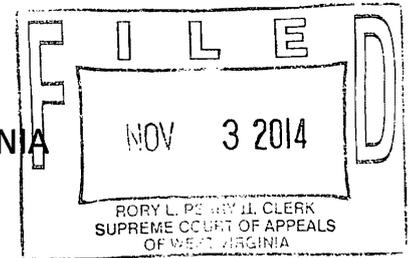


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No 14-0315



LARRY MYERS

Petitioner Below,
Petitioner.

v.

OUTDOOR EXPRESS, INC. and
WORKFORCE WEST VIRGINIA

Respondent Below,
Respondents.

Respondent's Brief

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RESPONDENT'S BRIEF

Comes now WorkForce West Virginia and responds to the Petitioner's Brief as follows.

I

RESPONSE TO ASSIGNMENTS OF ERROR

Each of Petitioner's assignments of error is quoted below, followed by the Respondent WorkForce West Virginia's response.

1. THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER WAS NOT TOTALLY OR PARTIALLY UNEMPLOYED DURING THE RELEVANT PERIODS.

Respondent's Response to Assignment 1.

THE PETITIONER WORKED FULL TIME FOR THE WEEKS HE CLAIMED UNEMPLOYMENT BENEFITS AND WAS NOT SEPARATED FROM HIS EMPLOYMENT; WHEREFORE HE WAS NOT TOTALLY OR PARTIALLY UNEMPLOYED.

2. THE CIRCUIT COURT ERRED BY FAILING TO ADDRESS WHETHER THE GUIDANCE PROVIDED BY THE LOCAL WORKFORCE WEST VIRGINIA OFFICE WAS PROPER FOR SEASONAL WORK ACTIVITIES OR FOR EMPLOYEES WHO OPERATE ON A COMMISSION BASIS.

Respondent's Response to Assignment 2:

WEST VIRGINIA CODE §21A-6-1a, SEASONAL EMPLOYMENT DOES NOT ALLOW EMPLOYEES OF A RECOGNIZED SEASONAL INDUSTRY TO BE ELIGIBLE FOR BENEFITS, UNLESS HE HAS EARNED WAGES IN HIS BASE PERIOD FROM OTHER COVERED EMPLOYMENT AND INDIVIDUALS WHO WORK FULL TIME ON A COMMISSION BASIS ARE ALSO NOT ELIGIBLE FOR BENEFITS. FURTHERMORE, REGULATION OF THE COMMISSIONER MAY NOT UNDER THE GUISE OF 'INTERPRETATION' BE MODIFIED, REVISED, AMENDED OR REWRITTEN.

3. THE CIRCUIT COURT ERRED BY ATTRIBUTING INCOME TO THE PETITIONER DURING TIME PERIOD WHEN CLAIMS WERE FILED.

Respondent's Response to Assignment 3:

THE CIRCUIT COURT DID NOT ERR BY ATTRIBUTING INCOME TO THE PETITIONER DURING THE TIME PERIODS WHEN CLAIMS WERE FILED DUE TO THE FACT THAT PETITIONER SHOULD HAVE LISTED HIS INCOME WHEN IT WAS EARNED.

4. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT WORKFORCE WEST VIRGINIA IS ENTITLED TO RECOVER ALL THE BENEFITS PAID TO THE PETITIONER.

Respondent's Response to Assignment 4:

WHEN PAYMENT WAS MADE TO THE PETITIONER ERRONEOUSLY DUE TO HIS NOT LISTING HIS INCOME WHEN IT WAS EARNED NOR HIS FULL TIME WORK HOURS WHEN PERFORMED ON HIS CLAIM FORM THEN WORKFORCE WEST VIRGINIA BECAME STATUTORILY ENTITLED TO RECOVER ALL BENEFITS PAID TO THE PETITIONER. (WV Code §21A-10-8).

II
STATEMENT OF THE CASE
A. Introduction

This is an appeal of the final order of the Circuit Court affirming the decision of the Board of Review by holding that Petitioner (hereinafter "Claimant") is ineligible for unemployment benefits due to the fact that he worked 40 hours a week, and therefore is not partially unemployed thus resulting in an overpayment of \$39,713.00 recoverable in accordance with West Virginia Code §21A-10-8. (Appendix R at 1.)

Statement of Facts

The Claimant, Larry Myers, was employed as a salesman for a recreation vehicle sales company, Outdoor Express, Inc. The Claimant was paid on a commission basis between three and four percent of the sales price for each unit sold. The Claimant was not entitled to draw upon anticipated commissions. (Tr. at 18, 19, 36.)

The Claimant is paid by the company on a bi-weekly basis upon sales closed by the company within the preceding two week period. (Tr. at 18, 57.)

The Claimant was paid a full weekly Unemployment Compensation Benefit for all periods between \$339 a week, to \$424 a week depending upon the benefit year. (Tr. at 34.) For all relevant periods the employer, Outdoor Express, reported the claimant worked 40 hours per week for the employer and was paid no compensation. (Tr. at 24, 35, 36, 41, 48, 61.)

For all relevant periods of time for which low earning reports were issued by the employer to the Claimant, said Claimant was performing some services for the company for which the Claimant was eventually compensated by commissions. (Tr. at 12, 35, 36.)

During primarily winter months, the claimant and a co-worker would come to the office on a split-time type of coverage, rotation basis, and/or work from home for the benefit of the company for which the claimant was paid commissions for sales made. (Tr. at 35, 36, 61.)

Between the third quarter of 2009 and the third quarter of 2012, the claimant was paid approximately \$164,000 in commissions by the employer. During the said time period, the employer reported all compensation paid to the Claimant on a quarterly basis to the Unemployment Compensation Office. During the said time period, the Claimant reported no compensation in the form of commissions received to Unemployment Compensation on his continued claim forms. (Tr. at 20, 21, 22, Appendix R at 1.)

For the claim year ending November 17th 2012, the Claimant reported no earnings; for the claim year ending November 19th 2011, the Claimant reported no earnings; and for the claim year ending November 20th 2010 the Claimant reported no earnings. (Tr. at 20, 21, 22, 23.)

This was discovered when the case was ultimately picked up in a cross-match audit comparing the inconsistencies among what the employer reported regarding compensation to the Claimant and the fact that the Claimant was being employed 40 hours per week. (Tr at 12, 24. ALJ's Conclusions of Law.)

III

SUMMARY OF ARGUMENT

The purposes of the Unemployment Compensation Act are only served when an available and willing worker who against his will and contrary to his choice, is compelled to leave his employment, receives compensation. Lee-Norse Co. v. Rutledge, 170 W.Va. 162,291 S.E.2d 477, (1982). *Emphasis added.*

Claimant admits that he works for a recreational dealership providing sales and service for travel trailers and campers and at all relevant times herein that he was never separated from his employer, Outdoor Express, Inc. (Petitioner's brief at 4, 7.) Claimant admits that an individual is totally unemployed when he is separated from his employment and during which separation he performs no services and with respect to which no wages are payable to him. (Petitioner's brief at 6.)

Also, Claimant admits that partial unemployment is when an individual, not separated from employment, is partially unemployed in any week due to "lack of work" he performs no services and with respect to which no wages are payable to him. (Petitioner's Brief at 6.) *Emphasis added.*

Outdoor Express, Inc. issued low earning reports (hereinafter LERs) to Claimant for any period when the claimant was not issued a commission check beginning November 28, 2008 to March 17, 2012. (Petitioner's Brief at 7, Appendix R at 1.) Outdoor Express did not take the position that Claimant's commissions while being paid on occasion were nevertheless garnered for services rendered over many preceding weeks.

In addition, Claimant admits that for periods in which he did not receive a commission check, Claimant filed claims and was paid unemployment compensation benefits between \$339 and \$424 per week. (Petitioner's Brief at 7, Appendix R at 1.)

On the other hand, because he did not file claims during periods which he received commission checks; he did not receive unemployment compensation during these periods. (Petitioner's Brief at 7.)

In Kismore v. Rutledge, 166 W.Va. 675,276 S.E.2d 821,680 (1981), the appellant, unlike the Claimant in the instant case, contends that a "lack of work" existed within the statutory definition of partial unemployment in that the appellant could not voluntarily return to his employment. (Petitioner's Brief at 6.)

Claimant admits during the relevant periods that he may have been physically present at Respondent Outdoor Express' place of business sometimes 40 or more hours per week. (Petitioner's Brief at 11.) Also, Claimant's employer, Outdoor Express admitted he worked 40 hours per week in a cross-match. (Tr. at 12, Appendix R at 1.)

Based on the above, the fact that the employer never laid the Claimant off, or specifically cut back the Claimant's hours, and the Employer Outdoor Express said the Claimant was reporting to him every day and putting in approximately 40 hours per week (Tr. at 12), causes the Claimant not to meet the definition of partial unemployment, since the Claimant never lacked full time work nor was he separated from employment.

On recoupment of benefits paid to the Claimant, the record does not disclose that the erroneous benefit payments were due to a "typographical or "clerical error" or an error in an employer's report, but they were made due to the Claimant not filling out the continued claim

form correctly and not being informed by the employer on how to fill out the form. (The Claimant never spoke to the local office.) Thus, §21A-10-21 Recovery of benefits paid through error; limitation cannot apply to this case.

It is evident from the record that the Claimant did not report the commissions when he earned them nor that he worked 40 hours a week. Thus, Claimant's acts of nondisclosure make §21A-10-8 applicable to this case for the recoupment of all benefits which the Claimant received.

The employer is the only one who alleges that they received incorrect information from the local office. Although the employer cannot name the person giving him the information nor can he remember if the person was male or female, the employer Outdoor Express blames the unidentified agency employee for any incorrect information he could not read on the form.

(Tr at 40-41, 58-60)

Wherefore, based on the above, WorkForce West Virginia respectfully requests this honorable Court to affirm the judgment of Circuit Court and grant the Respondent WorkForce West Virginia an overpayment of unemployment compensation benefits in the amount of \$39, 713.00 against Claimant pursuant to West Virginia Code §21A-10-5.

IV

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Court desires oral argument for clarification of any issues, then the Respondent respectfully requests oral argument for such clarification. Accordingly, the Respondent states that the Court may declare that oral argument is not necessary, pursuant to Rev. R.A.R. 18(a), or in the alternative, the Court may declare oral argument necessary under Rev. R.A.R. 19(a)(1).

V

ARGUMENT

1. ERROR: THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER WAS NOT TOTALLY OR PARTIALLY UNEMPLOYED DURING THE RELEVANT PERIODS.

RESPONSE: THE PETITIONER WORKED FULL TIME FOR THE WEEKS HE CLAIMED UNEMPLOYMENT BENEFITS AND WAS NOT SEPARATED FROM HIS EMPLOYMENT; WHEREFORE HE WAS NOT TOTALLY OR PARTIALLY UNEMPLOYED.

West Virginia Code §21A-1A-27 defines total unemployment as “an individual [who is] totally unemployed in any week in which such individual is separated from employment for an employing unit and during which he or she performs no services and with respect to which no wages are payable to him or her.” *Emphasis added.*

In the instant case, the Claimant was never separated from his employer, Outdoor Express Inc., and continually performed services, 40 hours per week, on a commission

basis. Wherefore the Claimant does not fulfill the definition of being totally unemployed. *Emphasis added.*

Partial unemployment is defined, in §21A-1A-27 of the W.Va. Code, as “an individual who has not separated from employment is partially unemployed in any week in which due to lack of full-time work wages payable to him or her are less than his weekly benefit amount plus sixty dollars: Provided, that said individual must have earnings of at least sixty-one dollars.”

Emphasis added.

Moreover, the Claimant worked a full time work week, or 40 hours per week, because the weeks that Claimant claimed benefits was not a week of less than full-time work under the statutory requirement but was a normal and standard full-time work week . Wherefore the Claimant does not meet the definition of partial unemployment, because he does not lack full time work. *Emphasis added.*

In Higgins v. Board of Review, 1983 Ohio App. LEXIS 15894, one of the issues was whether the claimant was entitled to unemployment compensation benefits for the periods in which he received no commissions, but nevertheless was engaged as a real estate salesman.

The Court answered in the negative due to the fact that the claimant was rendering services during his benefit period for which he eventually was paid commissions. Thus, the Court concluded the claimant was not unemployed during the benefit payment period as well as found it immaterial that the claimant did not receive remuneration for his services during the weeks he claimed benefits. 1983 LEXIS 15894, at *3.

In the instant case, the Claimant was working full-time or 40 hours per week during his benefit period and was paid on commission as the claimant in Higgins was. As in Higgins, Id. the

Claimant was performing services with the expectation that they would produce earnings, and the Claimant claimed benefits for the weeks he had no commissions paid for his work. Paying unemployment to such individuals during the weeks they were not compensated for their work could mean a double pay off for their efforts. For example, a real estate agent could work for several weeks without compensation trying to sell a home during which time if the agent could claim unemployment benefits, because he is receiving no remuneration, then he would receive double pay when his commission was paid in the future for all his prior work.

In our case, Claimant did not report his commissions when earned and continued to draw unemployment compensation benefits for the weeks he received no commission money. This was wrong due to the fact that unemployment compensation is for the unemployed and underemployed and is not to be used to supplement a paycheck or commission sales to be paid in the future. (Tr. At 17.)

West Virginia Code §21A-10-8 Recovery of benefits made on misrepresentation; limitations states as follows:

A person who, by reason of nondisclosure or misrepresentation, either by himself or another (irrespective of whether such nondisclosure or misrepresentation was known as fraudulent), has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection for past due payments against employers as set forth in section sixteen [§ 21A-5-16] of article 5 of this chapter, which specifically includes the institution of civil action and collection procedures thereon enumerated in said section: Provided, that such collection or deduction of benefits shall be barred after the expiration of five years, except for known or fraudulent nondisclosure or misrepresentation which shall be barred after the expiration of ten years, from the date of the filing of the claim in connection with which such nondisclosure or misrepresentation occurred. *Emphasis added.*

The statute passed the West Virginia Legislature in 1936.

The Claimant's case was discovered in a cross-match audit comparing the inconsistencies between what the employer reported as the compensation received by the Claimant as well as the fact that the Claimant worked 40 hours a week, and the failure of the Claimant to report any compensation on his claim form. (Tr. at 12, 20, 21, 22).

The Claimant was not totally or partially unemployed for any period for which he received low earning reports by Outdoor Express Inc. and therefore, he is ineligible for unemployment benefits for such periods. During all relevant time periods the Claimant was performing services for Outdoor Express Inc. and working at least 40 hours per week, therefore, in this action, the Claimant does not meet the requirement of being totally or partially unemployed. (Tr. at 24-25.)

2. ERROR: THE CIRCUIT COURT ERRED BY FAILING TO ADDRESS WHETHER THE GUIDANCE PROVIDED BY THE LOCAL WORKFORCE WEST VIRGINIA OFFICE WAS PROPER FOR SEASONAL WORK ACTIVITIES OR FOR EMPLOYEES WHO OPERATE ON A COMMISSION BASIS.

RESPONSE: WEST VIRGINIA CODE §21A-6-1a, SEASONAL EMPLOYMENT DOES NOT ALLOW EMPLOYEES OF A RECOGNIZED SEASONAL INDUSTRY TO BE ELIGIBLE FOR BENEFITS, UNLESS HE HAS EARNED WAGES IN HIS BASE PERIOD FROM OTHER COVERED EMPLOYMENT AND INDIVIDUALS WHO WORK FULL TIME ON A COMMISSION BASIS ARE ALSO NOT ELIGIBLE FOR BENEFITS.

"A statute, or administrative rule, may not under the guise of 'interpretation', be modified, revised, amended or rewritten." Syl. Pt. 1, Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm. Of West Virginia, 182 W.Va. 152, 386 S.E.2d 650 (1989).

West Virginia Code §21A-18-28 defines Wages as “all remuneration for personal service, including commissions Thus the Claimant made wages, since he was an RV salesman paid on commission usually two weeks after he made a sale.

West Virginia Bureau of Employment Programs Regulations of the Commissioner Reg. Chapter 21A-2 Section 11.01 states as follows:

In any week in which an employee is partially unemployed, each employing unit is required to deliver to each employee on or before the payday of the week for which the low earnings occurred . . . a report of low earnings on a prescribed form furnished by the West Virginia Department of Employment Security. Such form shall set forth : (a) the employee’s name and social security number, (b) the employee’s name, address, and account number, (c) the week ending date, (d) the earnings during the week, (d) any pertinent information regarding the claimant’s eligibility, and such other information as required by the form.

Moreover, on the Initial/Continued Claim for Benefits form, it states to the claimant to report wages even if you have not received payment and to report the number of hours worked each week.

Earnings is defined in Black’s Law Dictionary, 598 (4th ed. 1951) as “the gains of a person derived from his labor, services or performance.” On the other hand, payment is the discharge of a debt by the delivery of money. (Black’s Law Dictionary, 1285 (4th ed. 1951))

It is important to note what the claimant has earned during the week for which he or she claims benefits, so that when he or she is paid, it will not result in an overpayment to be paid back to WorkForce West Virginia.

In the instant case, it was the employer, Outdoor Express, who contacted the local office not the Claimant, and the employer, Outdoor Express, who could not even remember the name of the person whom he alleged gave him the misinformation. Thus, the evidence of the alleged

misinformation was nothing more than hearsay. Based on the above and for this reason, the argument fails.

3. ERROR: THE CIRCUIT COURT ERRED BY ATTRIBUTING INCOME TO THE PETITIONER DURING TIME PERIOD WHEN CLAIMS WERE FILED.

RESPONSE: THE CIRCUIT COURT DID NOT ERR BY ATTRIBUTING INCOME TO THE PETITIONER DURING THE TIME PERIODS WHEN CLAIMS WERE FILED DUE TO THE FACT THAT PETITIONER SHOULD HAVE LISTED HIS INCOME WHEN IT WAS EARNED. *Emphasis added.*

The Circuit Court did not err by attributing income to the Claimant during the period when claims were filed due to the fact that according to the low earnings report the Claimant was responsible for reporting all money earned and hours worked for any weeks he claimed unemployment compensation benefits even if he had not received payment. Moreover, during all relevant time periods the Claimant was performing full-time services for this employer, and therefore, does not meet the requirement of being totally or partially unemployed.

The Initial Claim/Low Earnings Report tells the claimant that he must report his wages that he has earned even if he has not received payment. (Tr. At 28.) In order to discover how much his earning for the weeks he was not paid were, the Claimant would have to ask his employer, Outdoor Express.

For example, if a commission is earned on a day, and it is a percentage of a sale of an RV it really is compensation for the work that is done over a number of weeks prior to the sale. (Tr. at 50.)

In the instant case, the confusion comes into the case when the employer believes that the Claimant only has to report his made commission at the time the employer paid it to him, even though it applied to supporting him for weeks prior to the sale. (Tr. at 51.) "It was never our understanding that we had to report earnings when they are earned. It was always earnings when paid." (Tr. at 51.) The employer paid the Claimant every two weeks. (Tr. at 57.)

Wherefore based on the above, the court did not err by attributing income to the Claimant during the period when claims were filed due to the fact that the Claimant failed to report any earned compensation or his 40 hours worked as instructed on his claim form.

4. ERROR: THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT WORKFORCE WEST VIRGINIA IS ENTITLED TO RECOVER ALL THE BENEFITS PAID TO THE PETITIONER.

RESPONSE: WHEN PAYMENT WAS MADE TO THE PETITIONER ERRONEOUSLY DUE TO HIS NOT LISTING HIS INCOME WHEN IT WAS EARNED NOR HIS FULL TIME WORK HOURS WHEN PERFORMED ON HIS CLAIM FORM THEN WORK-FORCE WEST VIRGINIA BECAME STATUTORILY ENTITLED TO RECOVER ALL BENEFITS PAID TO THE PETITIONER. (WV Code §21A-10-8)

Claimant incorrectly cites §21A-10-21 and its two year statute of limitation as reason that WorkForce West Virginia is barred from collecting any benefits. Claimant states those benefits paid prior to two years before the dates of the Deputy Commissioner's decisions those being November 13, and 16, 2012, and also benefits paid to Claimant on or before November 13, 2010 cannot be collected.

In Acts of the Legislature of West Virginia 1982 c.63, W. Va. Code §21A-10-21 is written as follows:

A person who, by reason of departmental error, irrespective of the nature of said error, has received a sum as a benefit under this

chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner that amount which he has received. Collection shall be made in the same manner as collection of past due payment: Provided, that such collection or deduction of benefits shall be barred after the expiration of two years. *Emphasis added.*

In 1989, the West Virginia Legislature amended §21A-10-21 by taking out the word departmental. (Acts of the Legislature of West Virginia 1989, c.202) This was due to the fact that in March 1991 the name of the agency was going to change to West Virginia Bureau of Employment Programs and included Employment Security and Workers' Compensation. (Acts of the Legislature of West Virginia 1991, c. 16.) *Emphasis added.*

Though this amendment took place; the interpretation of the agency remained the same. This interpretation was that when the claimant does everything correctly-- lists his wages correctly, list his hours correctly-- and the agency makes a mistake by not entering them correctly, W. Va. Code §21A-10-21 applies. Thus, it allows the agency a statute of limitations of two years to collect when it is agency error.

Moreover, if W. Va. Code §21A-10-21 was to apply to Claimant's case then W.Va. Code §21A-10-8, a statute addressing misrepresentation and nondisclosure of information created in 1936 with a five year statute of limitation, would have been revoked. Wherefore, W.Va. Code §21A-10-21 was a law written for agency error only, not claimant error as when the continued claim form tells you to list the hours worked and money earned and the Claimant does neither.

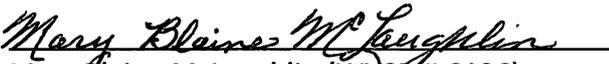
Based on the above, the Claimant's argument is a red herring due to the fact that it side steps the issue of why he did not list on the initial/continued claim for benefits form that ask him for the number of hours worked and money earned for the weeks he was claiming.

VI

CONCLUSION

For the reasons set forth herein, WorkForce West Virginia respectfully requests that this honorable Court affirm the Circuit Court's Final Order Affirming Decisions of Board of Review by denying unemployment compensation benefits to the Claimant and granting an overpayment against Claimant in the amount of \$39,713.00 to WorkForce West Virginia.

Respectfully submitted,
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Respondent
By counsel,


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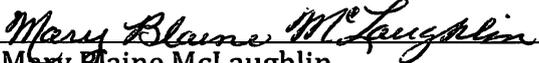
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CERTIFICATE OF SERVICE

I, Mary Blaine McLaughlin, Senior Counsel of Workforce West Virginia do hereby certify that a true copy of Respondent's Brief, was served upon the following by delivering via United States Postal Service first class mail a true copy thereof on the 3rd day of November, 2014, addressed as follows:

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