

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

**APPELLANT**

**VS.**

**CIVIL ACTION NO.**

**APPELLEE**

**MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT MOTION**

I.

This unemployment insurance benefit appeal is before this Court under the provisions of Section 71-5-531, Mississippi Code of 1972. That section, of course, provides for the appellate review by the Circuit Court of the record filed upon which the Board of Review made the decision appealed from.<sup>1</sup>

After the Defendant, \_\_\_\_\_, filed its Answer and the record as prescribed, it was discovered that the transcript of the very lengthy hearing before the Appeals Referee was incomplete, in that a portion of claimant's testimony was omitted. As best can be determined, the Referee must have inadvertently recorded over the omitted testimony.

1 "With its answer, the commission shall certify and file with said court all documents and papers and a transcript of all testimony taken in the matter, together with the board of review' findings of fact and decision therein. In 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." Such things do happen, and when they do, the parties generally agree among themselves that, in order for justice to be done, which cannot be accomplished without a complete record, the matter must be remanded for a new hearing, or at least for such testimony as the parties may agree to. That customary remedy was suggested to the parties when this record deficiency was discovered, but \_\_\_\_\_ declined to agree.

II.

\_\_\_\_\_, instead, has taken the position by the filing of its Summary Judgment Motion that because there was an inadvertent omission of a portion of claimant's testimony, everybody forfeits in the company's favor - that is, claimant's omitted testimony must have been so damaging to his/her own case that this Court must reverse the Board's decision and hold as a matter of law that claimant was guilty of disqualifying misconduct. The argument is presumptuous, and doesn't merit serious consideration. *Honea v. Harris*, 498 F.Supp. 1169, USDC, S.D.Miss. (1980), states the desirability of

a complete record but nothing about forfeiture or the "judicial intervention...vacating the Board's decision". (Memorandum, P. )

A Motion for Summary Judgment under Rule 56, Mississippi Rules of Civil Procedure, has no place in this case in any event. Examination of the Rule, the comments and the annotations, as well as those under the corresponding Federal Rule, clearly shows the 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. There should be no need to cite authority for this. Summary Judgment Motion does not fit here. Under Section 71-5-531, there is no trial to be avoided. This tactic is misplaced, and the Motion should be denied.

### III.

The material exhibited with the Summary Judgment Motion, and the Arbitrator's decision subsequently mailed to the Court, insofar as they are not contained in the record considered by the Board of Review, are not properly before this Court, and should not be considered. Section 71-5-531 states exactly what the bounds of this appellate review are to be. That material is excluded. Under the Board's Appeal Regulations, adopted pursuant to Section 71-5-525, MCA, the Board, unless it directs an additional hearing, does not consider supplemental evidence.

2 Excerpts from Rule 56, MRCP "Comment" "The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial. "Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried;" "...determine what, if any, issues of fact are present for the jury to determine;" "(summary judgment procedure) cannot be used to deprive a litigant of a full trial of genuine fact issues." (emphasis added)

3 Accordingly, the supplemental evidence offered at that level was not considered, and is so marked. See Appeals Regulation C.3.(a), which provides:

All appeals to the Board of Review shall be heard upon the evidence in the record previously made. 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. In such event, notices of hearing shall be mailed, by the Chairman, at least seven days before the date of hearing, specifying the

place and time of hearing, to the claimant and to all others interested in the decision of the Referee which is being appealed. The Board of Review will consider written arguments or briefs filed by any of the parties.

There is no basis for the argument the Board of Review acted in an arbitrary and capricious manner.

IV.

In the interest of justice and judicial economy, the Court should upon its review of the entire record before it hold that the Board of Review properly affirmed the decision of the Appeals Referee, and affirm the decision of the Board, there being no showing that the partial omission of claimant's testimony was harmful error. See Harp v. Department of Army, 791 F.2d 161 (Fed.Cir. 1986); Morales v. Merit System Board, 932 F.2d 800 (9th Cir. 1991). The employer's sole viable argument to the contrary would be that the omitted portion of claimant's testimony would have supplied what was lacking in its burden to show by clear and convincing evidence that there was disqualifying misconduct by claimant.

4. Shannon Eng'g & Constr., Inc. v. Miss. Emp. Sec. Comm'n, 549 So.2d 446, 449 (Miss. 1989). must argue, then, that in claimant's omitted testimony he/she admitted he/she threw tacks and kicked cars. Right.

The Summary Judgment Motion should be denied, and the decisions of the Board of Review affirmed.

Respectfully submitted,

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