IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CASE NO. 2011-CC-01476

MENKEM ONYIA **APPELLANT**

V. **CASE NO. 2011-CC-01476**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY **APPELLEES**

BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT
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. Mr. Menkem Onyia, Appellant/Claimant
2. Albert Bozeman White, Assistant General Counsel for Appellee
3. Mississippi Department of Employment Security, Appellee
4. Honorable Jeff Weil, Sr., Hinds County Circuit Court Judge

This the 18th day of April, 2012.

Albert Bozeman White

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

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STATEMENT OF THE ISSUE

1. Whether the Circuit Court and Board of Review decisions should be affirmed finding that the Claimant, Menkem Onyia, failed to timely appeal the Administrative Law Judge decision dated November 19, 2010, to the Board of Review, pursuant to the time requirements set out in Mississippi Code Annotated Section 71-5-519 (Rev. 2009)?

2. Whether the Circuit Court and Board of Review decisions should be affirmed finding that the Claimant, Menkem Onyia, failed to prove that he timely appealed the Administrative Law Judge decision dated November 19, 2010, by allegedly calling the phone number specified in said decision on December 3, 2010, and speaking to "Janice"?

3. Whether the Claimant, Menkem Onyia, failed to establish good cause for untimely appealing the Administrative Law Judge decision dated November 19, 2010, to the Board of Review, due to Agency error?

4. Alternatively, in the event this Honorable Court finds that the Claimant, Menkem Onyia, timely appealed the Administrative Law Judge decision dated November 19, 2010, or proved good cause for untimely appealing, whether the Court should remand to the Board of Review to consider Claimant's appeal on the separation issue, or affirm the Administrative Law Judge decision finding that Claimant voluntarily quit his employment without good cause, pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(a) (Rev. 2009)?

STATEMENT OF THE CASE

Menkem Onyia [hereinafter also referred to as "Claimant"] was employed by Integrated Management Services [hereinafter also referred to as "Employer"] as a construction inspector for approximately one (1) year and seven (7) months. (R. Vol. 2, p. 1). He is Nigerian; and his job separation occurred after he left work on April 2, 2010 to return to Nigeria to take care of family business. When he did not return or attempt to contact the Employer for three months, the Employer concluded that he abandoned his job, and replaced him. (R. Vol. 2, p. 7-11, 45-46).

After he attempted to return to work, and was told that he had been replaced due to his extended unapproved absence, and thus job abandonment, Mr. Onyia filed his Initial Claim for Benefits on October 1, 2010. (R. Vol. 2, p. 1). A Claims Examiner investigated his eligibility to receive benefits by obtaining a Form UI-21A from the Employer and interviewing Mr. Onyia. (R. Vol. 2, p. 7-11). Afterwards, the Claims Examiner found that the Claimant voluntarily left work because of personal reasons; and so notified Mr. Onyia and the Employer on October 30, 2010. M.C.A. Section 71-5-513 A(1) (Rev. 2009). (R. Vol. 2 p. 12, 14). Therefore, Mr. Onyia was disqualified from receiving benefits. (R. Vol. 2, p.14). He was also notified of an overpayment of benefits prior to date of disqualification in the amount of $705.00. (R. Vol. 2 p. 14).

Mr. Onyia appealed to the Administrative Law Judge [hereinafter also referred to as "ALJ"] on November 3, 2010. (R. Vol. 2, p. 16). A hearing was held on November 18, 2010, at which Mr. Onyia testified. Derrick Cannon, Vice-President of Finance & Administration, and Tom Avant, Corporate Vice-President of Engineers, testified for the Employer. (R. Vol. 2, p. 25-62). Based upon the testimony, the ALJ found that Mr. Onyia voluntarily quit his employment due to absence from his employment for three (3) months to take care of family business. Essentially, the ALJ found that Mr. Onyia did not take reasonable steps to protect his job, and

abandoned his employment. (R. Vol. 2, p. 66-67). Thus, the ALJ disqualified Mr. Onyia for voluntarily quit his employment without good cause. (R. Vol. 2, p. 66-67). M.C.A. Section 71-5-513(A)(1)(a) (Rev. 2009). The ALJ's Findings of Fact and Opinion as follows, to wit:

FINDINGS OF FACT

> The claimant last worked for this employer in April 2010. On April 2, the claimant left the U.S. to travel to Nigeria for family business. He told the employer he would be gone about three or four weeks. During his stay, the country's president died and the country went into turmoil. The claimant could not call out of the country until the political situation calmed down. When he did, he did not try to call the employer. The claimant received numerous calls from his daughter who was located in the U.S. but never thought to ask her to tell the employer that he was delayed in returning. The claimant finally returned in late June but traveled to Washington D.C. to visit his daughter for a week before returning to work. He did not try to contact the employer while in D.C. (Emphasis added.)
>
> The employer needed someone to replace the claimant so another worker was hired sometime in April. The employer told the claimant that they had no work for him when he reported back to work. The employer had granted the claimant leave in January for three weeks, which turned into six weeks because the claimant had been delayed in returning to work. He was also in Nigeria at that time. The claimant received unemployment insurance benefits after his work ended. (Emphasis added).

REASONING AND CONCLUSION

> Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he has earned remuneration for personal services equal to not less than six (6) times his weekly benefit amount as determined in each case. Section 71-5-513 A (1) (c) provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.
>
> Section 71-5-355 of the Mississippi Employment Security Law provides, in part, that an employer's experience rating record shall be chargeable with benefits paid to a claimant, provided that an employer's experience-rating record shall not be chargeable if the Department finds that the claimant left work voluntarily without good cause connected with the work, was discharged for misconduct connected with the work, or refused an offer of available, suitable work with the employer.

> Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he has earned remuneration for personal services equal to not less than six (6) times his weekly benefit amount as determined in each case. Section 71-5-513 A (1) (c) provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.
>
> The record establishes that the claimant did not intend to quit; however, his failure to maintain contact with the employer for a period of almost three months would leave the employer with the assumption that he had in fact quit. A worker genuinely desirous of retaining his employment would make a concerted effort to keep in contact with the employer. While the claimant may not have been able to call the U.S., he had constant contact with his daughter who could have made that contact on his behalf. The claimant was the moving party in this work separation, which establishes that he quit. A quit because of family issues is without good cause. Benefits were properly denied. The claimant is liable for the overpayment. (Emphasis added.)
>
> DECISION
>
> AFFIRMED. Benefits are denied in this matter. The employer's experience rating record is not chargeable for benefits. The claimant remains liable for the overpayment.

(R. Vol. 2, p. 66-67).

Mr. Onyia appealed the ALJ's decision to the Board of Review. However, the appeal was untimely. The ALJ's decision was dated and mailed November 19, 2010. The ALJ's decision informed Mr. Onyia of his appeal rights stating in pertinent part: "This decision will become final on **12/03/2010**, which is fourteen (14) calendar days from the date this decision was mailed, unless you file an appeal with the Board of Review and/or request a hearing of the case by **12/03/2010**." (R. Vol. 2, p. 68). However, MDES did not receive his appeal until December 6, 2010, and the Board of Review did not receive Mr. Onyia's Appeal until December 7, 2010. (R. Vol. 2, p. 69-70).

On December 30, 2010, the Board of Review dismissed Mr. Onyia's appeal as untimely. (R. Vol. 2, p. 79). Mr. Onyia then appealed to the Circuit Court of Hinds County, Mississippi, on January 5, 2011. (R. Vol. 2, p. 80).

On January 12, 2011, MDES filed its Answer. (R. Vol. 1, p. 4-5). On April 6, 2011, MDES filed the record transcript. On April 25, 2011, Mr. Onyia filed his Brief. MDES filed its Brief on May 6, 2011. On July 20, 2011, the Circuit Court affirmed the decision of MDES, finding that Mr. Onyia failed to file his appeal to the Board of Review timely. (R. Vol. 1, p. 10-11). Mr. Onyia then appealed to this Honorable Court. (R. Vol. 1, p. 12-16).

SUMMARY OF THE ARGUMENT

Mississippi Code Annotated Section 71-519 provides that a claimant or employer who disagrees with the ALJ's decision has fourteen (14) calendar days from the date it was mailed to appeal such decision.

In this case, the ALJ's decision was mailed to Mr. Onyia on **November 19, 2010**, at the mailing address he provided on his Initial Claim, and at which he received all prior communications from MDES. (R. Vol. 2, p. 1, 65-68). The ALJ's decision informed Mr. Onyia that he had fourteen (14) days from the date the decision was mailed to appeal to the Board of Review. (R. Vol. 2, p. 68). As stated in the ALJ decision, the deadline for Mr. Onyia to file his appeal was **December 3, 2010**. (R. Vol. 2, p. 68). MDES did not receive Mr. Onyia's appeal until **December 6, 2010; and it was officially filed with the Board of Review on December 7, 2010**. (R. Vol. 2, p. 69-70). Thus, his appeal was at least three (3) days late, such that the Board of Review's decision is correct.

Mr. Onyia claims that he actually appealed the ALJ decision by telephone on December 3, 2010, when he called the MDES to see if his appeal letter post-marked December 2, 2010 had been received. However, the MDES has no record of him appealing by telephone on that date; and his Certified-Mail appeal letter was not received until December 6, 2010, being three (3) days late.

Alternatively, Mr. Onyia argues that MDES made an error in dating the receipt of his appeal letter, such that he has established good cause for the Court to allow his untimely appeal. The Return Receipt was incorrectly dated "November 6, 2010", instead of "December 6, 2010." However, the appeal letter was also correctly stamped "Received" by the Board of Review on December 7, 2010. Since said letter admittedly was not mailed until December 2, 2010, it could not have been received in November. Thus, the error in the month written on the Return Receipt

is insufficient to establish good cause to allow his appeal out of time, based on some alleged implication that the day it was received may also be erroneous.

The Hinds County Circuit reviewed the record and Briefs; and found that the Board of Review correctly dismissed Mr. Onyia's appeal as untimely. (R. Vol. 1, p. 10-11). Based on the standard of review on appeal, and the facts and law, this Honorable Court should also affirm the decision of the Board of Review dismissing Mr. Onyia's appeal as untimely. Alternatively, in the event that the Court allows the appeal, it should determine that based on the record made before the ALJ, Mr. Onyia voluntarily quit his employment without good cause due to job abandonment. Alternatively, if the Court excuses his late appeal, the Court should remand this matter to the Board of Review to consider the appeal and make that determination on the separation issue.

ARGUMENT

I. Standard of Review

The provisions of Section 71-5-531 provide for an appeal by any party aggrieved by the decision of the Board of Review. That section provides that the **appeals court shall consider the record made before the Board of Review of the Mississippi Employment Security Commission, 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 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So. 2d 193 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982).

In Barnett, the Mississippi Supreme Court stated that:

> {J}udicial review, under Mississippi Code Annotated Section 71-5-531 (1972), is in most circumstances, limited to questions of law, to-wit:
>
> > In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said shall be confined to questions of law.

Barnett, 583 So. 2d at 195.

Furthermore, if the Board's findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing court must affirm. Id. A rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Miss. Emp. Sec. Comm'n., 639 So. 2d 904, 906 (Miss. 1994). The appeals court must not reweigh facts nor insert its judgment for that of the agency. Allen, 639 So. 2d at 906.

II. Facts Showing Claimant's Appeal Was Not Filed Timely

Mississippi Code Annotated Section 71-5-519 sets forth the applicable appeal time providing, in pertinent part, to wit:

> The parties shall be duly notified of such tribunal's decision, together with its reasons therefore, which shall be deemed to be the final decision of the executive director **unless, within fourteen (14) days after the date of notification of such decision, further appeal is initiated** pursuant to Section 71-5-523.

Emphasis added.

In the case *sub judice*, the ALJ's decision was mailed on **November 19, 2010**, to the Claimant at the mailing address he provided on his Initial Claim, and at which he received all prior communications from MDES. (R. Vol. 2, p. 1, 65-68). The ALJ's decision informed Mr. Onyia that he had fourteen (14) days from the date the decision was mailed to appeal to the Board of Review, and further informed him of the deadline to file his appeal, being **December 3, 2010**. This information was printed in bold, black letters. Nevertheless, Mr. Onyia did not file his appeal to the Board of Review until **December 6, 2010**, being three (3) days late. (R. Vol. 2, p. 65-68, 69-70).

a.) Alleged Appeal By Telephone

In his appeal letter to the Board of Review, Mr. Onyia gives no reason for untimely filing his appeal. (R. Vol. 2 p. 70). However, in his Brief to this Honorable Court, Mr. Onyia asserts that he actually appealed to the Board of Review by contacting "Janice", an MDES staff member, on **December 3, 2010**, at (601) 321-6503. Mr. Onyia claims that he called the Appeal number specified on the ALJ decision, and was connected with "Janice". The MDES Appeal number (601) 321-6503 is an automated number shown in the ALJ's decision as one of the two numbers to call to appeal. By calling this number, callers are given only three options, being to press "1" to appeal, "2" to inform the Appeals department of phone contact information for a hearing, or "3" to return

a phone call from the Appeal department. Once option "1" is pressed, the caller is connected with a phone Appeals attendant at the Call Center. This number does not give callers the option of connecting to the Benefit Payment Control department, where one of three persons named "Janice" is employed, and where a claimant would call to inquire regarding an overpayment. Thus, Mr. Onyia's testimony that he spoke to "Janice" indicates that he called MDES to inquire about MDES's notice to him of an overpayment in the amount of $705.00, not to file an appeal. (R. Vol. 2 p. 8). Even so, assuming that Mr. Onyia was connected to the Benefit Payment Control department, "Janice" in that department would not have been able to take and log his appeal as filed; and he would have either been transferred to the Appeal number, or instructed to call MDES back at the correct phone number.

Regarding Mr. Onyia's alleged appeal by phone on December 3, 2010, the MDES Appeals department has no record of a call from him on that date. Further, Mr. Onyia admits in his Brief that he never spoke to the Appeals department, or an appeal attendant at the Call Center. Further, Mr. Onyia produces no phone records to the Court showing the MDES number that he allegedly called on December 3, 2010.

Based on his Brief, Mr. Onyia did not follow the proper phone instructions to file an appeal, but instead apparently called a different number and spoke to an MDES employee in the Benefit Payment Control department, which does not accept or handle taking appeals. Although Mr. Onyia may have spoken with "Janice" regarding an overpayment of benefits, he did so only by calling a different number than the number listed on the ALJ's decision, which was the only appropriate number to file an appeal.

Mr. Onyia's vague allegations, without substantial proof, *i.e.* his phone records, showing that he in fact called the MDES on December 3, 2010, and called the correct Appeal phone number, do not establish that he appealed on that date.

b.) Alleged Appeal By Letter

The only MDES record of an appeal by Mr. Onyia is a letter to the MDES Board of Review on December 2, 2010, via Certified Mail, Return Receipt Requested.

In that regard, Mr. Onyia produced a Return Receipt reflecting that the MDES mail center received the letter until **December 6, 2010**, which was incorrectly stamped "November 6, 2010". (*See* Appellant's Attachment B (3) and Exhibit "A" attached to his Circuit Court Brief). This appeal letter was forwarded to, and stamped "Received" by the Board of Review on December 7, 2010. (R. Vol. 2 p. 71). Thus, his appeal was effectively filed for the first and only time on December 6, 2010, at the earliest date, when received by the MDES; and subsequently when forwarded to and received by the Board of Review on December 7, 2010, being at least three days late.

In Wilson v. Miss. Dept. Emp. Sec., 32 So. 3d 130 (Miss. Ct. App. 2010), the Court held that the appeal must be **received** by MDES on the fourteenth (14^{th}) day, or it is not timely filed. In this case both MDES's records and Mr. Onyia's Return Receipt establish that MDES did not receive his appeal until three (3) days past the appeal deadline of December 3, 2010.

In Brown v. Miss. Dept. of Emp. Sec., 29 So 3d 766 (Miss. Ct. App. 2010), the Court again considered whether an appeal was timely filed as of the date it was postmarked, rejecting this argument by Mr. Brown. In this case, Mr. Brown had fourteen (14) days to appeal from the Claims Examiner's June 6, 2008 decision, making the appeal deadline June 20, 2008. Mr. Brown mailed his appeal on June 20, 2008, and the letter was postmarked as of that day. However, it was

not received by MDES until June 25, 2008. The Court held that the appeal was five (5) days late; and affirmed MDES's dismissal of Mr. Brown's case.

In his Brief to this Honorable Court, Mr. Onyia does not assert that his appeal letter dated December 2, 2010 was timely filed by being postmarked prior to the December 3, 2010 deadline. However, he argues that due to Agency administrative error in incorrectly dating the month it was received, creates an issue as to whether MDES did not in fact receive this letter on December 3, 2010, not December 6, 2010. Specifically, he alleges that his appeal letter may have actually been received prior to December 6, 2010, based on an alleged inference of doubt created by the Return Receipt incorrectly reflecting receipt in November, rather than December, 2010. However, an error in dating the month the letter was received does not establish that an error occurred in dating the day it was received.

As to this argument, this Honorable Court should take judicial notice that December 2, 2010 was a Thursday; that December 3, 2010 was a Friday; that MDES, being a State Agency, was closed for business on Saturday and Sunday December 4 and 5, 2010; and that the next business day was Monday December 6, 2010. Since the letter was not received on December 3rd, the next business day was December 6th. Further, the letter could not have been received in November, since it was not post-marked until December 2nd. Further, it is not unusual for local mail to take at least a couple of days to be delivered. It is certainly logical that MDES did not receive the December 2nd letter until December 6th, particularly since it was sent Certified Mail, which may also extend the time for delivery by the Post Office due to additional handling requirements. Further, the fact the month was entered wrong on the Return Receipt, without some other proof, should not sufficiently establish that the day was wrong to justify Mr. Onyia's out-of-time appeal.

Based upon Brown and Wilson, supra, Mr. Onyia must establish that his appeal letter was received timely by the MDES. It is not the burden of MDES to prove that it was not received timely. Further, the Agency error in dating the month the Return Receipt has no bearing on the date the appeal letter was actually received, when it could not have been received in November. Obviously, the letter postmarked as of December 2, 2010 could not have been received on November 6, 2010. The fact the letter was erroneously dated November 6, 2010 should not create any implication that it was received on December 3, 2010, since the error is in the month, not the day. Further, the letter is also stamped "Received" by the Board of Review as of December 7, 2010. Thus, Mr. Onyia's argument that the fourteen (14) day appeal requirement should be relaxed due to the dating of the Return Receipt should be rejected as irrelevant, insufficiently probative, and unpersuasive as grounds to allow his late appeal to proceed for good cause shown. Typically, to establish good cause, there must be a showing of some affirmative event or legal cause that delayed delivery of the appeal letter to the MDES. Holt v. Miss. Emp. Sec. Comm'n., 724 So. 2d 466 (Miss. App Ct. 1998).

In Wilkerson v. Miss. Emp. Sec. Comm'n., 630 So. 2d 1000 (Miss. 1994), the Mississippi Supreme Court held that when notification is by mail, the fourteen day time period began running from the mailing date. Id. at 1002. Furthermore, while holding that an appeal filed **one** day late was untimely, the Court stated that the fourteen-day time period as set by statute is to be strictly construed. Id. *Emphasis added.*

Mr. Onyia was afforded all of the notice to which he was entitled and his appeal to the Board of Review was not timely filed. Since notification was sent by mail to his correct address, the case of Wilkerson v. Miss. Emp. Sec. Comm'n., 630 So. 2d 1000 (Miss. 1994), is on point and controls as to calculating the appeal deadline.

Further, Mr. Onyia was given instructions in the ALJ decision as to how to appeal. He failed to follow those instructions, instead apparently questioning an MDES employee in a different MDES department about his overpayment of benefits. Since Mr. Onyia was notified of the procedure for filing an appeal in the ALJ decision, and since he failed to timely follow that procedure, Mr. Onyia failed to establish good cause for his untimely appeal.

III. Voluntary Quit Issue

Regarding the record testimony as to Mr. Onyia's job separation, in the instant case, Menkem Onyia testified first. Mr. Onyia stated that his last day to work for the Employer was on April 2, 2010, when he left for Nigeria. He asked for a 3-4 week leave of absence sometime prior to April 2, but he could not remember the exact date. (R. Vol. 2, p. 30-33). He alleged the leave was approved, but did not state for how long, or produce any written approval.

Mr. Onyia was questioned further about the need for the leave of absence. He stated that he needed to travel to Nigeria to meet with the descendants of his late father, Chief Jayaigia Onyia. He told the Employer that the length of his absence depended on the circumstances. However, he expected to be gone about three weeks to one month. (R. Vol. 2, p. 36). Mr. Onyia claimed that Thomas Avant or Mr. Danzi gave him permission to leave. (R.Vol. 2 p. 36-37). Mr. Avant disputed that in his testimony. (R. Vol. 2, p. 56-57).

Mr. Onyia was questioned as to when he returned to work. He returned to the United States towards the end of June, but did not attempt to return to work until June 30, 2010. He had no contact with the Employer from April 2 until he attempted to return to work on June 30. (R. Vol. 2, p. 36-39). Mr. Onyia alleged that he could not call the Employer during that time due to the circumstances in Nigeria. He stated the country was in turmoil due to the death of the president. He alleged that he could not go anywhere or do anything due to the unrest, but he also

admitted that he had constant contact with his daughter, who was in Washington, D. C. (R. Vol. 2, p. 37-40). He did not state that the phones were not working in Nigeria; and obviously some phones were working for him to be in constant contact with his daughter.

When questioned why he could speak to his daughter, but could not call the Employer, Mr. Onyia stated that **he took full blame for not calling to inform the Employer of the delay**. (R. Vol 2, p. 38). When questioned about his return to the United States, he stated that he returned to the United States about **one week prior to calling the Employer**. When he got back, his daughter had arranged for him to be with her in Washington, D. C. for her birthday. He stated that he flew from Nigeria to Jackson, spent the night, and then flew from Jackson to D. C. However, he again stated that he did not attempt to call the Employer while in Jackson or D. C.; and he took full responsibility for not calling at that time. (R. Vol. 2, p. 39-40). He also acknowledged that the Employer did not know he had returned to the U. S., and gone to Washington, D. C. (R. Vol. 2, p. 41). It simply did not cross his mind to call the Employer.

During the questioning, Mr. Onyia also stated that in January 2010, he traveled to Nigeria on family business; and was delayed in returning at that time. At that time, he was gone about six weeks, which was approximately three weeks longer than his appointed return date. At that time, he was allowed to return to work, without notifying the Employer that he would not return on time.

Assuming from this testimony that Mr. Onyia left for Nigeria in early January, he did not return to work until the first of March. Then he left again for Nigeria on April 2, 2010, meaning that he was only at work approximately three to four weeks before again leaving on personal business. (R. Vol. 2, p. 42-43). At the end of this testimony, he again admitted that during the trip to Nigeria in April, May and June, 2010, he spoke to his daughter in D. C. continuously, but did not

have her call the Employer to inform them of the reason for his extended absence, or when he intended to return to work. (R. Vol. 2, p. 43).

Derrick Cannon, Vice President of Finance and Administration, testified next. (R. Vol. 2, p. 44). Mr. Cannon was questioned as to whether the leave of absence was granted in April. He was not sure. He did recall the first leave of absence with permission, which began January 19 and ended March 1. Mr. Cannon stated that although Mr. Onyia did not return when he was scheduled to return, the Employer did allow him to return to work on March 1. (R. Vol. 2, p. 45).

Mr. Cannon was later informed that Mr. Onyia had to go back to Nigeria on April 2. However, Mr. Cannon was not aware of whether he was given consent to do so. (R. Vol. 2, p. 45-46). In fact, Mr. Cannon stated that the extended absences were a pattern that they could no longer tolerate, implying that permission for the second leave of absence request was doubtful. He explained that Mr. Onyia's position involved inspecting time sensitive projects, such that it was necessary to fill his position with somebody dependable. (R. Vol. 2, p. 46-51). He was replaced after he did not return, indicating that the replacement occurred when he did not return as expected within three weeks. (R. Vol. 2, p. 46).

Mr. Cannon again stated that Mr. Onyia said he would be gone three weeks max. (R. Vol 2, p. 47). Mr. Cannon also stated there was no communication with Mr. Onyia during his absence. The Employer had no idea how to contact him. (R. Vol. 2, p. 47).

Mr. Cannon was questioned further about Mr. Onyia's request for a leave of absence. He again stated that the Employer could not approve two to three months off, due to the time sensitive projects. (R. Vol. 2, p. 51-52). He also stated that Tommy Avant told him that he did not approve Mr. Onyia's second leave request. (R. Vol. 2, p. 48).

Tom Avant, Corporate Vice-President of Engineers, testified next. Mr. Avant stated that Mr. Onyia did inform him that he was again leaving for Nigeria to take care of family business. However, Mr. Avant could not recall how long he wanted off, or what Mr. Onyia was told about whether his job would be available on return. (R. Vol. 2, p. 56). Mr. Avant stated that Mr. Onyia gave him the impression that he was leaving permanently due to a family emergency in Nigeria. (R. Vol. 2, p. 57).

Mr. Avant further stated that when Mr. Onyia attempted to return in June, he also stated that he would again be leaving for Nigeria in September. (R. Vol. 2, p. 58).

The case NCI Building Components v. Berry, 811 So. 2d 321 (Miss. Ct. App. 2001) is instructive regarding an employee's obligations to take reasonable steps to protect his/her job.

In Berry, Mr. Berry was disciplined for excessive absenteeism. Subsequently, his supervisor allowed him to take a couple of days off, but he was nevertheless required to call in those absences according to company policy. Mr. Berry did not call in; and the policy called for termination after three successive absences without calling in. On the day following these two absences, Mr. Berry came into the office to pick up his paycheck. Mr. Berry then asserted that he was terminated when he picked up his check. Mr. Berry apparently did not return to work after that.

In Berry, supra, based on these facts, the Court held that the evidence was that work was still available to Mr. Berry; and the evidenced supported the Department's determination that Mr. Berry voluntarily quit. The Court further held that he did not take reasonable steps to protect his job by discussing his employment with his supervisors, instead of simply not returning to work. Id.

In Quinn v. Miss. Dept. of Emp. Sec., 56 So. 3d 1281 (Miss. Ct. App. 2010), the Court of Appeals also recognized the employee's obligation to take reasonable steps to protect his/her job. In this case Ms. Quinn had an approved maternity leave of absence. After being released to return to work, the Board of Review found that she did not return to work as required. Although the testimony was conflicting, the Court affirmed the Board of Review's decision finding that she voluntarily quit her employment without good cause, by failing to timely return to work after her leave of absence.

In Miss. Dept. of Emp. Sec. v. Shields, 42 So. 3d 1204 (Miss. Ct. App. 2010), the Court of Appeals reversed the Circuit Court and reinstated a determination that Ms. Shields failed to return to work after a leave of absence ended, abandoned her employment, and thus voluntarily quit without good cause. In this case, the facts as to whether she abandoned the employment by failing to call the employer to return to work after her leave ended. Claimant alleged that she did so.

Regarding the separation issue, even if the Court finds that Mr. Onyia appealed timely, or had good cause for his late appeal, the record established that he is not eligible for unemployment benefits based on his job separation. While it's questionable as to whether the Employer approved a three-to-four week leave for Mr. Onyia, his absence admittedly was for twelve (12) weeks (3 months), due to personal reasons. He also failed to maintain contact with his employer during this time, and even after he returned to the United States. Based on the facts as set out above regarding the separation issue, this Honorable Court should remand this matter to the Board of Review to determine that Mr. Onyia voluntarily quit his employment without good cause due to abandoning his job; or alternatively, the Court should make such determination.

CONCLUSION

Mr. Onyia has offered an insufficient explanation to this Court and MDES that can be considered good cause as to why his appeal to the Board of Review was late. Furthermore, the record supports a finding that his appeal was not made timely. There is substantial evidence to support the Board of Review decision in holding Mr. Onyia did not timely file his appeal, and that he is disqualified from benefits, and remains liable for the assessed overpayment, plus any accrued interest.

Since the law was appropriately applied to the facts and it supports the Circuit Court and Board of Review decisions, this Honorable Court should affirm. Alternatively, if the Court finds that the appeal should be allowed, based on the facts as set out above regarding the separation issue, this Honorable Court should remand this matter to the Board of Review to determine that Mr. Onyia voluntarily quit his employment without good cause due to abandoning his job; or alternatively, the Court should make such determination, based on the record before the Court.

RESPECTFULLY SUBMITTED, this the 18th day of April, 2012.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

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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:

Mr. Menkem Onyia
548 Ellis Avenue
Jackson, MS 39209-6201

Honorable Jeff Weill, Sr.
Circuit Court Judge, District 7
Post Office Box 327
Jackson, MS. 39205-0327

THIS, the 18th day of April, 2012.

Albert Bozeman White

Albert Bozeman White