IN THE SUPREME COURT OF MISSISSIPPI

| | |
|---|---|
| GINNY WATKINS | APPELLANT |
| VS. | NO. 2010-IA-00093-SCT |
| MISSISSIPPI BOARD OF NURSING | APPELLEE |

INTERLOCUTORY APPEAL FROM

THE CHANCERY COURT OF

RANKIN COUNTY, MISSISSIPPI

# REPLY BRIEF OF THE APPELLANT

STEPHEN L. BEACH III
ATTORNEY FOR APPELLANT
385 EDGEWOOD TERRACE DRIVE
P. O. BOX 13336
JACKSON, MS 39236-3336
PHONE: (601) 969-1222
MSB NO[redacted]

# TABLE OF CONTENTS

# TABLE OF CASES AND AUTHORITIES

## ARGUMENT

### ISSUE ONE: THE CHANCERY COURT COMMITTED ERROR IN FINDING THAT THE RECORD IN THIS CAUSE WAS LIMITED TO THE EVIDENTIARY HEARING TRANSCRIPT OF THE APPEAL PANEL OF THE MISSISSIPPI BOARD OF NURSING

The Appellee Board accuses Ginny Watkins and counsel of attempting to "back door" the appellate procedure in an effort to "sneak in" documents and matters related to the appeal of Ginny Watkins of the Nursing Board's decision. The Board claims in the Appellee's Brief at page 17 that the actions of Watkins and her counsel were "tactics to circumvent the appeal procedure" and "nothing more than Appellant's attempt to get another bite at the apple." While these are clever word plays to impress this Court, it does not change the procedure, the rules, or the case law related to what may be contained in an appellate record of the appeal of an administrative agency.

Moreover, Ginny Watkins and counsel are asking this Court to interpret a statute that is silent as to post hearing actions and whether the documents related to those actions may be considered a part of the record of an administrative agency appeal. As pointed out in the Appellant's Brief, this may be a case of first impression related to the content of the record in such appeals from the Mississippi Nursing Board. Remember the old corporate axiom? A Board can only speak through its minutes! You have to be able to read those minutes in the record to determine what happened before that Board. *See* *Urban Developers LLC v. City of Jackson, Miss*, 468 F.3d 281, 297-299 (5th Cir. 2006).

It is common practice for appeals relating to workers compensation cases and other administrative boards for attorneys or persons appearing *pro se* before those boards to file motions for rehearing, motions to clarify decisions, and other post-hearing motions. These post-hearing motions or actions taken by Boards

**are the frequent subject of appellate review of administrative boards and the records on those appeals regularly contain those post-hearing items.**

**The Board in this cause implies that the Nursing Practice Act does not allow for the appellate review record to contain such items. As pointed out previously in the Appellant's Brief at pages 21-22, Section 73-15-31 of the Mississippi Code of 1972 specifically says: "Such appeal shall be to the chancery court of the county of the residence of the licensee *on the record made, including a verbatim transcript of the testimony at the hearing*." As argued by Ginny Watkins, the definition of "record made" is unclear and there is a statutory vacuum which this Court must interpret in this appeal.**

**Here are the documents filed after the administrative license hearing was held on July 26, 2007, and their importance to this appeal:**

**(1) Final Order of hearing panel dated August 16, 2007 (RE 112-118)—this is the administrative order denying Ginny Watkins the RN license;**

**(2) Appeal briefs filed by all parties (RE 349-367)—presents the arguments of both parties as to the Final Order issued by the administrative panel;**

**(3) Notification by the Board of the hearing on the appeal dated February 20, 2008 (RE 368-391)—this notice set the date for the appeal of the administrative denial of the RN license;**

**(4) Final order dated April 17, 2008 (RE 392-406)—the Board reversed the administrative order and ostensibly granted a restricted RN license to Watkins, however, the order also stated that the Board was granting all of Watkins' requested relief which included an unrestricted license;**

**(5) Watkins files a Motion to Suspend Proceedings to Clarify Final Order on May 5, 2008 (RE 407-421)—this motion was filed to correct the problem caused by the confusing order dated April 17, 2008;**

(6) Amended Final Order dated May 12, 2008 and Order to Suspend Proceedings and to Clarify Final Order (RE 422-434)—this order was to correct the confusion of the April 17, 2008 Board order;

(7) Motion to Reconsider the Amended Final Order and to Reopen Record dated May 29, 2008 (RE 435-440)—this motion was to request the Board to reconsider the Amended Final Order and to present new evidence to the Board received after the administrative hearing;

(8) Order extending appeal time dated June 9-10, 2008 (RE 441)—Board extended appeal time until Motion to Reconsider could be heard by the Board;

(9) Notice of hearing on the Motion to Reconsider issued by the Board setting hearing date for December 5, 2008 (RE 442-445)—this is a notice issued by the Board informing all counsel that the Board would take up the motion to reconsider on the date listed;

(10) Notice by Board attorney that final order had been issued on March 4, 2009 (RE 446);

(11) Order *Nunc Pro Tunc* dated March 4, 2009 (RE 447)—order declares that the Motion to Reconsider would not be considered after counsel was advised that the motion would be heard by the full Board;

(12) Pleadings index sent by Board attorney dated March 20, 2009 (RE 448-450)—index indicated that the unapproved minutes and approved minutes of the full Board hearing would be made available to Watkins counsel;

(13) Affidavit filed by Watkins counsel on March 31, 2009 (RE 451-462)—this affidavit was filed by the undersigned counsel to memorialize the action of the Board taken on December 5, 2008, prepared and filed with

**the Board to show that one hour before the scheduled hearing before the Board, the Board's Executive Director informed counsel that the Board would not entertain oral argument or allow counsel or Ginny Watkins to attend the hearing;**

**(14) Notice of Appeal to Chancery Court filed on April 1, 2009 (RE 8-11, CP 2)—notice of appeal of Board's Order *Nunc Pro Tunc;***

**(15) Amendment of Designation of Record filed on May 20, 2009 (RE 13-15, CP 7)—filed by Watkins counsel to reflect the newly discovered evidence related to the appeal;**

**(16) Response to Designation of Record dated July 10, 2009 (RE 16-18, CP 11)—on the same day this response by the Board was filed, the Board's attorney instructed the Rankin County Chancery Clerk to "hold" appellate documents and not to mark the documents as being filed (the Board's attorney claims in the Appellee's Brief at p. 7-8 that the clerk was informed to keep copies of all of all transcripts previously delivered for review by Watkins counsel, but this is not the procedure contemplated by MRAP rules);**

**(17) Attorney's Examination and Proposed Corrections pursuant to MRAP Rule 10 & 11 filed by Watkins counsel on July 30, 2009 (Re 19-32, CP 14)—Watkins counsel filed this document in accord with MRAP rules with three Exhibits to clarify the confusion regarding the appellate record;**

**(18) Memorandum Brief filed by Watkins counsel of September 10, 2009 (RE 465-492, CP 460)—brief provided to Chancellor itemizing what should be included in the record;**

(19) Motion to Adopt Attorney's Examination of Record and Proposed Corrections filed by Watkins counsel on December 15, 2009 (RE 493-496, CP 490)—motion filed to conclude action on the content of the record; ***and***

(20) Order Overruling the Motion to Adopt Attorney's Examination of Record and Proposed Corrections to Record filed on January 19, 2010 (RE 497-498, CP 496)—order issued by the Chancellor ruling that no other items except for the transcript of the hearing would be considered to be part of the record and part of appellate review.

These documents do not reflect insignificant events. These 20 items record the actions of a Board hearing an appeal, issuing a confusing order in reversing the administrative appeal, motions to reconsider and to reopen the record to present new evidence received after the hearing, and the actions of the Board in noticing counsel for a hearing on the those motions and then denying participation in that hearing. You have here the presence of a possible denial of due process and ignoring newly discovered evidence, yet, the Board wants this Court to completely disregard the existence of these actions.

Several items listed in the timeline of post-hearing actions above did not exist at the time of the administrative hearing. The actions of the Board in allowing then denying a hearing on a motion to reconsider could not have possibly been raised at the hearing held months before those actions. The newly received evidence was not received until after the appeal was filed, however, it was necessary to include this information in any appeal in a supplemental record. Again, there was no way to present this information regarding Watkins' criminal history at the hearing held prior to the filing of the appeal. The undersigned counsel had to make a record on these matters for the protection of the interests

and rights of the client. Those matters were not in existence at the time of the administrative hearing, therefore, all counsel could do was make a record to preserve any appellate issues. Besides, as illustrated, there was *nothing* in the statute that indicated that those particular items could not be included in the record.

MRAP Rule 10 (f) states as follows:

> Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that are the bases of appeal.

Here, Ginny Watkins and counsel seeks to do exactly what is called for in MRAP Rule 10 (f) and that is to convey a fair, accurate, and complete account of what transpired in the trial court. Trial court, in the administrative sense, is not restricted to a hearing where testimony is adduced. Further, if this were true, then criminal appellate appeals could not consider a motion for a new trial to be part of the record. The same could be said for a chancery court case where a litigant files a motion for rehearing or MRCP Rule 59 or 60 motions to correct a judgment. If you only limit the record to the hearing itself and not the post-hearing documents or other items, then you could never convey a fair, accurate, and complete account at what happened at the lower level of court or an administrative board.

Again, there is nothing in the statutes of the Nursing Practice Act that even remotely limits the record to a hearing transcript. The statute says that the appeal is on the "record made" and *must* include the transcript of testimony at the hearing. The statute is silent as to whether or not post-hearing actions may be considered to be part of the record although it is clear from case law that other

**administrative agencies have considered post-hearing actions and documents part of an appellate record.**

**Ginny Watkins is asking that this Court interpret the meaning of "record made" in administrative appeals related to the Nursing Practice Act. As stated in *Board of Law Enforcement v. Voyles*, 732 So.2d 216 (Miss. 1999):**

> **Statutes should be give a reasonable construction, and if susceptible of more than one interpretation, they must be given that which will best effectuate their purpose rather than one which would defeat it.....Yet, a statute must be read sensibly, even if doing so means correcting the statute's literal language...**
>
> **(*Voyles*, at p. 221, cites omitted)**

**Further, in *Dean v. Public Emp. Retirement System*, 797 So.2d 830 (Miss. 2000), this Court made the following pronouncement about statutory interpretation:**

> **Whether a statute is ambiguous or not, the ultimate goal of this Court in interpreting a statute is to discern and give effect to legislative intent. *Anderson v. Lambert*, 494 So.2d 370, 372 (Miss. 1986). While an agency's interpretation of its governing statutes is entitled to deference, there is no duty of deference where the agency's interpretation runs contrary to statutory or constitutional language. *Mississippi State Tax Comm'n v. Moselle Fuel Co.*, 568 So.2d 720 (Miss. 1990).**
>
> **(*Dean*, at p. 836)**

**By reasonable construction and by examining agency deference plus legislative intent, it can be easily argued that the Nursing Practice Act Statute Section number 73-15-31 should be *inclusive* rather than *exclusive* as to what the record should contain.**

**The Appellee Board claims in its brief at pages 13-14 that Watkins should have filed a MRCP Rule 60 motion to submit other documents as additional**

evidence. In essence, the post-hearing motions, particularly the Motion to Reconsider Final Order and to Reopen Record filed by Watkins and counsel are tantamount to such a motion the Board is proposing. The Board is also arguing, however, that the filing of such a motion should not be included in the record. As the Board noted in its brief, the Board found the motion to be improper! It is odd; therefore, that the Board is advising Watkins to file an "improper" motion that would never be part of the record since it took place after the administrative hearing!

It would have actually been easier for Ginny Watkins to simply file an appeal in Chancery Court immediately after the Board's confusing Final Order dated April 17, 2008, (RE 392-406) which in essentially granted Watkins ***both*** a restricted and an unrestricted RN license by the wording of the order. Being mindful of the principle of administrative procedure exhaustion and this Court's ruling in *Purvis v. Barnes*, 791 So.2d 199 (Miss. 2001) which requires a litigant to give a Chancellor the opportunity to reconsider a final ruling before filing an appeal, the undersigned counsel gave the Board every opportunity to correct an obvious error. Now, the Board seeks to have those very corrective actions stricken from the record.

The Board, in its Appellant's Brief, relies heavily on *Spears v. Miss. Dept. of Wildlife, Fisheries and Parks*, 997 So.2d 946 (Miss.App. 2007) and *Watts v. State*, 717 So.2d 314 (Miss. 1998). *Spears* involved a missing transcript while *Watts* is a criminal appeal that dealt with missing portions of the record by the court reporter. In *Watts*, there was an issue of the absent record sections prejudiced

**the criminal defendant. This case, however, is not a criminal matter dealing with the standard of proof of beyond a reasonable doubt. The substantial evidence rule applies to appeals from administrative entities in Mississippi. Here, there are no missing portions of the record or disappearing transcripts, the documents post-hearing are there for the inclusion into the record. Besides, *attempting* to make a record is far different than *failing* to make a record. There was no avenue for making an offer of proof in the post-hearing proceedings. Counsel dutifully and vainly attempted to correct and/or make the record to place the entire matter before the appellate court.**

**Counsel in this case strictly followed MRAP Rule 10 (b) (5) and took every effort to establish an accurate and fair appellate record. *See Appellant's Brief at p. 18-20.* Counsel took the following actions to straighten out the record *even though the Chancery Clerk did not certify the record and counsel opposite took the unusual step of advising the Clerk "not to file" the record*:**

**(1) Timely filed a proper Notice to Appeal and Designation of the Record on April 1, 2009 (RE 8-11, CP 2);**

**(2) Filed an Amendment to the Designation of Record to include newly discovered evidence on May 18, 2009 (RE 13-15, CP 7);**

**(3) Filed the Attorney's Examination and Proposed Corrections on July 30, 2009 pursuant to MRAP Rules 11 (d) (2) and 10 (b) (5) (RE 19-32, CP 14) including three sets of exhibits to enable the Court to determine the contents of the record;**

**(4) Filed a Memorandum Brief related to the Attorney's Examination and Proposed Corrections on September 10, 2009 (RE 465-492, CP 460);**

**(5) Filed a Motion to Adopt the Attorney's Examination of Record and Proposed Corrections on December 15, 2009 (RE 493-496, CP 490).**

**Counsel is frankly puzzled as to what other actions could have been taken in order to produce a fair and accurate record for the appellate review of an administrative ruling. This falls in line with this Court's rules and case law set forth in *Pratt v. Sessums*, 989 So.2d 308 (Miss. 2008) and *Miller v. R. B. Wall Oil Co.*, 970 So.2d 127, 130-131 (Miss. 2007).**

**In responding to Ginny Watkins and her brief submitted to this Court, the Board has failed to address several issues raised regarding procedures under MRAP that were not followed. Specifically, the Board has not commented about the failure of the Chancery Court Clerk to follow the certification process. While the Board counsel has responded briefly in the Appellee's Brief at p. 7-8, nothing was offered as to the failure of the clerk to follow MRAP Rule 10 (b) (5) or Rule 11 (d) (2). The Board also did not provide any explanation as to the reason the undersigned counsel filed an affidavit stating that his appearance before the Board was summarily cancelled and he was not allowed to argue the Motion to Reconsider and to Reopen the Record. (RE 451-462)**

**Since this blatant lack of procedure under MRAP by the Clerk and the issue as to the affidavit were not addressed by the Appellee Board, by case law, the Board has *waived* these two issues. "An appellee should anticipate that the case may be reversed on the issues raised by appellant, and if he wishes to raise a point in event of reversal he must do so in his brief, otherwise he waives it." *See Rigdon v. General Box Company*, 162 So.2d 862, 864, 249 Miss. 239 (Miss. 1964).**

**It is the argument of Ginny Watkins that the Board is fighting so hard to keep the post-hearing documents from being considered by the Chancellor because the Board realizes that there may be a blatant disregard for due process**

in this case against Ginny Watkins and her counsel. A review of this case by the Chancery Court will reveal that the Board acted in an arbitrary and capricious manner.

As this Court has stated in *P.E.R.S. v. Shurden*, 822 So.2d 258 (Miss. 2002):

> An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone.... An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles...

(*Shurden*, at p. 264, cites omitted)

Finally, it should be noted that the Board sought to interject argument regarding the merits of the case itself in the Appellant's Brief at page 15-17. The only issue of this Interlocutory Appeal is the content of the record and interpreting the Nursing Practice Act as to what may be contained in the record for appeal, particularly, all motions, pleadings, documents, and items related to post-hearing actions of the Board and counsel. Watkins and counsel have a legitimate argument regarding the arbitrary, capricious and discriminatory manner in which the Board handled the appeal of the nursing panel's decision to the full nursing board. The granting of a hearing before the full Board followed by denial of appearance at the same hearing is an egregious act that must be considered on any appeal.

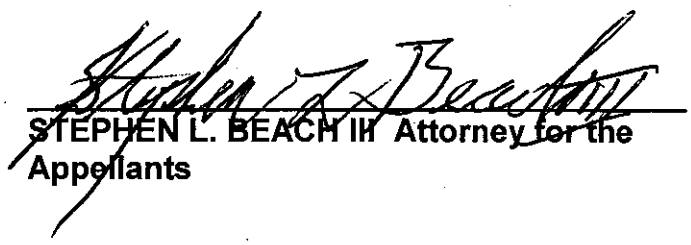
Above all else, "administrative proceedings should be conducted in a fair and impartial manner, free from any suspicion of prejudice or unfairness." *Dean v. Public Emp. Retirement System*, 797 So.2d 830, 837 (Miss. 2000) Refusing to allow post-hearing pleadings, items, and documents from being the content of a record for appellate review clearly runs counter to this Court's statements in *Dean* and a host of other administrative agency appeals.

## CONCLUSION

**The Appellant, Ginny Watkins, though counsel, once again urges this Court to interpret a silent statute as to what may be placed into an appellate record of an administrative appeal, particularly in light of the Nursing Practice Act contained in the Mississippi Code of 1972, as amended.**

**Ginny Watkins respectfully requests that this Court set aside and vacate the Order Overruling the Motion to Adopt Attorney's Examination of Record and Proposed Corrections to the Record filed on January 19, 2010, and direct the Chancery Court to include any and all pre and post-hearing documents and pleadings filed with the Mississippi Board of Nursing to be allowed as part of the appellate record.**

**Respectfully,**



**STEPHEN L. BEACH III Attorney for the Appellants**

## CERTIFICATE OF SERVICE

I, Stephen L. Beach, III, Attorney of Record for Ginny Watkins, Appellant, do hereby certify that I have this date mailed, by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Reply Brief of the Appellant to the following persons:

Hon. John Grant
Chancery Court Judge, Rankin County
P. O. Box 1437
Brandon, MS 39043

Brett Thompson, Esq.
Mississippi Board of Nursing
Attorney for Appellee
1080 River Oaks Drive Suite A100
Flowood, MS 39232-9779

This, the 17TH day of September, 2010.

STEPHEN L. BEACH, III
ATTORNEY FOR THE APPELLANT

STEPHEN L. BEACH, III
Attorney for Appellant
385 Edgewood Terrace Drive
P. O. Box 13336
Jackson, MS 39236-3336
Phone: (601) 969-1222
Fax no. (601) 969-1270
MSB [redacted]