IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2014-CC-00555

FRANKLIN COLLECTION SERVICE **APPELLANT**

VS.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY and ANGELICA WESTBROOK **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

1. Franklin Collection Service, Inc., appellant;
2. Michael Chase, counsel for appellant;
3. Mitchell, McNutt & Sams, P. A., counsel for appellant;
4. Angelica Westbrook, appellee;
5. Mississippi Department of Employment Security, appellee;
6. Albert B. White, counsel for appellees.

/s Michael Chase
MICHAEL CHASE
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STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

After being discharged by Franklin Collection Service ("Franklin"), Angelica Westbrook filed a claim for unemployment benefits. The claims examiner approved Ms. Westbrook's claim on the ground that Franklin had not shown that it discharged Ms. Westbrook for misconduct. (R. 108.) Franklin appealed the initial determination. Following a telephonic evidentiary hearing, an administrative law judge affirmed the claims examiner's determination. (R. 135-36.) Franklin appealed that decision to the MDES Board of Review, which affirmed the ALJ's decision, expressly adopting the ALJ's findings of fact and conclusions of law. (R. 143.) Franklin appealed the decision of the board of review to the Circuit Court of Lee County, which affirmed the decision. (R. 64; R.E. 3.) Franklin then timely perfected this appeal.

Statement of Facts

Franklin is in the business of debt collection and must comply with the requirements and prohibitions of the Fair Debt Collection Practices Act ("FDCPA"). (R. 120.) The claimant, Angelica Westbrook, was employed by Franklin as a collector. On or shortly before July 26, 2011, Ms. Westbrook, during a telephone conversation with a debtor, falsely told the debtor that a $15 processing fee collected by Franklin for receiving payments electronically was a charge for interest on the debt. (R. 124.) Franklin does not assess or collect interest on debt payments, and it is a violation of Franklin's policies to make a false statement to a debtor. (R. 120.) Also, making a false or misleading statement in the course of attempting to collect a debt is a violation of the

FDCPA, and Franklin has a policy of discharging employees for such violations. (R. 120-21, 126.)

Franklin has a call-monitoring department. One of the call-monitoring employees heard Ms. Westbrook's misrepresentation and notified a collection supervisor, who listened to a recording of the conversation and confirmed that Ms. Westbrook had made the false statement about the processing fee. (R. 123.) Franklin discharged Ms. Westbrook because of her false statement to the debtor, in accordance with its policy of terminating employees who violate the FDCPA. (R. 120, 123, 125-26).

At the MDES evidentiary hearing, collection supervisor Brittany Thomas testified that Franklin's call-monitoring department had notified her that Ms. Westbrook had misrepresented the processing fee as an interest charge and that she had listened to a recording of the telephone call and confirmed that Ms. Westbrook made the misrepresentation. (R. 123.) Ms. Westbrook's testimony at the hearing was equivocal. She stated, "I have never said anything about a [sic] interest fee" but followed that statement by saying, apparently with respect to the specific call, "If I did, I don't remember how it went." (R. 128.) Ms. Westbrook said that she was aware that the fee at issue was an electronic-payment-processing fee and not a charge for interest and that she knew of the policy and FDCPA rule against making false statements to debtors. (R. 128-29.)

SUMMARY OF THE ARGUMENT

The decision of the board of review awarding benefits to the Angelica Westbrook was contrary to law because the deliberate and unlawful misrepresentation made by Ms. Westbrook meets the definition of misconduct: a deliberate action that violates the known policies of the employer or transgresses a standard of conduct the employer has the right to expect of its employees. Her action subjected Franklin to potential liability under federal law and thus was in disregard of Franklin's interests.

Alternatively, the decision of the board of review should be reversed because, contrary to MDES regulations and case law, the board did not give a discernible explanation for the decision. The findings of fact essentially summarized the testimony at the hearing rather than clearly and definitively resolving disputed issues pertinent to the question of disqualification from benefits and are susceptible to multiple potential interpretations as to the board's reasoning so that one cannot readily ascertain the basis for the decision.

In any event, the decision of the board of review is not supported by substantial evidence. The possible finding that Ms. Westbrook did not make the false statement in question lacks evidentiary support because the evidence is overwhelming that she did make the statement, and such a finding would be inconsistent with other findings stated in the decision. The possible finding that Ms. Westbrook made the statement but did not do so deliberately also lacks substantial evidentiary support, because Ms. Westbrook's failure to give an innocent explanation for the statement and her own testimony and undisputed training and experience with regard to Franklin's policies and the legal requirements for debt collectors make it highly improbable that she made the statement through ignorance or by accident.

ARGUMENT

I. The apparent conclusion of the board of review that making the false statement in question was not "misconduct" was an error of law.

When the supreme court or the court of appeals reviews a decision by a circuit court concerning an agency action, it applies the same standard of review those courts are bound to follow. *Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993). The court reviews the factual findings of the board of review to determine whether they are supported by substantial evidence or are arbitrary and capricious. The court reviews the legal conclusions of the board of review *de novo* to determine if the relevant law was properly applied to the facts. *Mississippi Employment Security Commission v. Jones*, 826 So.2d 77 (Miss. 2002); *Mickle v. Mississippi Employment Security Commission*, 765 So.2d 1259, 1261 (Miss. 2000). The issue of whether given actions constitute "misconduct" under the unemployment compensation statute is one of law. *City of Clarksdale v. Mississippi Employment Security Commission*, 699 So. 2d 578, 580 (Miss. 1997); *Mississippi Employment Security Commission v. Berry*, 811 So. 2d 298, 301 (Miss. Ct. App. 2001). A circuit court's decision that agency action is supported by substantial evidence is a question of law subject to *de novo* review. *Illinois Central R. Co. v. Jackson Ready-Mix Concrete*, 137 So. 2d 542, 545-46 (Miss. 1962).

A person who has been discharged from his job is disqualified from receiving unemployment benefits if his termination was for "misconduct connected with the work." Miss. Code Ann. § 71-5-513.A(1)(b). Misconduct is defined as "deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee." *Wheeler v. Arriola*, 408 So.2d 1381, 1383 (Miss. 1982).

With the element of deliberateness, misconduct is thus distinguished from "[m]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence." *Id.*

As discussed below, the written decision of the ALJ, adopted by the board of review, does not clearly explain the basis for the decision that Ms. Thomas was entitled to benefits. It appears, however, that the decision may well have been based on a conclusion of law that the act Ms. Thomas was accused of did not constitute misconduct.

The ALJ's decision, which was adopted by the board of review, stated that "[t]he evidence on record does not establish that the claimant willfully or deliberately disregarded the employer's interest." (R. 136.) This could mean either (1) that the evidence was insufficient to show that Ms. Westbrook made a false statement as alleged by Franklin; (2) that Ms. Westbrook did make the false statement, but the evidence was insufficient to prove that she did so willfully and deliberately; or (3) that Ms. Westbrook deliberately misrepresented the nature of the processing fee, but that act does not constitute misconduct under the statute.

The stated findings of fact do not clarify the basis for the decision of the ALJ and the board of review. The central express findings (R. 135) were as follows:

1. "The employer discharges an employee for giving false or misleading information to a debtor."

2. "The employer monitors its collectors' calls."

3. "The employer's monitoring department notified the employer of an issue with one of the claimant's calls."

4. "The employer determined that the claimant referred to the employer's 'processing" or 'convenience' fee as an 'interest' fee."

5. "The employer is a non-interest company" (*i.e.*, Franklin does not collect interest on debts it collects).[1]

6. "The claimant does not believe that she referred to the employer's fee as 'interest.'"

7. "The employer discharged the claimant because the employer believed that she gave false or misleading information to a debtor."

Absent from these findings of fact is a finding that Ms. Westbrook did not make the false statement; the ALJ found only that Ms. Westbrook *did not believe* that she had referred to the processing fee as interest on the debt. In contrast, the ALJ found that Franklin "determined" (by Ms. Thomas's listening to the recording of the call) that Ms. Westbrook referred to the processing fee as interest. Given the word "determine" its usual and common meaning of to establish or ascertain something definitely, this appears to be a finding that Ms. Westbrook did, in fact, falsely state that the processing fee was an interest charge, because Franklin could not have determined that she make the statement unless she had actually done so. Also, there was no finding that the false statement was made in ignorance or by accident rather than being made deliberately, and Ms. Westbrook did not claim that she described the charge as interest but did so by mistake. She admitted that she knew the nature of the charge. (R. 129.)

In light of the foregoing findings, the most likely explanation for the ruling is that the ALJ and the board of review determined that Ms. Westbrook made the false statement as claimed by Franklin but concluded as a matter of law that the false

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[1] *See* R. 120. Therefore, a statement that Franklin was collecting an interest charge along with the payment on the debt would be a false statement.

statement did not constitute misconduct.[2] As noted above, this court reviews a legal conclusion of the board of review *de novo*. For the following reasons, that legal conclusion—that it was not "misconduct" within the meaning of the statute to falsely tell the debtor that the $15 additional charge was for interest on the debt—is erroneous; Ms. Westbrook's false representation to the debtor is misconduct under the statute and associated case law.

"[M]isconduct occurs . . . where an employer establishes an applicable policy and standard of behavior, the standard is communicated to its employees, and the employee violates these policies." *Johnson v. Mississippi Employment Security Commission*, 761 So. 2d 861, 866 (¶ 19) (Miss. 2000.) Brittany Thomas, Ms. Westbrook's supervisor, testified without contradiction that Franklin had a policy that collectors were forbidden to make false statements to debtors, that this policy was in the employee handbook, and that Ms. Westbrook's review of the handbook had been acknowledged in writing. (R. 120-21.) Ms. Thomas also testified that FDCPA also prohibits such false statements, and that Franklin's policy was to terminate employees who violate FDCPA. (R. 120-21, 125-26.) Ms. Westbrook admitted that she knew of these policies and knew that the fee was for electronic payment and was not an interest charge. (R. 128.) Thus, there was no dispute that Ms. Westbrook's conduct was prohibited by a policy promulgated by Franklin (as well as a statute), that the policy was communicated to Ms. Westbrook and she was aware of it, and that Ms. Westbrook violated the policy if she described the processing fee as interest. Consequently, making the false statement would be misconduct, at least if it was done intentionally. There is no evidence of record that Ms.

[2] Alternatively, the ALJ and board of review might have intended to refrain from deciding the factual question of what Ms. Westbrook did because a decision was unnecessary in light of their legal conclusion that even if Ms. Westbrook did what Franklin alleged, that conduct did not rise to the level of misconduct.

Westbrook made the false statement by accident. Ms. Westbrook did not testify that she mistakenly believed the charge was for interest—rather, she admitted that she knew it was not interest (R. 129)—or that she had a (quite improbable) slip of the tongue[3] and said "interest" instead of "processing fee for paying electronically." Thus, if Ms. Westbrook described the fee as an interest charge, as the ALJ apparently found and as the evidence overwhelmingly shows, then the statement necessarily was deliberate and willful. Therefore, it was disqualifying misconduct, because it was a "deliberate violation[ ] or disregard of standards of behavior which [Franklin] has the right to expect from [its] employee." *Wheeler v. Arriola*, 408 So.2d 1381, 1383 (Miss. 1982). Certainly Franklin has the right to expect that its employees will abide by its policies and not violate the FDCPA.

The locution used by the ALJ—that the evidence did not establish that "the claimant willfully or deliberately *disregarded the employer's interest*" (R. 136 (emphasis added))—suggests that the ALJ and the board of review may have based the decision not on whether the false statement violated FDCPA or a policy established by Franklin but rather on whether the false statement was actually inimical to Franklin's interest—a sort

[3] Such an assertion would have been implausible because it is difficult to see how an experienced collector such as Ms. Westbrook could accidentally refer to a processing fee, which was assessed only for electronic payments, as "interest." On the other hand, there were reasons for an unscrupulous collector to tell a debtor that the processing fee was interest. Obviously the collector would prefer to have the debtor make the payment immediately rather than relying on the debtor to write out and mail a check after the call concludes, because, human nature, including procrastination and forgetfulness, being what it is, the latter might not happen. The way to pay immediately is by electronic payment, for which Franklin imposes a $15 processing fee. A debtor who pays later, by sending a check, does not have to pay that extra $15. If the collector truthfully tells the debtor that the fee is a processing fee charged for electronic payments, the debtor might be inclined to avoid that fee by writing a check. In that case, as noted above, there is the possibility that the debtor will reconsider his decision to pay up and not send a check after all or will procrastinate or forget and thus delay sending payment. So mischaracterizing the fee as an interest charge, which the debtor would have to pay in any event, would encourage the debtor to pay electronically.

of "no harm, no foul" concept. If that was the case, then that reasoning was erroneous both legally and factually.

The cases cited above holding that an employee commits misconduct by violating the employer's standards of conduct do not suggest that an additional requirement is that the violation actually caused some tangible harm to the employer. It would simply impose too great a burden on employers to have to show that the violation of a particular rule of conduct actually caused harm in a specific instance in order to have the violation be considered misconduct under the statute.

In any event, there is no basis for finding that making a false statement to a debtor is not contrary to the interests of Franklin. The FDCPA prohibits making false or misleading statements in attempting to collect a debt. 15 U.S.C § 1692e.[4] Such false statements can subject a debt collector to substantial civil penalties. The Federal Trade Commission Act imposes a civil penalty of up to $10,000 for each violation of the FDCPA. 15 U.S.C. § 45(m)(1)(A); 15 U.S.C. § 1692*l*(a). A debt collection company may also be liable in a civil suit for damages. 15 U.S.C. § 1692k. Therefore, making a false statement to a debtor in violation of FDCPA would be in disregard of Franklin's interest. Accordingly, a conclusion by the ALJ and the board of review that Ms. Westbrook did not commit misconduct even if she deliberately violated the policy against making false statements to debtors was legally erroneous and requires reversal of the decision that Ms. Westbrook was entitled to benefits.

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[4] In addition to the general prohibition of false statements, the Act specifically prohibits, *inter alia*, "[t]he false representation of . . . any . . . compensation which may be lawfully received by any debt collector for the collection of a debt." 15 U.S.C. § 1692e(2)(B).

II. The decision of the board of review is arbitrary and capricious in that the board gave an insufficient explanation for the decision.

In the alternative, if it is not sufficiently clear that the decision of the board of review was based on the legal conclusion that making a false statement to a debtor in the course of attempted collection does not meet the legal definition of misconduct, then the decision should be reversed because that very lack of a clear reason for the decision renders the decision invalid. As set forth below, both case law and regulations require that the board of review give an intelligible reason for a decision on employment benefits, and in the absence of such an explanation a decision is not permitted to stand. The ALJ's decision, adopted by the board of review, does not give a sufficient explanation as to as how the findings of fact led to the ultimate decision because, as set out above, there are at least three possible conclusions that can be inferred from the decision. Also, if the decision is interpreted to be based on or to include a finding that Ms. Westbrook did not make the false statement, there is no explanation of how the evidence was interpreted and findings were made to lead to that result.

Regulations adopted by MDES governing the benefit appeal process require that the board of review make findings of fact that are more than cursory conclusions. Under the regulations, "[e]very decision of the Board of Review . . . shall include findings of fact sufficient to inform the parties of the basis for the conclusions of law and the decision." Unemployment Insurance Regulations § 200.06(A). Even without such a regulation, the board's decision would have to be intelligibly explained in order to preserve the viability of meaningful judicial review; a court cannot determine if an agency's decision was supported by substantial evidence if the findings are obscure, cryptic, or ambiguous and cannot tell if an decision was arbitrary if the reasons for the decision are unstated or unclear. *See McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 323 (Miss.

1992); *Illinois Central R. Co. v. Jackson Ready-Mix Concrete*, 137 So. 2d 542, 545-46 (Miss. 1962).

In *Illinois Central*, the court said, "If an agency does not disclose the reason upon which its decision is based, the courts will be usurped of their power of review over questions of law" including "whether board action is arbitrary and capricious and whether it is supported by substantial evidence." 137 So. 2d at 545-46. In *McGowan*, the court described that proposition as "obvious" and said that a court must have an understanding of the reasons for agency action "before we can on judicial review intelligently consider whether the Board acted arbitrarily and capriciously or whether its decision was supported by substantial evidence." 604 So. 2d at 323. The court in *McGowan* was reviewing the agency's denial of a permit to operate a certain kind of salt water disposal well. The agency held extensive hearings on the matter but, as the supreme court found, offered only a cursory explanation for its action. The supreme court reversed the agency's decision, holding that the agency's failure to make adequate findings and to explain how it reached its decision rendered the decision arbitrary and capricious. *Id.* at 313, 323-24.

In *Public Employees Retirement System v. Marquez*, 774 So. 2d 421, 429 (Miss. 2000), the court reversed the agency's ruling that a claimant was not disabled because the agency failed to give an explanation for the decision. The court noted that "[t]he only conclusion offered in the PERS orders was that 'there is insufficient evidence to support Ms. Marquez's claim that she is permanently mentally or physically incapacitated from performing her job'" and held that this explanation was insufficient to support the decision. *Id.* at 428-29 (¶29). The court said that its decision in *McGowan* "sets a standard that 'administrators say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious.'" *Id.* at 429 (¶ 30) (quoting *McGowan*, 604 So. 2d at 322.)

In this case, quite similar to the agency's explanation in *Marquez*, the ALJ's explanation was that "[t]he evidence on record does not establish that the claimant willfully or deliberately disregarded the employer's interest." This explanation fails to satisfy the requirement of explicitness and clarity imposed by the regulation and case law. Although here the ALJ did make some findings to accompany its conclusion, those findings, as explained above, are imprecise and unclear, and thus are insufficient to support the decision. The findings merely, as the circuit court noted in its opinion, "summarized everything that was testified to at the hearing." (R. 65; R.E. 4.) The ALJ and board of review gave no explanation as to how the evidence or any particular finding or findings resulted in the ultimate conclusion that Ms. Westbrook was entitled to benefits. Consequently, in this case, we know what the board of review decided about entitlement to benefits but, as the court said in *McGowan*, "we are not quite sure why." *See McGowan*, 604 So. 2d at 323. As in *Marquez*, "we do not know what it was about the evidence that persuaded the board" that Ms. Westbrook did not commit misconduct. *See Marquez*, 774 So. 2d at 429 (¶ 31). For these reasons, the decision of the board of review does not satisfy the requirement of giving an ascertainable explanation for the decision.

An administrative decision that is not discernibly explained is per se arbitrary and capricious. *See Public Employees Retirement System v. Ross*, 829 So. 2d 1238, 1241 (Miss. 2002)(decision is arbitrary if it gives no explanation as to controverting evidence); *McGowan*, 604 So. 2d at 322-24 (Miss. 1992)(agency's failure to give explanation rendered decision arbitrary and capricious); *Fortune Furniture Mfg. Co. v.*

Sullivan, 279 So. 2d 644, 647 (Miss. 1973)(failure to furnish explanation for disregarding uncontradicted testimony made decision arbitrary); *cf. Mississippi Employment Security Commission v. Penn's Fish House*, 866 So. 2d 503, 506 (¶14) (Miss. Ct. App. 2004)(decision that "offers no readily discernible reason" for the result "is by definition arbitrary and capricious").

In addition, as noted above, the MDES regulations require specificity in administrative decisions. The lack of a reasonably clear explanation means that the decision of the ALJ and board of review is, contrary to the regulation, not "sufficient to inform the parties of the basis" for the decision that Ms. Westbrook was entitled to benefits. If an agency fails to follow its own administrative procedures, "its decision is by definition arbitrary and capricious." *Edwards v. Booker*, 796 So. 2d 991, 994-995 (Miss. 2001) (¶ 13); *see also Lowe v. Lowndes County Bldg. Inspection Dep't,* 760 So.2d 711, 714 (¶ 12) (Miss. 2000) (agency's failure to abide by its rules is per se arbitrary and capricious).

For these reasons, the decision of the ALJ and board of review was arbitrary and capricious in lacking a cogent explanation for the ultimate result and in particular for not explaining a determination, if any, that Ms. Westbrook did not make the false representation as claimed by Franklin. Accordingly, if this court were to conclude that the decision was not legally erroneous in holding that the false representation fell short of misconduct, the court should reverse the decision on the foregoing ground.

III. The decision of the board of review is not supported by substantial evidence and is contrary to the overwhelming weight of the evidence.

A court must set aside an administrative decision that is arbitrary and capricious or based on findings of fact that are not supported by substantial evidence. *Mickle v. Mississippi Employment Security Commission*, 765 So.2d 1259, 1261, 1262 (Miss. 2000). An administrative decision is arbitrary and capricious and not supported by substantial evidence when it is contrary to the overwhelming weight of the evidence or where there is "only a scintilla of evidence" supporting the decision. *Pannell v. Tombigbee River Valley Water Management District*, 909 So. 2d 1115, 1125 (¶29) (Miss. 2005); *Smith v. Johnston Tombigbee Furniture Mfg. Co.*, 43 So. 3d 1159, 1164 (¶16) (Miss. Ct. App. 2010). Apart from the lack of explanation for the decision of the board of review addressed above, the court should set aside the decision because none of the possible factual findings that might have led to the board's decision are supported by substantial evidence.

As noted in section I above, one of the potential interpretations of the ALJ's decision, albeit an implausible one, is that the ALJ found that Ms. Westbrook did not make the false statement at all. That potential interpretation is implausible because, as noted above, the ALJ found that Franklin "determined" that Ms. Westbrook made the false statement, which seems plainly to be a finding that she did make the statement. But even if it were held that that finding by the ALJ was ambiguous and that the ALJ did find that Ms. Westbrook did not make the false statement, such a finding cannot support the ultimate decision, because it is not supported by substantial evidence in that it is negated by other facts expressly found by the ALJ and is contrary to the overwhelming weight of the evidence.

The ALJ expressly found that Franklin believed that Ms. Westbrook had given false information. In other words, the ALJ found that Franklin was not giving a false reason for the termination, but truly believed that Ms. Westbrook had made the false statement. The only possible source for such a belief was that Franklin employees had heard Ms. Westbrook make the statement. Thus, the ALJ found, in effect, that Ms. Thomas testified honestly that she had heard Ms. Westbrook make the false statement on the recording. The chance that Ms. Thomas could have been mistaken about what was on the recording—that is, that she could have thought she heard the word "interest' being uttered when it had not been—is quite slim. In short, Franklin could not have had an honest belief that Ms. Westbrook made the false statement unless Ms. Westbrook had indeed referred to fee as interest on the debt. Furthermore, Ms. Thomas's testimony was corroborated by the fact that the call monitoring department had notified her about Ms. Westbrook's statement, since Ms. Thomas would never have had the call brought to her attention in the first place had not the call monitoring department first heard the false statement. The chance that that *both* Ms. Thomas and the call monitoring department could have misheard what Ms. Westbrook said is exceedingly small.

Ms. Thomas did not categorically deny making the false statement, instead professing a lack of recollection of doing so, saying, "If I did, I don't remember how it went." (R. 128.) Although she did say in her testimony that she had "never said anything about a [sic] interest fee" (R. 128), that appears to be a statement about her work experience in general prior to this incident rather than about the particular conversation in question, and, in any event, that testimony is equivocal in light of her "I don't remember" testimony noted above and would be inconsistent with her statements to the claims examiner during the fact-finding phase of the initial determination of her claim. MDES documents show that Ms. Westbrook told the claims examiner only that she "[did] not remember" describing the $15 processing fee as interest; she did not deny making the statement. (R. 106.) The failure to make a categorical denial to the claims examiner should negate any weight that could legitimately be given to such a denial at the hearing. In *Gilbreath v. Mississippi Employment Security Commission*, 910 So. 2d 682 (Miss. Ct. App. 2005), the employer gave different accounts to the claims examiner and the hearing referee regarding the reasons the claimant had given for resigning. The court held that the account given to the claims examiner but not to the referee could not support the finding that the claimant had voluntarily left employment and that reliance by the board of review on that "discredited statement" was arbitrary and capricious. *Id.* at 687 (¶ 16). Similarly, because Ms. Westbrook did not deny making the statement during the initial interview by the claims examiner, any subsequent denial lacks credibility. In addition, Ms. Westbrook had a strong financial motive not to admit making the statement, while there was no evidence that Ms. Thomas or the call monitoring center employee who alerted her had any motive to falsely accuse Ms. Westbrook.

Furthermore, if Ms. Westbrook truly believed that she did not make the false statement, she could have compelled Franklin to produce the recording for use at the hearing to resolve the issue conclusively. This case is similar in that regard to *Mississippi Department of Employment Security v. Clark*, 13 So. 3d 866 (Miss. Ct. App. 2009). In *Clark*, the claimant had been discharged for being intoxicated at work. A representative of the company testified at the MDES hearing that a drug/alcohol test had been administered to the claimant and showed the presence of an intoxicating level of alcohol. However, the company did not introduce the actual test report. After the circuit court reversed the department's finding of misconduct with a conclusory holding that there was an absence of substantial evidence of intoxication, the court of appeals surmised that the circuit court might have been troubled by the absence of the test report from the record. The court of appeals held that the failure to introduce the report did not result in the employer failing to meet its burden of proof, noting that the claimant could have obtained a copy of the report if he really believed that it would disprove intoxication. *Id.* at 872-73.

For these reasons, even if the decision of the ALJ and the board of review could be construed as finding that Ms. Westbrook did not make the false statement, that finding would be contrary to the clear weight of the credible evidence. Consequently, the decision would be arbitrary and not supported by substantial evidence.

As also noted above, another possible interpretation of the ALJ's decision was that the ALJ found that Ms. Westbrook did make the false statement but did not do so intentionally. That appears to be the way the circuit court interpreted the decision; the court's opinion says that the ALJ found that "the employer failed to prove that the Claimant's actions were willful or deliberate." (R. 66; R.E. 5.) If indeed the ultimate conclusion of the ALJ and board of review was that Ms. Westbrook made the false statement but that Franklin failed to prove that Ms. Westbrook did so deliberately, then that conclusion is not supported by substantial evidence.

For the false statement not to have been deliberate, Ms. Westbrook had to have made it by accident or through ignorance (that is, believing that it truly was an interest charge). However, there was no evidence that Ms. Westbrook made the false statement by mistake or accident. Ms. Westbrook did not testify that she believed the charge represented interest on the debt; to the contrary, she admitted that she knew it was a convenience fee and not interest (R. 129). Neither did she testify that she "misspoke" and said "interest" instead of "processing fee for electronic payment." Ms. Westbrook simply gave no innocent reason for the false statement, instead denying any recollection of having made the statement. Moreover, it is highly implausible that a collector with Ms. Westbrook's experience and her training about Franklin's policies[5] would have made the statement by accident, particularly since there would never have been a reason to mention interest in her previous collection efforts, since, as the ALJ found, Franklin does not collect interest. It is hard to see how there could have been any stronger evidence of deliberateness absent a confession of the fact from Ms. Westbrook. In the absence of an innocent explanation given by Ms. Westbrook, the evidence ineluctably leads to the conclusion that the statement was deliberate and willful.

If Ms. Westbrook had admitted the statement and claimed that it was the result of a mistake, that arguably would have been substantial evidence of non-deliberateness (at least but for the fact that it would still have been greatly outweighed by contrary evidence showing the improbability of an accident or a mistake). However, since she gave no such innocent explanation, then the conclusion of the ALJ and the board of review that Franklin failed to show that the false statement was deliberate and willful (if indeed that was their conclusion) was not supported by even a scintilla of evidence. In short, the evidence establishes that Ms. Westbrook made the false statement and that she did so under circumstances where the falsehood could only have been deliberate. Consequently, the contrary decision of the board of review was arbitrary and unsupported by substantial evidence, and the decision should have been reversed by the

[5] Ms. Westbrook had worked for Franklin for nearly a year at the time of the incident, and she testified that she had been trained as to the collection policies in question. (R. 120, 128-29.)

circuit court. Therefore, this court should reverse the decisions of circuit court and the board of review.

CONCLUSION

For the reasons set forth above, the decision of the board of review was arbitrary and capricious or contrary to law, and thus the circuit court erred in affirming that decision. Accordingly, this court should reverse the order and judgment of the court below and the decision of the board of review in all respects and render judgment for Franklin.

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ADDENDUM OF STATUTES AND REGULATIONS

MDES Unemployment Insurance Regulations

200.06 Decisions

(A) Every decision of the Board of Review and Appeals Department shall be in writing and shall include findings of fact sufficient to inform the parties of the basis for the conclusions of law and the decision. Findings of fact must be supported by substantial evidence in the record.

(B) A copy of the decision shall be promptly mailed via U.S. Mail or electronically to each party to the proceeding and their representative of record. Written notice of the party's rights to appeal to the Board of Review or the courts, and the time within which such action must be taken, shall be given to each party with the decision.

(C) The following statement shall appear on the ALJ’s decision: "If an appeal is taken to the Board of Review, such appeal will be considered on the record previously made, and no hearing before the Board will be scheduled."

(D) The Board of Review shall maintain a record of the vote of each member of the Board of Review with respect to the Board of Review decision. If a decision of the Board of Review is not unanimous, the decision of the majority shall control. The minority may file a dissent from such decision setting forth the reasons why it fails to agree with the majority.

15 U.S. Code § 1692e - False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
(2) The false representation of—
(A) the character, amount, or legal status of any debt; or
(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—
(A) lose any claim or defense to payment of the debt; or
(B) become subject to any practice prohibited by this subchapter.
(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
(13) The false representation or implication that documents are legal process.
(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a (f) of this title.

15 U.S. Code § 1692k - Civil liability

(a) Amount of damages
Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
(1) any actual damage sustained by such person as a result of such failure;
(2)
(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.
(b) Factors considered by court
In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—
(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.
(c) Intent
A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
(d) Jurisdiction
An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau
No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S. Code § 1692*l* - Administrative Enforcement

(a) Federal Trade Commission
The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.]. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

* * *

15 U.S. Code § 45 - Unfair methods of competition unlawful; prevention by Commission

* * *

(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief
Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

* * *

§ 71-5-513. Disqualifications [Repealed effective July 1, 2019]

A. An individual shall be disqualified for benefits:

(1) (a) For the week, or fraction thereof, which immediately follows the day on which he left work voluntarily without good cause, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case; however, marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this subsection. Pregnancy shall not be deemed to be a marital, filial or domestic circumstance for the purpose of this subsection.

(b) For the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case.

(c) The burden of proof of good cause for leaving work shall be on the claimant, and the burden of proof of misconduct shall be on the employer.

CERTIFICATE OF SERVICE

This is to certify that I have this day served via the court's electronic filing and notification system or by United States Mail, postage paid, a true and correct copy of the above and foregoing Brief of Appellant on:

Albert B. White, Esq.
Mississippi Department of Employment Security
P.O. Box 1699
Jackson, MS 39215-1699

Ms. Angelica Westbrook
140 Andrews Street
Shannon, MS 38868

Honorable James Seth Pounds.
Circuit Judge
c/o Court Administrator
P. O. Box 1100
Tupelo, MS 38802

This, the 15th day of January, 2015.

/s Michael Chase
MICHAEL CHASE