

**IN THE CIRCUIT COURT OF                      COUNTY, MISSISSIPPI**

**APPELLANT**

**VS.**

**CIVIL ACTION NO.**

**MISSISSIPPI EMPLOYMENT SECURITY  
COMMISSION AND                      APPELLEE**

**REBUTTAL MEMORANDUM SUPPORTING  
'S SUMMARY JUDGMENT MOTION**

**I.**

**INTRODUCTION**

The Mississippi Employment Security Commission ("MESC") argues that appellant's summary judgment motion is inappropriate and without foundation. The MESC ignores the central issues in this case: (1) the Board of Review failed to maintain a complete record as required by Mississippi statutory law; (2) Mississippi statutory law does not provide for remand; (3) the Board of Review erroneously refused to consider eye-witness testimony of                      and                      who witnessed misconduct by the claimant, \*; and (4) the Board of Review's decision is not supported by substantial evidence.

**II.**

**ARGUMENTS AND AUTHORITIES**

In its opposition motion and corresponding memorandum, the MESC fails to address the dispositive central issue in this case. Specifically, the MESC failed to maintain a complete record as required by statutory law, thus rendering its answer inadequate to support a determination in its favor by this Court. A substantial part of the record is missing and that omission makes a significant difference as demonstrated by Arbitrator                      's decision discussed later in this brief. Under Mississippi law, there is no statutory nor common law basis for remand, and this Court has no alternative under existing law but to reverse the decision of the Board of Review and issue a determination in favor of                      . If the Mississippi Legislature had wanted this Court to have the option of remand available, it would have provided for such.

In its Memorandum, the MESC contends: "That customary remedy [remand] was suggested to the parties when this record deficiency was discovered, but                      declined to agree." This statement by the MESC is not entirely true for several reasons. First, the MESC cites no authority supporting its "customary remedy" of remand because none exists. Second, the MESC did not discover that portions of the record were missing until                      appealed the Board of Review's decision to Circuit Court, and statutory law required the MESC to transcribe the hearing tapes. Third, the MESC rejected the idea of a de novo hearing suggested by                      and proposed only to retake the omitted testimony, thus reserving to itself the definition of what testimony was omitted, with no record by which to judge that. The MESC did not want to

conduct a de novo appeal hearing because of the compelling evidence of [redacted] and [redacted]. These eye-witness accounts of claimant's misconduct, which the Board of Review had in its possession but chose to ignore, would compel a finding that the support a determination in its favor by this Court. A substantial part of the record is missing and that omission makes a significant difference as demonstrated by Arbitrator [redacted]'s decision discussed later in this brief. Under Mississippi law, there is no statutory nor common law basis for remand<sup>1</sup> and this Court has no alternative under existing law but to reverse the decision of the Board of Review and issue a determination in favor of [redacted]. If the Mississippi Legislature had wanted this Court to have the option of remand available<sup>1</sup> it would have provided for such.

In its Memorandum, the MESC contends: "That customary remedy [remand] was suggested to the parties when this record deficiency was discovered, but [redacted] declined to agree." This statement by the MESC is not entirely true for several reasons. First, the MESC cites no authority supporting its "customary remedy" of remand because none exists. Second, the MESC did not discover that portions of the record were missing until [redacted] appealed the Board of Review's decision to Circuit Court, and statutory law required the MESC to transcribe the hearing tapes. Third, the MESC rejected the idea of a de novo hearing suggested by [redacted] and proposed only to retake the omitted testimony, thus reserving to itself the definition of what testimony was omitted, with no record by which to judge that. The MESC did not want to conduct a de novo appeal hearing because of the compelling evidence of [redacted] and [redacted]. These eye-witness accounts of claimant's misconduct, which the Board of Review had in its possession but chose to ignore, would compel a finding that the claimant was guilty of misconduct, as demonstrated by Arbitrator [redacted]'s opinion, a copy of which has been previously submitted to this Court by letter dated [redacted], [redacted].

Specifically, Arbitrator [redacted] found that "The company claim of serious misconduct by the grievant must be upheld." With respect to the testimony of [redacted] who also testified before the Appeals Referee as to the events of the afternoon of [redacted], [redacted], the arbitrator found:

The record is clear in showing the janitorial employee, who had known the grievant since childhood, reported having words with [redacted] over [redacted]'s sweeping up the tacks at the front entrance about [redacted] a.m./p.m. on [redacted], [redacted]. The Grievant admits being there when the sweeper was being used, but gave a different version of the conversation between the two. Again he/she absolutely denied knowing what the sweeper was being used for, or seeing any tacks around the picket line. Further testimony from a salaried employee, who also had known the Grievant from childhood indicated stopping at the front entrance about [redacted] a.m./p.m. on [redacted], [redacted], to complain about his/her just picking up tacks in all four tires. The tacks were still in his tires when four pickets, who he/she knew at work, came to the driver's window and laughed upon hearing his/her objections to tack damage. This Witness reported the Grievant was about six feet behind the four pickets, which he/she considered as well within hearing distance. The Grievant, in his/her testimony, denied he/she was even on the picket line at that time on that day.

Testimony, under oath, denying everything can seldom prevail when there is considerable eyewitness accounts [sic] to the contrary. This is especially true when: (1) the denials by the Grievant seem so unbelievable relative to the eyewitness testimony; and, (2) there is absolutely nothing in the record to support the Grievant's position in this matter. It must also

be recognized the eye witness testimony came from individuals having known the Grievant over a long period of time, and took place during daylight hours at close range. In other words, the great weight of evidence in the record greatly favors the considerable eyewitness testimony over the Grievant's mere denials.

See Opinion of Arbitrator \_\_\_\_\_, p. 18, a copy of which has been previously submitted to this Court by letter dated \_\_\_\_\_, \_\_\_\_\_. The MESC ignores \_\_\_\_\_'s additional argument that the MESC erroneously refused to consider additional affidavit and deposition testimony of \_\_\_\_\_ and \_\_\_\_\_. Such evidence was not known to exist at the time of the initial hearing, and \_\_\_\_\_ submitted such evidence to-the MESC for consideration as soon as it became aware of its existence. As evidenced by the record submitted by the MESC to this Court, the MESC did not consider any of the evidence. Specifically, the MESC stamped each document "NOT PART OF THE HEARING RECORD, THEREFORE, NOT CONSIDERED BY THE BOARD OF REVIEW." The MESC's decision not to consider such highly relevant, eye-witness testimony while in its possession is arbitrary and capricious. Furthermore, the fact that the MESC Board of Review did not exercise its discretion and hold a hearing to take additional evidence such as the direct testimony of \_\_\_\_\_ and \_\_\_\_\_, further demonstrates that the Board of Review acted arbitrarily and capriciously and purposely denied \_\_\_\_\_ the opportunity to present substantial evidence.

The MESC contends that "Under the Board's Appeal Regulations, adopted pursuant to 71-5-525, MCA, the Board, unless it directs an additional hearing, does not consider supplemental evidence." The MESC further quotes one of its regulations, c.3. (a), for the proposition that "The Board of Review, itself, may in its discretion, and in order to enable it to determine the rights of the parties, direct that a hearing be held for the taking of additional evidence before it." The MESC contends that "there is no basis for the argument the Board of Review acted in an arbitrary and capricious manner" when it refused to consider the additional evidence submitted by appellant. This position by the MESC is obviously without merit. The actions taken by the MESC, refusing to consider additional evidence of, and, in the alternative, not holding a meeting to take additional evidence when the MESC knew that additional evidence existed, directly violate its own regulations as well as demonstrate that the Board of Review simply rubber-stamped the Appeals Referee's decision. Such denial of an opportunity to present substantial evidence to the Board of Review demonstrates that the Board of Review acted arbitrarily and capriciously.

The MESC also argues that appellant's Motion for Summary Judgment is inappropriate in this appeal context or, in the alternative that it is without foundation. Specifically, in its Memorandum, the MESC contends that "[T]he [Summary Judgment] Motion is to be used to avoid the necessity of a trial in a proper case, that is, where there is no material issue of fact, and the issue is one of law only. Summary Judgment Motion does not fit here." Memorandum, pp. 2-3.

There is no genuine material issue of fact in this case; the only issues that do exist are of law. Appellee's contention that \_\_\_\_\_. Accordingly, summary judgment is an appropriate vehicle to resolve these matters of law that rest before the court. \_\_\_\_\_ agrees that the label "summary judgment" may not be the best name for appellant's motion; essentially, the MESC's argument is semantic; for "A rose by any other name would smell as sweet." Perhaps the most appropriate title for appellant's motion would be that of "Assignment of Error." See Rules 4.01,

4.02, & Rule 5.01, this Court is precluded from considering a summary judgment motion is unfounded. In *Drocato V. Mississippi Publishers Corp.*, 503 So.2d 241 (Miss. 1987), the Mississippi Supreme Court determined that an appellate court is not precluded from considering other grounds for finding that a movant is entitled to summary judgment as a matter of law when the grounds were not the basis of the lower court's judgment but were included in the pleadings. *Brocato*, 503 So.2d at 244-246. Thus, appellee's contention that summary judgment is inappropriate in this context is misplaced, and this Court possesses the inherent authority to enter judgment on behalf of .

### III.

### CONCLUSION

For the above and foregoing reasons, respectfully requests that this Court grant summary judgment in its favor, vacate the findings of fact and opinion of the Mississippi Uniform Circuit Court Rules. These rules govern appeals to this Court from the Mississippi Employment Security Commission. Specifically, Rule 4.01 states that . After the record of proceedings in the lower court upon which the appeal is based is filed with the Clerk of the Court, the appellant, shall, within thirty (30) days, file his assignment of error and brief, and shall signify whether or not oral argument is desired."

Rule 4.01, Mississippi Uniform Circuit Court Rules. These rules apply except where they conflict with the Mississippi Rules of Civil Procedure. Rule 5.01, Mississippi Uniform Circuit Court Rules. Employment Security Commission's Board of Review and issue a decision of nonchargeability.

Respectfully submitted,

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