administrative law judge that the driver of the other vehicle (Vehicle #1) tried to pass him after the appellant had positioned his vehicle in the left lane in order to make a wide right turn." (TR. 55-56; 78-85; RE. 78-87). The accident report indicated that the appellant (in Vehicle #1) was traveling west bound on Amite Street at the intersection of Amite and Mill Streets when the appellant attempted to make a right turn from Amite Street on to Mill Street striking the front left side of the other vehicle (Vehicle #2). Furthermore, the accident report

indicates that the driver of Vehicle #2 was traveling west bound on Amite Street and had stopped at the light at the intersection of Amite and Mill Streets, and when the light changed the vehicle driven by the appellant (Vehicle #1) proceeded to make a right turn striking the front left side of Vehicle #2. (TR. 82-85; RE. 84-87)

At the hearing, the appellant explained that the accident on April 4, 2008 took place because he was making a right turn and the driver of the second vehicle was listening to his radio and not paying attention and attempted to pass the appellant's vehicle while he was making the right turn. The appellant contends that the driver of Vehicle #2 even drove the car up on the curb while trying to pass the appellant. (TR 64; RE. 88).

The appellant also testified that he had a witness–Dixie Herman–who is a driver for Jatran, and was in the far lane. Appellant Magee stated that he had given his employer the telephone number for the witness, but that Central Transport never contacted this witness because, according to Ted Matthews, they had the police statement which they felt was more credible. (TR 52; RE. 89)

B . Accident #2

The second "chargeable" accident allegedly occurred on April 12, 2008 when Mr. Magee pulled away from a dock and the rear of the trailer he was hauling hit the headlight of a parked truck. According to the employer, a person called and alleged that the appellant had, while driving a Central Transport, Inc. truck and trailer, struck a vehicle while backing up. The employer, through its representative, Ted Matthews, the Director of Safety for Central Transport, Inc. submitted several documents in support of its contention that the appellant had been involved in a "preventable or chargeable" accident. (TR. 86-91; RE. 90-95)

For this accident, although the appellant was accused of engaging in hit and run type conduct, law enforcement was not called. Also, this alleged accident was never investigated, in that no one from Central Transport ever went out and looked at the vehicle that was allegedly damaged, and, there were no scratch marks on the appellant's trailer or any other evidence of an accident. Additionally, it appears that the witness did not identify himself as the owner or caretaker of the vehicle. At the hearing, Mr. Matthews stated that he did not know who owned the vehicle; that he did not have any insurance information.

C. Accident #3

The third accident took place on September 9, 2008 when the trailer of the vehicle driven by the appellant, while making a wide turn, allegedly made contact with the vehicle driven by another truck driver causing a foot long scratch on the rear of the vehicle driven by the other person. Notably, the driver's name is not listed on any of the employer's records and the word "driver" is listed as the witness.

It is significant to note that Mr. Magee maintained in the incident action report that he was just about off the road when the driver of this vehicle, a dump truck, came over on him. (TR 92-99; RE. 96-103) Also, it is significant to note that once again, the police was not called for what was (if you are to take the word of the caller) a hit and run accident. Also, notably, this accident allegedly took place in the morning, but no report was made of it until late in the afternoon.

At the hearing before the administrative law judge, Appellant Magee denied ever receiving a warning after the September 9, 2008 accident that another accident could result in his discharge. He also denied being provided a copy of the company handbook as well as having

seen a copy of the policy being posted. (TR. 62-63; RE. 106-107)

D. Accident #4

The final and fourth accident at issue allegedly took place on October 21, 2008 when the appellant was pulling around the yard and hit a dolly. (TR. 100-106; R.E. 108-116) The appellant alleges that he did not damage the fender as described by the employer. Notably, the employer was unable to provide an answer as to whether anyone else witnessed the accident. Additionally, it appears that someone else drove the vehicle to Memphis after the appellant allegedly hit the dolly. (TR. 60-62; RE. 104-106) There were no pictures taken contemporaneously with the accident to support the employer's claim that the appellant caused the damage to the vehicle. The appellant, while admitting that he had hit the dolly, denied that the accident caused as much damage as indicated in photographs submitted by Mr. Matthews at the hearing before the administrative law judge.

The appellant also alleged that not any of the accidents for which he was terminated was adequately or thoroughly investigated; that there was insufficient proof of a company policy regarding the number of accidents that a Central Transport employee could have in one year; and that he did not receive notice of what conduct regarding accidents was prohibited or permitted.

IV. ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

Our Supreme Court has repeatedly held that it will not disturb the conclusions of an administrative agency unless "that agency's order (1) is not supported by substantial evidence; (2) is arbitrary and capricious; (3) is beyond the scope or power granted to the agency; or (4)

violates one's constitutional rights." *Spears v. Mississippi Department of Wildlife, Fisheries and Parks*, (Miss. 2008).

Miss. Code Ann. §71-5-531 (2000) provides the appropriate standard of review in cases reviewing decisions of the Board of Review. This section provides that "[i]n any judicial proceeding under this section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." *Southwood Door Co. v. Burton*, 847 So.2d 833 (Miss. 2003). The burden is on the employer to show by substantial, clear and convincing evidence that the employee's actions bar him from unemployment benefits. *City of Clarksdale*, 699 So.2d at 580

Our Mississippi Supreme Court has defined misconduct connected with work as [c]onduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect from his employee. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design and showing an intentional or substantial disregard of the employer's interest or the employee's duties and obligations to his employer..." *Richardson v. Mississippi Employment Security Commission and Community Counseling Service*, 593 So.2d 31 (Miss. 1992). Furthermore, the general law is that work-connected negligence or inefficiency constitutes "misconduct" within the meaning of §71-5-513(A)(1)(b), the applicable statute, precluding a discharged employee from unemployment compensation benefits when of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional and substantial disregard of an employer's interests or of an employee's duties and obligations. *Wheeler v. Arriola*, 408 So.2d 1381 (Miss. 1982); 26 A.L.R.

3d 1356.

B. THE DECISION OF THE BOARD OF REVIEW WAS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE

1. Misconduct Defined

Misconduct is a question of fact for the Board of Review to resolve, and it has been held that the Board's decision should not be disturbed unless it is not supported by substantial evidence. In the case at hand, the decision of the Board should be reversed because it is not supported by the substantial evidence. Specifically, the decision should be overturned because (1) the alleged accidents were never thoroughly investigated; (2) there was insufficient evidence to show that the company had a policy prohibiting any number of accidents within a twelve month period and that the claimant was aware of such an alleged policy; (3) the claimant was not given sufficient notice that his conduct was prohibited and would lead to termination; and (4) the claimant did not engage in wilful misconduct.

2. Accidents Were Not Thoroughly Investigated.

According to the employer, Central Transport, the appellant was discharged because he had four chargeable accidents within a short period of time. Specifically, according to Ted Matthews, the Safety Director at Central Transports, who testified at the hearing, "Mr. Magee was involved in four chargeable accidents in a brief period of time, less than a year." (TR. 40; RE. 117). When asked what a chargeable accident was, Mr. Matthews stated that a chargeable accident is a preventable accident. (TR. 50; RE. 118) In explaining further, Mr. Matthews testified that in determining whether the accident is preventable, they look to see if the driver could have done anything within reason to prevent the accident. (TR. 50; RE. 118).

a. Accident #1

In looking at the alleged accidents in totality and individually, it is clear that none of these accidents was thoroughly investigated, if at all. For example, according to the employer, the first "chargeable" accident took place on April 4, 2008, when the employer claims that the appellant made a right turn and hit the vehicle beside him. The appellant stated in the incident action report that "He hit me." (TR 79; RE. 81). The accident report indicated that the appellant (in Vehicle #1) was traveling west bound on Amite Street in Jackson, Mississippi at the intersection of Amite and Mill Streets when the appellant attempted to make a right turn from Amite Street on to Mill Street striking the front left side of the other vehicle (Vehicle #2). Further the accident report indicates that the driver of Vehicle #2 was traveling west bound on Amite Street and had stopped at the light at the intersection of Amite and Mill Streets, and when the light changed the vehicle driven by the appellant (Vehicle #1) proceeded to make a right turn striking the front left side of Vehicle #2.

At the hearing, the appellant explained that the accident on April 4, 2008 took place because he was making a right turn and the driver of the second vehicle was listening to his radio and not paying attention and attempted to pass the appellant's vehicle while he was making the right turn. The appellant contends that the driver of Vehicle #2 even drove the car up on the curb while trying to pass the appellant. (TR 64; RE. 88).

The appellant's version of what occurred is credible given that the damage to the second vehicle was only on the front left side of the vehicle. This clearly shows that the appellant had established his truck in the right lane. Otherwise, if the second vehicle was stopped at the light as indicated by the police report, Vehicle #2 would have had damage to the whole left side of his vehicle, but especially, the rear left side.

The appellant also testified that he had a witness--Dixie Herman--who is a driver for Jatran, and was in the far lane. Appellant stated that he had given him employer the telephone number for the witness, but that Central Transport never contacted this witness because, according to Ted Matthews, they had the police statement which they felt was more credible. (TR 52; RE. 89)

The problem with the employer relying on the police report is the fact that the police report is not credible in this case because it is based on statements provided by someone other than the police officer drafting the report, and moreover, this particular report does not give any indication as to whether Vehicle #2 drove upon the appellant's truck while the claimant was making a wide turn. This report does not provide a clue as to which driver was at fault, and therefore, it appears that the employer made its own conclusions. Therefore, in refusing to contact the unbiased Jatran driver, Dixie Herman, the employer admittedly failed to conduct a thorough or full investigation of this accident. It should also be noted that the employer's refusal to contact this witness was unreasonable behavior on the part of the employer.

b. Accident #2

The second "chargeable" accident allegedly occurred on April 12, 2008 when Mr. Magee pulled away from a dock and the rear of the trailer he was hauling hit the headlight of a parked truck.

For this accident, although he was accused of engaging in hit and run type conduct, the police was not called. Also, this alleged accident was never investigated in that no one from Central Transport ever went out and looked at the vehicle that was allegedly damaged, and, there were no scratch marks on the appellant's trailer or any other evidence of an accident. In this

case, the employer merely took the word of a caller–a caller who may or may not have been credible. Also, Central Transport never tried to find out who the owner of the allegedly damaged vehicle was. The employer never presented any information as to what type of vehicle the alleged damaged vehicle was. Additionally, the witness did not identify himself as the owner or caretaker of the vehicle. Furthermore, at the hearing, Mr. Matthews stated that he did not know who owned the vehicle; that he did not have any insurance information. (TR. 56-58; RE. 79; 119-120)

It is strange that the owner of the vehicle did not make the call to report the accident and it is incomprehensible why Central Transports did not seek to find out anything more about this alleged accident. Yet, despite the paucity of the evidence; despite all of the unknowns or unanswered questions surrounding this alleged accident on April 12, 2008; despite the fact that the claimant contended that he did not hit any truck; and despite the fact that there were no scratch marks or paint on his trailer, the employer charged this alleged accident to the claimant as a chargeable accident.

c. Accident #3

The third accident took place on September 9, 2008 when the trailer of the vehicle driven by the appellant, while making a wide turn, allegedly made contact with the vehicle driven by another truck driver causing a foot long scratch on the rear of the vehicle driven by the other person. It is significant to note that the witness was not identified in any of the documents presented. Again, this accident, like the one on April 12, 2008 was not thoroughly investigated, and it was charged against the appellant without a full investigation.

From the evidence presented, it appears that no one from Central Transports ever went

out and looked at the so-called damage to the truck or interviewed anyone other than the driver. Notably, the driver's name is not listed, although the word "driver" is listed as the witness. Therefore, presumably, the employer took the word of some unknown person as more credible than that of the appellant. It is significant to note that Mr. Magee maintained in the incident action report that he was just about off the road when the driver of this vehicle, a dump truck, came over on him. (TR 93; RE. 97) Also, it is significant to note that once again, the police was not called for what was (if you are to take the word of the caller) a hit and run accident. Also, notably, this accident allegedly took place in the morning, but no report was made of it until late in the afternoon. Finally, despite having very little information about this accident, it is significant to note that the employer did not even attempt to explain why this accident was deemed a "chargeable" accident to the appellant.

d. Accident #4

The final and fourth accident at issue allegedly took place on October 21, 2008 when the appellant was pulling around the yard and hit a dolly. Although he does not deny having been involved in this dolly accident, the appellant denied having caused the extent of the damage to the truck. (TR. 60-62; RE. 113, 114, 104) Specifically, the appellant alleges that he did not damage the fender as described by the employer. Notably, the employer was unable to provide an answer as to whether anyone else witnessed the accident. Additionally the owner could not say for certain whether anyone else drove the vehicle to Memphis after the appellant allegedly hit the dolly. There were no pictures taken contemporaneously with the accident to support the employer's claim that the appellant caused the damage to the vehicle.

From the beginning to the end, none of these accidents was ever properly or fully

investigated. While Ted Matthews testified that the employer looked at the nature of the accident to see if there was anything the employee could reasonably have done to prevent the accident, this statement is belied by what Central Transport actually did. The employer, for some unknown reason and without little or no proof, in most instances, took the mere word of unknown callers, biased witnesses, and persons without personal knowledge over the word of its own employee. In the one case in which it could have used an unbiased, reliable witness, Accident #1, Central Transport stated that it chose to rely on the accident report, a document often rejected as hearsay because of its unreliability. It is also significant to note that Central Transport is now denying that the appellant caused this particular accident in an action it is currently defending in the First Judicial District of the Circuit Court of Hinds County.

In essence, in the case sub judice, Central Transport's action in terminating the appellant was based simply on uncorroborated hearsay. This evidence should not be considered acceptable as the Mississippi Supreme Court has held that uncorroborated hearsay testimony is insufficient to rise to the required level of substantial evidence. *Mississippi Employment Security Commission v. McLane-Southern, Inc.*, 583 So.2d 626 (Miss. 1991).

3. No Deliberate Violations or Disregard of Employer's Standards of Behavior

The decision of the Board affirming the Administrative Law Judge's decision should also be reversed because there is no evidence that the appellant deliberately violated or disregarded any of Central Transport's standards of behavior. The record reflects that none of the "chargeable" accidents attributable by the employer to the appellant were deliberate or that he, in any way, disregarded any standards of conduct of the employer. Furthermore, given Mr. Magee's cooperation with his employer, it would appear that his actions did not rise to the level of

deliberate violations or disregard of Central Transports' standards of behavior which might have been expected of an employee. Additionally, his actions cannot be construed as a wanton disregard of the City's interests. There is simply no evidence of this type of behavior. At worst, Mr. Magee's conduct while driving constituted a good faith error in judgment or his driving record should be viewed as a driver who is inept or incompetent. Conversely, the evidence reflects that Appellant Magee made very reasonable efforts to avoid the three accidents in which he was involved.

4. No Willful Misconduct

There are numerous cases which have held that misconduct occurs under Miss. Code Ann. §71-5-513(A)(1)(b) where an employer established an applicable policy and standard of behavior, the standard is communicated to its employees, and the employee violates these policies. *Johnson v. State Employment Security Commission*, 761 So.2d 861 (Miss. 2000). This Court has held that "an employee would be disqualified from receiving unemployment benefits where the employee violated an employer's policy or otherwise failed to meet a required condition of employment." *Mississippi Department of Employment Security vs. Rarymond Clark*, 2009 Miss. 0722.386, citing *Halbert v. City of Columbus*, 722 So. 2d 522, 526-27 (Miss. 1998). The violation of an established policy of the employer can, in and of itself, constitute willful misconduct. To prove willful misconduct by showing such violation of the policy, the employer must prove both the existence of the policy and the violation thereof by the employee." *Id.* At 527.

During the hearing, Ted Matthews testified that all employees "should have been given a copy of the policy; that there was a copy of something posted on the board; and that there were

meetings at which the employees attended at which the policy would have been discussed. In *Clark*, there was testimony that the employees received a handbook and signed a form showing the date they received the handbook. The form is then placed in their file. In the present case, unlike in *Clark*, there is insufficient evidence to show that there was an established policy, and no evidence to show that Mr. Magee was aware of any such policy if it in fact existed. The employer testified that Mr. Magee "should have received a copy of a handbook," however there is nothing to show that Mr. Magee actually received a copy of a handbook. Mr. Magee asserts that no one received a copy. Additionally, the employer suggests that employees received information regarding the accident policy during company meetings. This is a stretch as the employer never provided any information as to which meeting or meetings this information was purportedly given. Besides there being a lack of evidence to show that any such meeting or meetings ever took place, there is nothing to show that Mr. Magee was ever in attendance at any such meeting or meetings. As to Matthews allegation that the information was posted, a simple photograph could have substantiated that information. Additionally, there is nothing to show what information was posted and when the information was posted. Overall, there is nothing to show that Mr. Magee was aware of any such policy regarding accidents until after he was allegedly involved in the third accident on September 9, 2008. At that time, he claims he was coerced into signing a piece of paper that was blank.

5. Accidents Were Isolated Incidents

The accidents described by the employer were isolated incidents in which there was little or no damage to the vehicle. In *McLane-Southern, Inc.*, our Mississippi Supreme Court noted that regardless of the sufficiency of the proof offered by the employer, the fact that an employee

had been involved in an isolated incident, standing alone, was not "misconduct" within the meaning of section 71-5-513(A)(1)(b) so as to disqualify that person from receiving unemployment benefits.

6. No Misconduct by Appellant Magee

In *Wheeler v. Arriola*, 408 So.2d 1381 (Miss. 1982), the Court set forth the general law on misconduct, as set forth in 26 A.L.R. 3d 1356. The Court noted that there is little disagreement that work-connected negligence or inefficiency constitutes "misconduct" within the meaning of the applicable statute precluding a discharged employee from unemployment compensation benefits when of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional and substantial disregard of an employer's interests or of an employee's duties and obligations. Conversely, mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, isolated instances of ordinary negligence, or good-faith errors in judgment or discretion are not considered "misconduct" precluding a discharged employee from unemployment compensation benefits. (26 A.L.R. 3d at 1358).

There was nothing to show that Mr. Magee failed to perform the work to the best of his ability or that he willfully failed to follow any instructions given by the employer, and that his accidents were due to any willful or intentional neglect on the part of Mr. Magee. Additionally, there is no showing of any relationship between any of the accidents Mr. Magee were allegedly involved, that is there is no evidence of any repetitive behavior or similarity or behavior by Mr. Magee as it relates to any of the alleged accidents.

In *Daniel E. Foster v. Mississippi Employment Security Commission & United Parcel*

Service, 632 So.2d 926, Foster was dismissed by his employer, United Parcel Service (UPS) after, during a six month period as a car washer, on five occasions, he backed vehicles into stationary objects while preparing to wash the vehicles. The Supreme Court , finding that "mere ineptitude does not constitute employee misconduct, reversed the decision of the circuit court. The Court, reiterating its finding in *Wheeler*, in defining the parameters of employee misconduct, stated that "'[m]ere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or inadvertence and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion are not 'misconduct" within the meaning of the [unemployment compensation] statute."' Further, the Court noted that when determining whether an employee terminated for ineptitude or negligence is eligible for unemployment benefits, most jurisdictions consider the totality of the circumstances involved, citing A.L. Schwartz, Annotation, *Work-Connected Inefficiency or Negligence as "Misconduct" Barring Unemployment Compensation*, 26 A.L.R.3d 1356 (1969 and Supp. 1993). The Court also cited *Karpe v. Unemployment Compensation Board of Review*, 43 Pa. Commw. 78, 401 A.2d 868 (1979), wherein the Pennsylvania court considered the totality of the circumstances while reviewing a case where a cab driver who had been involved in seven minor mishaps over a one year period. In finding that the employee was not guilty of misconduct, the court looked at the nature of the incidents, the absence of proof of significant monetary loss, and the employer's failure to provide evidence of the employee's negligence. In conclusion, the Pennsylvania court found that while willful misconduct can include a "disregard of standards of behavior which the employer has a right to expect of its employees, the employee in that case had not demonstrated that the appellant had violated any specific rules or regulations, nor that he exhibited a conscious

indifference to any rules or reasonable expectations. 43 Pa.Commw. At 82, 401 A.2d at 870. Finally, the *Karpe* court noted that even though an employer may think it is justifiable to dismiss an accident prone employee in order to protect the employer's insurance status, that is not enough to disqualify an employee from receiving unemployment compensation benefits.

In *Foster*, the Mississippi Supreme Court pointed out that there was no evidence that Foster's accidents were anything but accidental. Furthermore, the Court noted that the employer had not provided any evidence to show that Foster had willfully or recklessly disregarded his supervisor's instructions. Moreover, Foster, as did the appellant is this case, had reported the incidents to his supervisor when they were not aware of the incidents. Finally, the Court noted that although UPS did not present any evidence showing any financial losses resulted because of the incidents, the Court found the damage was insignificant.

In *Coahoma County v. State Employment Security Commission*, 761 So. 2d 846, (Miss. 2000), our supreme court noted that the Mississippi Employment Security Commission's Administrative Manual Part V. Paragraph 1720, reads: "An employee shall not be found guilty of misconduct for the 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 (3) the rule is fairly and consistently enforced." In the present case, as in Coahoma County, it appears that the employee–Jimmy Magee--had not been warned or reprimanded about any violation of such rule.

The fact that Mr. Magee had not been counseled concerning similar accidents does not lend sufficient support to the Board of Reviews conclusion that his actions were willful or at least sufficiently recurrent to manifest willfulness.

B. THE DECISION OF THE BOARD OF REVIEW VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS BECAUSE THE EMPLOYER FAILED TO ADEQUATELY INVESTIGATE THE ACCIDENTS IN WHICH THE APPELLANT WAS ALLEGEDLY INVOLVED; FAILED TO SHOW THAT THERE WAS AN ESTABLISHED COMPANY POLICY REGARDING ACCIDENTS, AND FAILED TO ADEQUATELY NOTIFY THE APPELLANT OF THE CONSEQUENCES OF HIS ACTIONS.

The appellant's right to due process of law as guaranteed to him under the state and federal constitutions has been violated as it appears that Central Transport did not have any established policy regarding the number of accidents could be involved and the time frame for accidents; the accidents alleged by the employer were not investigated resulting in Central Transport, Inc. not adhering to its own "so-called" policy regarding "chargeable" or preventable accidents; there was insufficient proof a policy regarding the number of accidents and the time frame for such accidents; and there was no notice of the finality of the decision to terminate the appellant.

A. Insufficient Proof of a Policy

There is insufficient proof in the record to show proof of a policy regarding the number of accidents one can be involved in during the course of a year. Ted Matthews, the witness for the appellee, Central Transport, testified at the hearing that the appellant would have received a written copy of the policy when he began work at Central Transport; that the policy would have also been discussed in meetings at the work facility; and that there is a copy of the policy posted at the facility near the time clock (Allegedly, a laminated document containing eight pages). (TR 50).

Matthews also testified that the document following Exhibit #1 in the record is a copy of the policy. (TR. 77; RE. 118) Looking at this document which Matthews claimed he was

reading from during the hearing, this document does not say anything about termination; nor does it discuss the number of accidents an employee of Central Transport could have before being terminated. In fact it reads, "Accidents (within any contiguous 12-month period); (a) Minor chargeable accident after full investigation". Further, it reads on the opposite side, "1st Offense – Final Written Warning" *depending on severity and nature of accident."

If this is in fact the policy of which the employer contends the appellant should have been aware, it is inconceivable that it would be posted with seven other pages unless it was highlighted with a less vague explanation of what it is actually saying written beside it. At the hearing, the employer failed to provide any proof that this so-called policy was in fact posted. A photograph or some other exemplar depicting the actual posted policy would have been sufficient.

The appellant objected to the admission of the document because he claimed he never received a copy of the document until the hearing. Based on the testimony of Ted Matthews, it appears that the employer only presumes that the employee received a copy of the policy or the information the employer contends is contained in the policy. There apparently is nothing in place to ensure that the employee is aware of the policy, and in this case we still do not know if the appellant ever received notice that he could have no more than three chargeable accidents within a year.

B. No Notice of Finality of Decision

Appellees allege that Central Transport, Inc. had a company policy which stated that any accidents within a twelve month period were to be treated with progressive steps, wherein for the first offense, the employee would receive a written warning; for the second offense, the employee

woud receive a written warning; and, for the third offense, according to Safety Director Ted Matthews, the employee could be terminated immediately if it was a major accident. (TR. 41;

As mentioned above, the appellant contended at the hearing that he had never received a copy of the policy which the employer's representative identified as Employer Exhibit #2. In looking closely at this document, there is nothing in it to show how many accidents are allowed. In fact, one can hardly understand what this policy permits or prohibits. In the case at hand, there is a factual dispute as to whether Mr. Magee was, or should have been, aware that he could be dismissed for having four accidents within a year. While the employer claims that the employees received a handbook; that the policy was posted; and that the employees were told about the policy in company meetings, there is no substantial evidence to support these contentions. The employer never produced any form signed by Mr. Magee to show his notice of the policy. Additionally, other than Matthews testimony at the hearing that the appellant should have received a copy of the policy, there is nothing to show that Mr. Magee or anyone else working for the company actually received a copy of the policy. There is nothing to show at what meetings the policy would have been discussed and, in his testimony, Mr. Magee countered that the policy was not posted while he was working there. By any means, even assuming *arguendo* that the policy was made available to Mr. Magee and other employees of Central Transports, it would not have provided sufficient notice of what conduct was prohibited or permitted.

The employer stated that Magee received a warning after the third alleged accident, and presented a copy of said warning. However, the appellant contends that he did not see a warning in the document he signed. He stated that he was threatened with termination if he did not sign the "IAR," so he went ahead and signed the document, but did not read it. By any means, this

"IAR" document is used unfairly against the employee. (TR. 93-94; RE. 97-98) The company does not require you to read the document, but you are *required* to say that you have received the document. Receiving a document is insufficient proof that you have read and understood the document. In this case,

employees of Central Transport are required to sign the form or be terminated for insubordination. In small print, the incident action reports reads as follows:

> Incident Action Requests are generally (but not always) used to inform you when Company expectations have not been met. You are required to sign an IAR, as proof that you have received it. Your signature indicates you have received the IAR; it does not mean you agree with what it says. Accordingly, refusal to sign an IAR is insubordination, which results in immediate termination of employment. Please remember: IAR's are primarily for corrective counseling, designed to improve or correct performance to match Company expectations.

This "IAR" presented by the employer is insufficient proof that the appellant was aware of any so-called "policy" of Central Transport regarding termination stemming from too many "chargeable" accidents, and therefore, the Board's decision should be reversed.

CONCLUSION

In its Circuit Court brief, the appellee urges this court to decide this case based upon the fact that "the employer had a legitimate interest in employing only safe, well-trained drivers" so that its insurance rates and other costs would remain low. According to this Court, in *Foster*, citing *Karpe,* this is simply not sufficient a reason to find willful misconduct such as to disqualify an employee from receiving unemployment compensation benefits.

For all of the foregoing reasons and looking at the totality of the circumstances surrounding this case, there is no substantial evidence to support the decision; the decision is

arbitrary and capricious; and the decision violates the appellant's right to due process, and therefore, the Circuit Court decision upholding the decision of the Board of Review which affirmed the decision of the Administrative Law Judge should be reversed.

Respectfully submitted on this the 31st day of January 2011.

JIMMY MAGEE, Plaintiff

By: Lydia R. Blackmon

LYDIA ROBERTA BLACKMON
Attorney and Counselor at Law
M.S.B. [redacted]
5250 Galaxie Drive (Delivery Only)
Jackson, MS 39206
P. O. Box 505 (Mailing Address)
Lexington, MS 39095
(601) 987-5585/(662) 834-0068
(601) 987-5587/(662) 834-0078–Fax

CERTIFICATE OF SERVICE

_____I, LYDIA ROBERTA BLACKMON, do hereby certify that I have this day served an original and three (3) copies and one (1) CD-ROM of the foregoing Brief of Appellant Jimmy Magee on the following interested persons:

LeAnne F. Brady, Esq.
MDES Legal Department
P. O. Box 1699
Jackson, MS 39215-1699

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

This the 31st day of January, 2011.

Lydia R. Blackmon
LYDIA ROBERTA BLACKMON
M.S.B. [redacted]