

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1080

**ALCAN ROLLED PRODUCTS RAVENSWOOD, LLC,
Respondent Below, Petitioner**

v.

**TERRY W. McCARTHY,
Petitioner Below, Respondent**

REPLY BRIEF OF THE PETITIONER

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I. STATEMENT OF THE CASE

This is an unemployment compensation case filed by an employee of the Ravenswood Aluminum Plant, Claimant/Respondent, Terry W. McCarthy ["Claimant"], who was terminated under the Employer's Rules of Conduct by Employer/Petitioner, Alcan Rolled Products Ravenswood, LLC ["Employer"], for gross misconduct as a result of picket line violence during an August-September 2012 strike against the Employer.

During the strike, Claimant tossed a "jack rock" weapon into the path of a car carrying Employer's management employees to the Ravenswood Aluminum Plant. At the administrative level, a WorkForce West Virginia deputy; an Administrative Law Judge ("ALJ"); and the full Board of Review unanimously concluded that (1) Claimant engaged in violent conduct during the course of a strike; (2) Claimant was discharged for "gross misconduct;" and (3) Claimant was not entitled to unemployment compensation benefits.

Even though the Employer presented eyewitness testimony that Claimant attempted to damage vehicles occupied by management employees traveling to the Ravenswood Aluminum Plant during a strike that was work-related, and introduced clear support that his actions both violated the Employer's Rules of Conduct and constituted "gross misconduct," the Circuit Court applied the wrong burden of proof; failed to apply the correct standard of appellate review; misstated the law regarding the disqualifying nature off-premises, off-hours violent acts; misstated the law regarding an employee's "property interest" in employment including a "right to strike" and engage in violent conduct in conjunction with the exercise of that "right;" and substituted its findings of

fact for those of the ALJ and the Board of Review on conflicting evidence, reversing their decisions and ordering that Claimant receive unemployment compensation benefits.

It is from that order applying the wrong burden of proof; misapplying the correct standard of appellate review of a decision of the Board of Review; and misstating the law that Employer is pursuing its appeal.

II. ARGUMENT

A. STANDARD OF REVIEW

In Syllabus Point 3 of *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994), this Court held, “The findings of fact of the Board of Review of [Workforce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard is of judicial review is *de novo*.”

Although Claimant does not dispute the applicability of this standard of review, Response Brief at 4, he defends the Circuit Court’s decision not by identifying where it held that the Board of Review’s findings were “clearly wrong,” but by stating, “The Circuit Court found that employer did not meet its burden by the preponderance of the evidence test.” Response at 5. This argument by Claimant is a tacit admission that the Circuit Court erred as it is inappropriate for a reviewing court to reverse findings by the Board of Review merely because the reviewing court concludes that “employer did not meet its burden.” Rather, reviewing courts are required to give “substantial deference” to findings by the Board of Review and to reverse only where those findings are “clearly wrong.”

Here, rather than giving “substantial deference” to the findings by the Board of Review, the Circuit Court plainly substituted its factual findings: “[T]he evidence of the employer at best is contradictory and confusing and does not rise even to the level of meeting the employer’s burden of preponderance of the evidence test, and falls far short of clear and convincing evidence.” App. 255 (emphasis supplied).

Under the proper standard of review, it was error for the Circuit Court to substitute its view of the evidence for that of the ALJ and Board of Review, particularly where as the Circuit Court acknowledged, the evidence was conflicting.

Similarly, with respect to any “purely” legal question, the Circuit Court improperly applied a “clear and convincing evidence” test to Employer’s burden of proving Claimant’s “gross misconduct;” misinterpreted this Court’s precedents to hold that an employee’s violent acts can never constituted “gross misconduct” if they occur off-premises and off-hours; and interjected some sort of First Amendment/Fourth Amendment test having no precedent in the law of unemployment compensation to the effect that employees have “property rights that a person has in his right to earn a living,” giving those employees “the right to strike” and apparently engage in violent conduct in the course of exercising “the right to strike” that precludes the “infliction of economic capital punishment” in the form of the denial of workers’ compensation benefits when an employee is discharged for engaging in violent conduct during the course of a strike. App. 255-256.

Again, in his response brief, Claimant simply restates the Circuit Court’s order, providing no meaningfully substantive response to Employer’s arguments that the Circuit Court applied the wrong burden of proof; misinterpreted this Court’s precedents

regarding “gross misconduct;” and erroneously interjected a First Amendment/Fourth Amendment analysis having no application in this context.

Accordingly, this Court should reverse the decision of Circuit Court of Kanawha County and reinstate the findings of fact and conclusions of law of the Board of Review denying unemployment benefits to an employee who engaged in violent conduct during a strike outside the Ravenswood Aluminum Plant.

B. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT COMPENSATION DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT SUBSTITUTED ITS FINDINGS OF FACT FOR THOSE OF THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW.

As discussed in Employer’s initial brief, the Circuit Court supplanted itself for the ALJ, who heard the testimony and observed the witnesses, and the Board of Review, which afforded proper deference to the ALJ who was in a superior position to evaluation the respective credibility of the witnesses. In Claimant’s brief, he simply recapitulates the same usurpations of the ALJ in which the Circuit Court engaged.

For example, Claimant (Response Brief at 1) and the Circuit Court (App. 250-251) place great emphasis on the fact that one of the witnesses, Rocky Elkins (“Mr. Elkins”), testified that although he saw Claimant make “a motion like he was tossing something,” that Mr. Elkins, who was operating a motor vehicle at the time, “didn’t see anything come out of his hand,” as if observing a pedestrian appear as if he or she is throwing something is not evidence that the pedestrian actually threw something because the observant did not actually see a projectile come out of the pedestrian’s hand. The physical act of

throwing something at a moving vehicle cannot be mistaken for a sneeze or some other innocent gesture.

Claimant (Response Brief at 2) and the Circuit Court (App. 251) also rely, in a “grassy knoll/second gunman” sort of analysis, the proximity and position of the witness who testified that he saw Claimant throw a jack rock at the passing vehicles:

The company did not call Jeffrey Wamsley, the driver of the car following Elkins,¹ but rather called David Johnson [“Mr. Johnson”], a supervisor who was in the passenger seat of the Wamsley vehicle. (Tr. 58.) Johnson’s testimony was that Wamsley’s car was four to five feet from the Elkins car going through the intersection. (Tr. 59.) This puts the Elkins car blocking Johnson’s view of where Mr. Elkins places Mr. McCarthy at the time of the alleged tossing motion. Johnson says he saw a jack rock on the road between the Elkins car and the Wamsley vehicle (Tr. 60), and that the motion by Mr. McCarthy was after Elkins passed McCarthy (Tr. 65), and that the jack rock was thrown between the Elkins and Wamsley car. Johnson’s testimony is totally inconsistent with Mr. Elkins’ testimony, and is totally opposite from the statement Johnson signed stating “I witnessed Terry McCarthy toss a jack rock at Rocky’s vehicle.” (See Employer Exhibit 2, Page 8). Additionally, Johnson said he did not see McCarthy until the Elkins car had passed him (Tr. 50), and that’s when he saw Mr. McCarthy make the motion. (Tr. 72.) The testimony of Johnson is in total conflict with that of Mr. Elkins who was in a much better position to observe Mr. McCarthy.

This is precisely the type of reexamination of the evidence by the Circuit Court that this Court has prohibited in its adoption of a deferential standard of review.

¹ The alleged failure to call Jeffrey Wamsley (“Mr. Wamsley”) as a witness is a non-issue because Mr. Wamsley’s statement was appended to an incident report admitted into evidence as a business record, Tr. at 81-82, and Claimant did not challenge Mr. Wamsley’s statement at the hearing, App. 9-10 (“Q Okay. And you took it down verbatim the way that Mr. Wamsley was telling you? A. Yes.”). In his brief, Claimant states, “The statement of Mr. Wamsley was allowed into evidence . . . over the objection of Mr. McCarthy (App. 43),” Response at 2-3, but only the statement of Mr. Wamsley appears at Page 43 of the Appendix and Claimant never objected to the admission of the incident report.

Like the Circuit Court, Claimant chooses to ignore the substantial evidence of record supporting the ALJ's finding that Claimant threw a jack rock.

For example, the first witness who testified was Tom Slone ("Mr. Slone"), Manager of Environmental Health and Safety and Security at the Ravenswood Aluminum plant. App. 6. Mr. Slone authenticated an incident report dated August 7, 2012, which reported that as Mr. Elkins was driving into the plant Claimant was observed throwing a jack rock at Mr. Elkins' vehicle. App. 7. Mr. Slone testified that he obtained statements from Mr. Wamsley, Mr. Johnson, and Mr. Elkins regarding the incident. App. 8. Mr. Slone testified that, based upon his investigation, he concluded Mr. Wamsley and Mr. Johnson had observed Claimant throwing a jack rock at Mr. Elkins' vehicle. Id. Finally, Mr. Slone testified regarding the Employer's rules of conduct which, in Mr. Slone's judgment, warranted termination of Claimant's employment. App. 8-9.

The second witness who testified was Mr. Elkins, who worked as a production supervisor at the plant. App. 11. He was driving a lead vehicle into the plant because Mr. Wamsley and Mr. Johnson, who were following in their vehicle, had "never driven through a picket line before." Id. He testified that as he was approaching the picket line, Claimant "scooped down and make a bowl - like a bowling motion with his arm. I didn't see anything come out of his hand." App. 12. Mr. Elkins explained that after observing Claimant appear to have thrown something, he confirmed with others that Claimant had actually thrown a jack rock in the direction of Mr. Elkins' vehicle:

And then later on, the people behind me - were about ten or fifteen minutes behind me and they said did you see Terry McCarthy? And I said yeah, I seen him. I said he was messing with me acted like he was throwing something at me.

They said well, he did throw something, we seen it. And so I went back out for orientation. They made their statements. And like I said, I seen him make a motion but I didn't see anything come out of his hand.

App. 13.²

With respect to Claimant's position as Mr. Elkins observed him as he was approaching driving a Dodge Charger, Mr. Elkins testified that (1) he was driving in the right-hand lane on his side of the yellow line; (2) Claimant was standing a foot to two feet off the edge of the left-hand lane all the way across the roadway; and (3) Claimant's appeared to throw something from across the roadway under Mr. Elkins' "left front quarter panel." App. 14. When asked if his vehicle could have blocked the vision of Mr. Wamsley and Mr. Johnson as Claimant appeared to throw something from across the roadway, Mr. Elkins testified, "I couldn't say, sir." App. 15.

The third witness who testified was Mr. Johnson, who was a supervisory employee. App. 16. Mr. Johnson confirmed the statement he provided to Mr. Slone regarding the incident. App. 17. Mr. Johnson testified that not only did he observe Claimant throw a jack rock at Mr. Elkins' vehicle, he even saw the jack rock bounce on the roadway. Id. Mr. Johnson testified:

² See also App. 15 ("Q Mr. Elkins, did Mr. Wamsley and Mr. Johnson tell you that they saw Mr. McCarthy . . . toss an object when they came into the plant? MR. ELKINS. Yes. . . . JUDGE: Mr. Elkins, what were you told? . . . MR. ELKINS: I asked them why it took so long to get to where I was. They said didn't you see Sunshine, which is his nickname. JUDGE: Mr. McCarthy's nickname is Sunshine? MR. ELKINS: Yes, sir. I said yes, I seen him. I said he was messing with me. I think he acted like he was tossing something at me. They said he wasn't acting. They said they seen something, a jack rock is what they told me. And they'd stopped and told the guards at the entrance there."). Respectfully, it is absurd to suggest that Mr. Elkins was not credible when he was careful not to testify to anymore than he actually observed and only concluded that Claimant threw a jack rock when it was immediately confirmed by Mr. Wamsley and Mr. Johnson.

As we hit the intersection, since it's a swerve we have to slow down to probably five to six miles an hour, almost came to a stop. And I looked over and I seen someone go like this. And that's when I seen the jack rock in between Rocky's car and Jeff's car.

JUDGE: And you were motioning with your right hand?

MR. JOHNSON: Yes.

JUDGE: With an underhand motion?

MR. JOHNSON: Just like a toss.

JUDGE: - about waist high?

MR. JOHNSON: Yes.

JUDGE: About two, two and a half foot swing in length?

MR. JOHNSON: That's about right, yes.

JUDGE: Any other questions for him, ma'am?

BY MS. PRICE:

Q And you saw the jack rock?

A Yes.

Q And were you all able to successfully navigate around the jack rock?

A Yes. I remember the driver Jeff, he kind of swerved over. Like I said, it was a sharp turn, just a - just kind of maneuvered over top of it.

Q Were able to avoid it so you did not have damage to your vehicle?

A Exactly.

Q Now, you were the passenger in the vehicle, did you have any trouble seeing Mr. McCarthy?

A No.

App. 17-18.

As Mr. Johnson explained when cross-examined by Claimant's counsel, he was readily able to observe Claimant throwing the jack rock because Claimant was positioned across and off the oncoming lane of travel: "Q So I take it you being in the passenger side and you were four or five feet in front of - behind Mr. Elkins' car that you would've had a good view that Mr. McCarthy was on the right-hand side of the road? A Left-hand side. Q Left-hand side. Clear over on the left-hand side - A - yes." App. 18.

Moreover, Claimant was not only positioned completely across and off the oncoming lane of travel, he was standing at an intersection where Mr. Elkins' vehicle was negotiating a sharp turn, depicting in a photograph introduced and referenced at the hearing before the ALJ, App. __, and Claimant would have been in full view of Mr. Johnson when he observed him throwing the jack rock: "MR. JOHNSON: We were directly behind him. MS. PRICE: You were behind him? MR. JOHNSON: Yes. But the intersection has a sharp curve." App. 19.

Claimant deals with this substantial evidence in support of the ALJ's findings by asserting non-existent inconsistencies in the testimony of the witnesses.

For example, as previously noted, Mr. Elkins' testimony that he saw Claimant appear to throw something which was immediately confirmed by other eyewitnesses becomes a basis for overturning the ALJ's finding, according to Claimant, because "Mr. Elkins stated he did not see Mr. McCarthy throw anything," Response at 1, as if seeing someone appear to throw something and having others immediately advise the observer that something was thrown is not evidence that something was actually thrown.

In another example, where the evidence was that Mr. Elkins' vehicle was traveling ahead of Mr. Wamsley's vehicle (Response at 2) and that Claimant threw a jack rock at Mr. Elkins' vehicle which was then observed in the roadway between Mr. Elkins' vehicle and Mr. Wamsley's vehicle (App. 17-18), Claimant argues that testimony regarding observations of a jack rock between the Elkins and Wamsley vehicles is somehow inconsistent with testimony that it was thrown at the Elkins vehicle (Response at 2) as if the laws of physics were not in play when a jack rock was thrown at the Elkins vehicle, which was moving away from where the jack rock was thrown, and then followed by the Wamsley vehicle moving over where the jack rock was thrown.

Claimant also asserts that because some eyewitnesses stated that, to their knowledge, no one else saw the jack rock being thrown (Response at 2), excludes the possibility that someone else, outside of their knowledge, did see the jack rock being thrown. Apparently, in Claimant's world, every person present at an event will see everything going on at that event and unless everyone testifies to seeing the same thing, the testimony of multiple witnesses regarding their observations of the same thing are not to be believed.

Based upon his personal observations of the witnesses and the documentary evidence submitted at the hearing, the ALJ found as fact the following: (1) "On August 7, 2012, the claimant was manning the picket line at the South Y Entrance;" (2) "The claimant threw a jack rock beneath and toward a vehicle entering the employer facility;" (3) "There were four vehicles in a convoy transporting supervisor personnel to work at the plant during the strike;" (4) "The claimant threw a jack rock into the roadway as the first

vehicle drove pass [sic] the South Y Intersection;” (5) “The driver of the second vehicle swerved to avoid the jack rock in the roadway;” and (6) “The passenger in the second vehicle observed the claimant throw the jack rock into the roadway as the first car traveled past the claimant.” App. 45-47.

These findings were based upon the testimony of Mr. Slone, who took statements from multiple witnesses who either saw Claimant make a throwing motion or who both saw Claimant make a throwing motion and saw the jack rock come out of Claimant’s hand and bounce on the roadway, including Mr. Elkins, Mr. Johnson, and Mr. Wamsley. Even Claimant and Claimant’s own witness, Ed Nunn (“Mr. Nunn”), admitted that a jack rock was in the roadway, and the only witness at the hearing who denied that it was Claimant who threw the jack rock was Claimant himself, as Mr. Nunn conceded that he was not always present with Claimant during the time the incident occurred.

In addition to fabricating conflicts in the evidence where there were none, Claimant also persists in relying upon a “sins of omission” argument to undermine the ALJ’s findings, claiming that because Mr. Wamsley was not called as a witness or surveillance videotapes were not introduced, the other substantial evidence that he threw a jack rock can be ignored. Response at 3.

The case relied upon by Claimant (Response at 3) and the Circuit Court to erroneously presume that this evidence would have been adverse, however, was *Workman v. Clear Fork Lumber Co.*, 111 W. Va. 496, 163 S.E. 14 (1932), where the issue presented was not whether the failure of a party to call a witness created any presumption that such witness’s testimony would have been unfavorable, but whether the failure of

parties who are present at trial to testify on their own behalf justified an instruction to the jury regarding a negative presumption.

Rather, the leading case on a negative inference is not *Workman*, but *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987), where this Court held in Syllabus Point 3 that, “The unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the ‘missing’ witness would, if he or she had been called, have been adverse to the party failing to call such witness. . . .”

In *McGlone*, this Court explained why prior cases, like *Workman*, adopted an overly broad application of the “missing witness” rule, including when, as in this case, “There is no presumption where there is already sufficient evidence so that that omitted would be merely corroborative.” *Id.* at 664-665, 363 S.E.2d at 741-742. (citation omitted). Here, of course, Mr. Elkins testified that he observed Claimant make a throwing motion; Mr. Johnson testified that he observed Claimant both make a throwing motion and observed the jack rock come out of Claimant’s hand and bounce on the roadway; and Mr. Slone testified about taking Mr. Wamsley’s statement, which was properly admitted as a business record. Accordingly, because Mr. Wamsley’s sworn testimony and surveillance videotape would have been cumulative, it was error for the Circuit Court to apply the “missing witness” rule.³

³ See, e.g., Syl. pt. 4, *Montgomery v. Chesapeake & Potomac Telephone Co.*, 121 W. Va. 163, 3 S.E.2d 58 (1939)(“The evidence of an absent material witness is not presumed to be adverse to the side not procuring his [or her] attendance when the same material facts relating to the severity of the plaintiff’s injury known to the absent witness have been testified to by other competent witnesses.”); *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975)(missing-witness instruction

Where there is conflicting evidence, or conflicting inferences which may be drawn from the evidence, deference must be given to the resolution arrived at by the ALJ. *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 111, 394 S.E.2d 340, 343 (1990)(“The record contains conflicting evidence on the employer’s motivation for discharging the complainant. These conflicts were resolved by the fact finder in favor of the complainant.”).

Obviously, the Circuit Court’s analysis in this case fails this test as the Circuit Court acknowledged that the evidence regarding whether Claimant threw the jack rock was conflicting. When the evidentiary record contained conflicting evidence, the Circuit Court was supposed to defer to the ALJ’s resolution of that conflicting evidence and the failure to defer constitutes reversible error.

C. CONTRARY TO W. VA. CODE § 21A-6-3 AND THIS COURT’S DECISIONS APPLYING THAT STATUTE, THE CIRCUIT COURT ERRED IN RULING THAT THROWING A JACK ROCK AT A SUPERVISOR’S VEHICLE AS IT IS ENTERING A PLANT DURING A STRIKE DID NOT CONSTITUTE “GROSS MISCONDUCT.”

As noted in Employer’s initial brief, it has been held that throwing jack rocks during the course of a strike justifies termination of employment.⁴ Likewise, courts have

should not have been given because the testimony of the absent doctors would have been cumulative).

⁴ See, e.g., *NSA v. United Steelworkers of America, AFL-CIO*, 2000 WL 3366521 (N.L.R.B.)(“Newman was discharged for his conduct on June 23, 1998, three days after the commencement of the strike in following a bus carrying replacement employees from the plant to lodging in Owensboro, Kentucky and throwing ‘jackrocks’ under the side of the bus as he passed it on the road. ‘Jackrocks’ are a three pronged bent nail device which are fashioned so that one of the points of the nails faces upward in order to puncture tires of vehicles. They apparently serve no other purpose. These items were regularly strewn by picketers on the drive to the plant in order to flatten the tires of individuals working or making delivery or transporting product from the plant. . . . I do not credit Newman’s testimony which I found to be unconvincing. I find that

held that those who engage in violent acts may be disqualified from the receipt of unemployment benefits even if those violent acts occur outside the scope of employment and off the employer's premises but are related to strike activities.⁵

Moreover, just as the Circuit Court applied the wrong burden of proof; misapplied the "clearly wrong" standard of review; and misstated the holdings of cases relied on, the Claimant (Response at 8) and the Circuit Court inaccurately applies this Court's case of

Herrin had an honest belief that Newman had thrown the jackrocks under the moving bus carrying replacement employees. This was a violent act which could have resulted in the death or injury of the occupants of the bus and the other vehicles and the discharge of an employee engaged in similar conduct would normally be the penalty for such conduct. . . . I find Respondent did not violate the Act by its discharge of Newman."); *Horsehead Resource Development Co., Inc. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO*, 321 NLRB No. 177 at *29 (N.L.R.B.), 321 NLRB 1404, 153 L.R.R.M. (BNA) 1200, 1996 WL 506087 (N.L.R.B.)("Crabtree was also discharged due to tossing jackrocks 'onto roadway at entrance to plant causing damage to the tire of a vehicle entering plant.' . . . Flanagan testified that the person who threw the jackrock was Thomas Crabtree. He testified that a foreman, who he believes 'might have been Sub Boles, I'm not really sure on that' identified Crabtree, based upon Flanagan's description of the clothing worn. Flanagan did not recognize Crabtree. . . . I do not credit Crabtree's denial of this conduct and find that Flanagan's identification of Crabtree is sufficient. . . . I credit Flanagan's testimony here and find that Crabtree's conduct here and damage to the property it caused warranted his discharge.").

⁵ See, e.g., *Miner v. Administrator*, 23 Conn. Supp. 206 (1961)("To sustain the commissioner's ruling upon the highly technical ground that this claimant had decided to leave his job and join the strikers as of the moment he walked out the gates of the plant and that therefore his act of violence, committed at those very gates, was not misconduct in the course of his employment would appear to distort the purposes of the act and offend public policy by rewarding a violent picketer rather than condemning his act of unlawful violence."); *Doughty v. Review Bd. of Dept. of Workforce Development*, 784 N.E.2d 524 (Ind. Ct. App. 2003)(unemployment benefits denied for striking worker who assaulted replacement worker after she had left employer's facility); *Jackson v. Doyal*, 231 So.2d 462 (La. Ct. App. 1970)(unemployment benefits denied where striking employee followed supervisory personnel after they departed place of employment and bumped the employee's vehicle into the rear of the supervisory personnel's vehicle); *Caruso v. Commonwealth Unemployment Compensation Board of Review*, 122 Pa. Cmwlth. 351 (1988)(unemployment benefits denied where worker appeared at supervisor's residence and harassed and terrorized supervisor's wife and small child accusing supervisor of being a "company man" instead of a "union man").

Dailey v. Board of Review, West Virginia Bureau of Employment Programs, 214 W. Va. 419, 589 S.E.2d 797 (2003).

In *Dailey*, the case did not involve, as Claimant (Response at 8) and the Circuit Court imply (Final Order at 4-5), an act of violence or destruction of property, but it merely involved an employee's failure to advise his employer that his driver's license had been suspended. *Id.* at 422, 589 S.E.2d at 800. Moreover, contrary to Claimant's brief (Response at 8) and the Circuit Court's order (Final Order at 5), this Court did not state that its previous decision in *UB Services, Inc. v. Gatson*, 207 W. Va. 365, 532 S.E.2d 365 (2000), where it correctly determined that an incident in which an employee savagely beat a co-worker during a domestic dispute at the employee's residence constituted "gross misconduct" under W. Va. Code § 21A-6-3(2), was wrongly decided.

Rather, it noted that the definition of "gross misconduct" used by the Court in *UB Services*, had been taken from a Michigan case, *Carter v. Michigan Employment Security Commission*, 364 Mich. 538, 111 N.W.2d 817 (1961), and that a broader examination of an appropriate definition of "gross misconduct" was appropriate as many states distinguish "gross misconduct" from simple "misconduct" for unemployment purposes. *Id.* at 424-426, 589 S.E.2d at 802-804.

Ultimately after conducting a broader examination of cases distinguishing "gross misconduct" from simple "misconduct" for unemployment purposes, this Court held in Syllabus Point 4, in part, of *Dailey* that, "For purposes of determining the level of disqualification for unemployment compensation benefits under West Virginia Code § 21A-6-3, an act of misconduct shall be considered gross misconduct where the underlying

misconduct consists of (1) willful destruction of the employer's property; (2) assault upon the employer or another employee in certain circumstances . . . or (5) any other gross misconduct which shall include but not be limited to instances where the employee has received prior written notice that his continued acts of misconduct may result in termination of employment."

Not only does Syllabus Point 4 of *Dailey* support the ALJ's and Board of Review's decision to deny Claimant unemployment benefits for "gross misconduct," this Court's holdings in Syllabus Points 5 and 6 also support those decisions:

5. Except where an employee has received a prior written warning, the phrase, "other gross misconduct," in West Virginia Code § 21A-6-3(2) evidences the legislature's intent to provide some element of discretion in the Board and reviewing courts, based upon the peculiar facts of each case.

6. Where the catch-all provision of "other gross misconduct" in West Virginia Code § 21A-6-3(2) is utilized as a basis for denial of all unemployment compensation benefits in the absence of a qualifying prior written warning, the employer is required to furnish evidence that the act in question rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items, and a resolution of matters brought under this subdivision must be analyzed on a case-by-case basis.

W. Va. Code § 21A-6-3 begins by stating, "Upon the determination of the facts by the commissioner, an individual is disqualified for benefits" [Emphasis supplied]. Here, the Board of Review took a look at the evidence presented to the ALJ and appropriately found it constituted "gross misconduct," which should have been afforded substantial deference by the Circuit Court, but it was not.

Consequently, this Court should reverse the Circuit Court's order and reinstate the decisions of the ALJ and the Board of Review.

D. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR AN EMPLOYER'S BURDEN OF PROOF IN AN UNEMPLOYMENT COMPENSATION CASE, THE CIRCUIT COURT ERRONEOUSLY APPLIED A CLEAR AND CONVINCING BURDEN OF PROOF.

As recently as in *Verizon Services Corp. v. Board of Review of Workforce West Virginia*, 2013 WL 5967047 at *3 (W. Va.) (memorandum, this Court reiterated, “[T]he burden of persuasion is upon the former employer to demonstrate by the preponderance of the evidence that the claimant’s conduct falls within a disqualifying provision of the unemployment compensation statute.”) (emphasis supplied and citations omitted).

In his brief, Claimant concedes, “[T]he Circuit Court did refer to a clear and convincing standard” Response at 4. Of course, it did so, erroneously, because it was that incorrect standard advocated by Claimant.

Where Claimant cites no authority for the proposition that a lower court order using an incorrect burden of proof in its review of an administrative agency’s decision may still be affirmed, the Circuit Court’s order in this case must be reversed.

E. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT OF KANAWHA COUNTY ERRED BY HOLDING THAT EMPLOYEES HAVE A “PROPERTY RIGHT” IN EMPLOYMENT THAT GIVES EMPLOYEES “THE RIGHT TO STRIKE” AND TO ENGAGE IN VIOLENT CONDUCT IN THE CONTEXT OF A STRIKE “WITHOUT THE FEAR OF INFLICTION OF ECONOMIC CAPITAL PUNISHMENT” IN THE FORM OF DENIAL OF UNEMPLOYMENT BENEFITS WHEN AN EMPLOYEE IS DISCHARGED FOR ENGAGING IN VIOLENT CONDUCT DURING THE COURSE OF A STRIKE.

In an apparent effort to justify application of an erroneous “clear and convincing evidence” standard, the Circuit Court held that employees have a “property right” in employment that giving them “the right to strike” and to engage in violent conduct in the

context of a strike “without the fear of infliction of economic capital punishment” in the form of denial of unemployment benefits. Final Order at 7. Incredibly, Claimant persists in his defense of these rulings, which are contrary to West Virginia law.

First, as noted in Employer’s initial brief, there is no “property right” to continued employment in the private sector.⁶ Although Claimant attempts to distinguish this Court’s cases so holding (Response at 9-10), he cites no authority supporting the proposition that a private employee, even one who works under a collective bargaining agreement, has a constitutionally-protected “property right” to continued employment.

Second, as noted in Employer’s initial brief, there is no constitutional or common law “right to strike.”⁷ Again, although Claimant attempts to distinguish this Court’s precedent so holding (Response at 11), he cites no authority supporting the proposition that there is a constitutional or common law “right to strike,” and his reference to a statutory right to strike under the National Labor Relations Act (Response at 11) is irrelevant as the Circuit Court’s order references not Claimant’s statutory right to strike, but some non-existent constitutional or statutory one.

Third, as noted in Employer’s initial brief, there is no “right” to unemployment compensation benefits to the extent that disqualifying a claimant for “gross misconduct”

⁶ See, e.g., *Kessel v. Monongalia County General Hosp. Co.*, 215 W. Va. 609, 328 S.E.2d 321, 328 (2004) (“[P]laintiffs’ alleged property right cannot derive from a private contract.”); Syl., in part, *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989) (“A state college administrator . . . has no property right in continued employment with the college beyond his current contract . . .”).

⁷ Syl. pt. 1, *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass’n*, 183 W. Va. 15, 393 S.E.2d 653 (1990) (“In the absence of legislation, the common law rule recognized in both federal and state courts is that public employees do not have the right to strike.”).

is somehow an unconstitutional infringement on the claimant's "right to strike."⁸ Claimant obviously cites no legal authority for this proposition in his brief (Response at 8-12), because there is none.

Fourth, as noted in Employer's initial brief, even where a "right to strike" may exist, such as under the National Labor Relations Act, there is no right to engage in "violent" conduct in conjunction with such strike.⁹ Again, Claimant has no legal authority for any argument to the contrary. (Response at 8-12).

Finally, Claimant's "discharge," which was not the issue before the Circuit Court in any event, was not based "on weak, inconsistent and uncorroborated testimony." Rather, Claimant and his witness admitted he was physically present when the incident occurred; Claimant and his witness admitted a jack rock was physically present; and Mr. Elkins'

⁸ See *Baker v. General Motors Corp.*, 478 U.S. 621 (1986)(Michigan statute denying unemployment benefits for any employee who provided financing for strike that caused the employee's unemployment by means other than payment of regular dues was valid); see also W. Va. Code § 21A-6-3(4)("Upon the determination of facts by the commissioner, an individual is disqualified for benefits . . . For a week in which his or her . . . unemployment is due to a stoppage of work which exists because of a labor dispute . . .").

⁹ See, e.g., *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939)("The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant."); *Kayser-Roth Corp. v. Textile Workers Union of America, AFL-CIO*, 479 F.2d 524, 528 (6th Cir. 1973)("The union's argument is in essence a contention that the results of picket line violence should be treated as additional penalties to be imposed upon a company whose unfair labor practices have caused a strike. This argument fails to consider that special appropriate remedial sanctions are available for unfair labor practices by a company, as have been invoked in this case. Furthermore, the Supreme Court has rejected the argument that violence by strikers should not be reimbursable if the strike was caused by the unfair labor practices of the company.")(citing *Fansteel*); *Sarrazine v. L. Karp & Sons*, 1996 WL 355362 at *11 (N.D. Ill.)("Violence on the picket line is not protected by federal labor law, and so Huffmaster's alleged breach of its duty to prevent that violence is also not preempted by federal labor law."); *MHC, Inc. v. International Union, United Mine Workers of America*, 685 F. Supp. 1370, 1377 (E.D. Ky. 1988)("The NLRA provides the right to strike but this privilege does not include a license to commit acts of violence.").

testimony was not inconsistent or uncorroborated as Mr. Elkins testified to Claimant making a throwing motion, Mr. Johnson testified to Claimant making a throwing motion and observing the jack rock come out of Claimant's hand and bounce on the roadway, and Mr. Slone testified that the reasons for the decision to discharge Claimant were set forth in his investigative report, which included the statement of Mr. Wamsley who, like Mr. Elkins and Mr. Johnson, observed Claimant making a throwing motion, and like Mr. Johnson, actually saw the jack rock fly from Claimant's hand and bounce on the roadway in the vicinity of Mr. Elkins' vehicle.

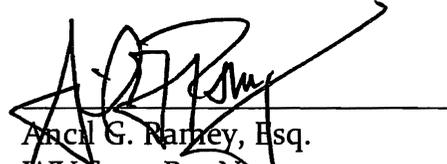
Accordingly, as employees do not have a "property right" in employment that gives those employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of economic capital punishment" in the form of denial of unemployment benefits, the judgment of the Circuit Court of Kanawha County should be set aside, and the decision of the Board of Review should be reinstated.

III. CONCLUSION

The Employer/Petitioner, Alcan Rolled Products Ravenswood, LLC, respectfully requests that this Court reverse the judgment of the Circuit Court of Kanawha County, and reinstate the decisions of a WorkForce West Virginia deputy; an Administrative Law Judge; and the full Board of Review concluded that Claimant/Respondent, Terry W. McCarthy, was discharged for gross misconduct and was not entitled to unemployment compensation benefits.

**ALCAN ROLLED PRODUCTS
RAVENSWOOD, LLC**

By Counsel

A handwritten signature in black ink, appearing to read 'Ancil G. Ramey', is written over a horizontal line. The signature is stylized and somewhat cursive.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2014, a true and accurate copy of the foregoing **REPLY BRIEF OF THE PETITIONER** was mailed to counsel for all other parties to this appeal as follows:

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