

DECIDED IN THE COURT OF APPEALS

APPELLANT

VS.

CIVIL ACTION NO.

**MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION AND APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE:
COURT FROM WHICH APPEALED:
ATTORNEY(S) FOR APPELLANT(S):
ATTORNEY(S) FOR APPELLEE(S):

NATURE OF THE CASE:
TRIAL COURT DISPOSITION:

CIVIL: UNEMPLOYMENT BENEFITS
CIRCUIT COURT VACATED DECISION OF MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION WHICH AWARDED UNEMPLOYMENT BENEFITS TO

BEFORE , AND ,
, FOR THE COURT:

filed a claim for unemployment benefits pursuant to the Mississippi Employment Security Law. The claims examiner disqualified under Section 71-5-5 13A (a) (b) on the grounds that was discharged for misconduct. appealed to the Board of Review which awarded Banks benefits and held that there was not substantial clear and convincing evidence provided by , 's employer, that committed any misconduct. appealed to the County Circuit Court which reversed the Board of Review's decision and denied 's claim. appeals to this Court and asserts the following errors:

- I. THE STANDARD OF REVIEW OF DECISION OF MISSISSIPPI EMPLOYMENT SECURITY COMMISSION BOARD OF REVIEW.
- II. THE FINDINGS OF FACT OF THE BOARD OF REVIEW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE DISTURBED.
- III. THE BOARD OF REVIEW APPLIED THE PROPER LEGAL STANDARD IN CONCLUDING THAT THE CLAIMANT DID NOT ENGAGE IN MISCONDUCT.

Finding that the circuit court was in error, we reverse and reinstate the Board of Review's award of benefits.

FACTS

On _____, _____, United Auto Workers Local 1956 commenced a strike against _____ when collective bargaining failed. After the strike, _____ alleged that _____, an employee on strike, threw tacks under non-striking employees cars and kicked a vehicle. _____ was terminated due to this alleged conduct. On _____, _____ filed a claim for unemployment benefits with the Mississippi Employment Security Commission. On _____, _____, the claims examiner disqualified _____ under section 71-5-513A (a) (b) on the grounds that Banks was discharged for misconduct.

_____ appealed to the appeals referee who awarded _____ benefits and held that there was not substantial clear and convincing evidence provided by _____, _____'s employer, that _____ committed any misconduct. _____ appealed to the board of review which adopted the findings of fact and opinion of the referee. _____ appealed the board of review's decision to the _____ County Circuit Court which denied _____'s claim. Subsequently, _____ appealed to this Court.

In awarding benefits to _____, the Board of Review adopted the findings of the appeals referee who held as follows:

The claimant was employed approximately _____ years, last working as an Assembler A with _____, _____, Mississippi. His/Her last day of work was on _____, _____. The employees as _____ of _____ went on labor strike effective _____ a.m./p.m. on _____, _____. While on strike, the employees set up a picket line at the plant's entrances. The claimant acted as a strike captain during this process. The employer began to receive complaints from nonstriking employees that their vehicles were being vandalized. Some acts of vandalism involved tacks in the tires of employees, broken windshields, as well as cut tires. To monitor the striking workers, the employer had security guards video tape the picketers. During this tape session, the employer witnessed the claimant bending down and motioning as to throw tacks in the pathway of departing employees. Furthermore, the employer believed that the tapes showed claimant kicking the vehicle of a nonstriking employee. In viewing the videotape, claimant does bend down and he/she made a motion as if to throw tacks. However, there is no visible evidence that claimant had tacks in his/her hand or that he/she threw tacks in the pathway of the vehicles. In the incident where claimant allegedly kicked the vehicle, the tape does show that claimant made a kicking motion at a passing vehicle. However, it is difficult to tell if claimant actually struck the vehicle with this motion. If claimant did, in fact, come in contact with the vehicles, the alleged kick was nothing more than a touch. There was no visible damage nor sound from the alleged kick. Based upon the evidence in the tape, the employer dismissed claimant for misconduct associated with the picket line and strike activities. . . In this case, the Referee is of the opinion that there was not substantial clear and convincing evidence provided by the employer to show that claimant threw tacks in the pathway of vehicles of the nonstriking employees nor has it been shown the claimant maliciously or intentionally damaged a nonstriking employee's vehicle with the kick. The testimony as well as recorded evidence does show the claimant was dissatisfied with the fact that many of the employees chose not to stand

together with the striking union members. However, this dissatisfaction within itself would not measure to the level of misconduct within the meaning of the law. The decision of the Claims Examiner is, therefore, cancelled.

In reversing the Board of Review the circuit court made three particular findings we need to note for a review of the law applicable to this case. First, the circuit court held that "the findings of fact as determined by the appeals referee are supported by the evidence and will not be disturbed." Next, later in its opinion, the circuit court stated that "was found by the commission to have engaged in conduct during the course of the strike designed to dissuade employees and visitors from entering the employer's plant."

Finally, the circuit court held that:

The referee seems to place much weight on the fact that the proof is scant on the extent of the actual damage caused by . The referee's approach misses the mark. It is not the damage caused by the claimant's conduct, but the conduct itself that disqualifies him/her from receiving benefits.

The claimant's actions were meant to be intimidating gestures and threats of property damage to non-striking fellow employees and visitors to the employer's plant. The actions were designed to interfere with and otherwise injure the business of the employer; or in the language of Wheeler, the conduct evidenced a willful and wanton disregard of the employer's interest and a gross disregard for the standard of behavior that the employer had a right to expect from its employee.

LAW

The three assignments of error argued here are interrelated and will be addressed collectively.

asserts that the scope of review by the circuit court is limited, and that if the facts are supported by substantial evidence, absent fraud, then the jurisdiction in any judicial proceeding is confined to questions of law. Mississippi Code Annotated Section 71-5-31, in pertinent part, provides the standard of review for this Court:

In any judicial proceedings 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.

See Also Mississippi Employment Sec. Commission V. Percy, 641 So. 2d 1172 (Miss. 1994).

The board of review must be affirmed absent substantial evidence to support its factual findings or misapplication of the law. is correct in this regard. agrees with this scope of review.

The Mississippi Supreme Court has defined misconduct as:

Conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard the 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 of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute.

Shannon Eng'g & Constr. V. Mississippi Employment Sec. Comm.; 549 So. 2d 446, 448-49 (Miss. 1989). The conduct "must be harmful to the employers interest." Wheeler v. Ariola, 408 So. 2d 1381 (Miss. 1982). The employer has the burden of establishing a claimants misconduct by "substantial, clear, and convincing evidence." Shannon Eng'g & Construction, 549 So. 2d at 450.

The circuit court held that the appeals referee's findings of fact were supported by the evidence and would not be disturbed, but further held that the board incorrectly interpreted the applicable law as to the definition of misconduct.

No witness testified that [redacted] had tacks on his/her person or attempted to throw them under the wheels of passing vehicles. [redacted] specifically denied the allegation. Likewise, no witness testified that [redacted] kicked any passing vehicle. Again, [redacted] denied this allegation.

The trial court's assertion in its opinion that the commission found [redacted] to have engaged in conduct designed to dissuade employees and visitors from entering the employer's plant is not supported by a plain reading of the commission's findings. Although we agree with the trial court's conclusion that conduct itself and not the amount of damage caused is what disqualifies a claimant from receiving benefits, the commission did not find sufficient bad conduct such as to evince a willful and wanton disregard of the employer's interest or a gross disregard for the standard of behavior that the employer had right to expect from its employee. Simply stated, although as the finder of fact our opinion may have differed from the commission, neither the trial court nor this court is at liberty to substitute our conclusions as to the facts or what the facts show.

In reaching our decision, we need to address two other points [redacted] raised in this appeal.

After the hearing before the appeals referee and before the opinion by the commission, [redacted] sought to have the record supplemented by an affidavit of one witness and the deposition of another witness, both of whom would allegedly directly implicate [redacted] in misconduct. Supplementation was denied. This was well within the commission's discretion. As [redacted] correctly points out, Section 71-5-523 of the Mississippi Code gives the commission the power to affirm, modify or set aside any decision based on evidence previously submitted or direct the taking of additional evidence or permit the parties to initiate further action.

After [redacted] appealed the board's decision to the circuit court, one side of the four tapes that were used to record the hearing before the appeals referee was missing. [redacted] argues that this testimony requires this Court to "affirm the circuit court, vacate the Mississippi Employment Security Commission's determination and issue a determination of non-chargeability." [redacted] asserts that the part missing from the tape would only be significant if the proof that was missing would have changed the decision of the board. [redacted] also argues that [redacted] failed to demonstrate any specific missing proof which would make a difference in the board's decision.

The missing testimony appears to have been limited to part of [redacted]'s testimony. The findings of facts were adopted by the circuit court and there does not appear to be any material testimony or facts missing for resolution of this case. [redacted] argues that because there is missing testimony, this Court must affirm the circuit court's decision. [redacted] cites *Melody Manor Convalescent Center V. Mississippi State Department of Health*, 546 So. 2d 972 (Miss. 1989) for the proposition that the board merely "rubber-stamped" the appeals referee's decision because this portion of the record was missing and such action constitutes arbitrariness and capriciousness. In that case, there was no discussion of missing portions of a record. The court merely stated that an appellate court will overturn an administrative agency where it acts arbitrarily or capriciously.

The Mississippi Supreme Court has not specifically addressed this issue but similar cases provide a guide. In *Shelton V. Kindred*, 279 So. 2d 642, 644 (Miss. 1973) the court held that in the absence of a record, "it must be presumed that the rulings of the trial court were correct, and such presumption will prevail, unless the actual record supports the contrary view." See also *Kirk V. Koch*, 607 So. 2d 1220, 1223 (Miss. 1992) (appellate court will not disturb a judgment based on allegations not supported by the record); *Jackson Opera House Co. V. Cox*, 192 So. 293 (Miss. 1939) (notes of stenographer stricken and thus Mississippi Supreme Court must presume that the evidence warranted trial court's decision); *Hume V. Inglis*, 122 So. 535 (Miss. 1929) (see below).

The record must be adequate to show that reversible error was committed below. *Queen V. Queen*, 551 So. 2d 197, 199 (Miss. 1989) (citing *Moawad V. State*, 531 So. 2d 632 (Miss. 1988));

The commission in its brief requested that we strike that portion of [redacted]'s brief wherein it characterized the commission as a "rubber stamp." We agree with the commission; consider it done. *Williams V. State*, 522 So. 2d 201, 209 (Miss. 1988)). Failure to provide a transcript could have the effect of requiring this Court to presume the evidence was legally adequate for the decision below. *Queen*, 551 So. 2d at 199 (citing *Wade V. Wade*, 419 So. 2d 584, 585 (Miss. 1982)).

In *Queen*, the appellant failed to present the Supreme Court of Mississippi with a transcript. *Queen* at 201. The Mississippi Supreme Court held that it could not consider on appeal any objection to alimony as the Court could not determine whether the appellant properly objected to consideration of alimony by the chancery court at trial or whether the chancery court failed to sustain his objection, if any. 1-1

In Williams, the appellant failed to present a transcript to the Mississippi Supreme Court. Williams V. State, 522 So. 2d 201, 209 (Miss. 1988). The Mississippi Supreme Court held that it could not consider whether a statement made by the prosecutor in closing was improper.

Moreover, where the record is absent or inadequate, the Mississippi Supreme Court has held that there are three options: (1) "if it appears from the record that there is vital error in the proceedings, regardless of and whatever may have been shown by" the portions missing then reversal will result; (2) affirm the case upon the presumption that the trial court is correct and that the portions of the record which are missing were necessary to support the judgment below; and (3) reverse in order to conduct another trial so this Court can obtain a complete record. Hume V. Inglis, [22 So. 535 (Miss. 1929). Thus, this Court could presume in the absence of a record that the evidence presented to the trial court, which was sitting as an appellate court, was sufficient to sustain the judgment of the commission.

Since there appears to be no direct case law on this specific issue, the Mississippi Employment Security Commission's brief cites Goodwill Industries, Inc. V. Industrial Claim Industrial Claim Appeals Office, 862 P.2d 1042 (Cob. App. 1993) for the proposition that if the relevant portions of the transcript are sufficient to allow review of the issue on appeal, then the record is sufficient and remand is unnecessary. The Goodwill court further noted that the employer failed to describe the nature of the testimony missing from the record and "the reason why the failure to have this testimony included for review is prejudicial to its case." Goodwill Industries of Colorado Springs, Inc. V. Industrial Claim Appeals Office, 862 P.2d at 1046.

cites Harp V. Department of the Army, 791 F.2d 161 (Fed. Cir. 1986) for the proposition that although the entire tape of the hearing was lost and there was no transcript, the claimant failed to demonstrate any particular testimony which was not considered or misused which might have caused a different result.

We believe Goodwill and Harp to be good authority. The record before us, and before the trial court below, and the commission is adequate to reader a decision, and fails to point out any particular testimony, which could or would have caused the commission to reach a difference result. We have considered 's other arguments and citations in its brief and need not further address the same in view of our already state opinions.

THE JUDGMENT OF THE CIRCUIT COURT OF COUNTY IS REVERSED AND THE BOARD OF REVIEW'S ORDER REINSTATED. APPELLEE IS TAXED WITH COSTS OF APPEAL.

, , , , , , , AND , , .
, NOT PARTICIPATING.