

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0315

LARRY MYERS, Petitioner Below,
Petitioner

Appeal from a final order
of the Circuit Court of Kanawha
County (13-AA-71)

v.

OUTDOOR EXPRESS, INC. and
WORKFORCE WEST VIRGINIA,
Respondents Below,
Respondents

Petitioner's Brief

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STATUTES

- W. Va. Code* § 21A-1-1
- W. Va. Code* § 21A-1A-27
- W. Va. Code* § 21A-6-1
- W. Va. Code* § 21A-6-3(1)
- W. Va. Code* § 21A-6-11
- W. Va. Code* § 21A-10-8
- W. Va. Code* § 21A-10-21

ASSIGNMENTS OF ERROR

- 1. THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER WAS NOT TOTALLY OR PARTIALLY UNEMPLOYED DURING THE RELEVANT PERIODS**
- 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**
- 3. THE CIRCUIT COURT ERRED BY ATTRIBUTING INCOME TO THE PETITIONER DURING TIME PERIODS WHEN CLAIMS WERE FILED**
- 4. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT WORKFORCE WEST VIRGINIA IS ENTITLED TO RECOVER ALL THE BENEFITS PAID TO THE PETITIONER**

STATEMENT OF THE CASE

I. Introduction

This is an appeal of a Final Order entered on February 25, 2014 by the Circuit Court of Kanawha County, affirming a decision of the Unemployment Compensation Board of Review on May 13, 2013.

Larry Myers (hereinafter referred to as "Petitioner") works as a sales associate for Respondent Outdoor Express, Inc. (hereinafter referred to as "Respondent Outdoor Express"), at its Outdoor Express RV location in Falling Waters, West Virginia. Respondent Outdoor Express is a recreational vehicle dealership providing sales and service of travel trailers and truck campers. Petitioner is paid on a commission basis (3% - 4%) only when one of his sales is closed by Respondent Outdoor Express. Sales of recreational vehicles of this type tend to occur on a seasonal basis, with higher sales in the summer and warmer months and significantly fewer sales during the winter/colder months. As a result, sales associates like the Petitioner may go for weeks without a

sale, and in turn, without income. For that reason, with guidance from Respondent WorkForce West Virginia (hereinafter referred to as “Respondent WorkForce”), Outdoor Express issued low earnings reports (LERs) to support claims for unemployment compensation during those periods.

This matter involves twenty-two separate claims for benefits over the time period November 29, 2008 to March 17, 2012 **A.R. 15-37**. On November 13, and November 16, 2012, WorkForce West Virginia Deputy Commissioner Susan Newsome issued decisions on each of those 22 claims, finding that Petitioner was neither totally nor partially unemployed during the time period in question, and was ineligible for unemployment compensation benefits. Newsome found overpayments in each of the 22 instances totaling \$37,590.

Subsequent appeals by the Petitioner to the WorkForce West Virginia Board of Review (**A.R. 6-9, 10-14**) and the Circuit Court of Kanawha County (**A.R. 1-5**) resulted in findings that Petitioner was ineligible for unemployment benefits.

II. Description of the West Virginia Unemployment Compensation Laws

The Unemployment Compensation benefits program was established by the United States Congress. "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *California v. Java!*, 402 U.S. 121, 130 (1971). The Supreme Court of Appeals of West Virginia has consistently held, "unemployment compensation statutes should be liberally construed in favor of the claimant[.]" *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d at 395 (quoting *Davenport v. Gatson*, 192 W.Va. 117, 119, 451 S.E.2d 57, 59 (1994) and citing numerous other decisions).

The purpose of West Virginia’s unemployment compensation laws, “is to provide reasonable and effective means for the promotion of social and economic security by reducing as far as practicable the hazards of unemployment[.]” so as to:

- (1) Provide a measure of security to the families of unemployed persons.
- (2) Guard against the menace to health, morals and welfare arising from unemployment.
- (3) Maintain as great purchasing power as possible, with a view to sustaining the economic system during periods of economic depression.
- (4) Stimulate stability of employment as a requisite of social and economic security.
- (5) Allay and prevent the debilitating consequences of poor relief assistance.

W.Va.Code 21A-1-1, See also *Childress v. Muzzle*, 222 W.Va. 129, 663 S.E.2d 583 (2008); *Davis v. Gatson*, 195 W.Va. 143, 464 S.E.2d 785 (1995).

The eligibility and disqualification provisions of the West Virginia unemployment compensation law constitute a two-step process to entitlement to unemployment compensation benefits. When an individual is held to be eligible to receive unemployment benefits, the next step is to consider possible disqualification for benefits. *Kisamore v. Rutledge*, 16 W.Va. 675, 276 S.E.2d 821 (1981). There have been no issues of disqualification raised in this matter, only questions of Petitioner's eligibility to receive benefits.

To be eligible to receive unemployment compensation benefits, an individual must be totally or partially unemployed. W.Va.Code, 21A-6-1; W.Va.Code 21A-6-11. 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. An individual is separated from his employment when there has been a total severance of the employer-employee relationship by quitting, discharge or otherwise. *Kisamore* at 681. Generally, an individual, not separated from employment, is partially unemployed in any week in which due to "lack of work" he performs no services and with respect to which no wages are payable to him. *Id.*

III. Statement of Facts

Petitioner was, at all relevant times herein, and still is, employed by Respondent Outdoor Express as a salesman of recreational vehicles. Petitioner is paid to perform the service of selling recreational vehicles. Petitioner is paid on a commission basis on a bi-weekly basis only when sales are closed by Respondent Outdoor Express during the preceding two-week period. Petitioner receives no pay if no sales are closed during such period.

Respondent Outdoor Express sought guidance from the local WorkForce West Virginia office in Martinsburg, West Virginia, which advised on when and how to issue LERs. Respondent Outdoor Express and Petitioner adhered to the guidance provided by Respondent WorkForce. Outdoor Express issued LERs to Petitioner for any period when the claimant was not issued a commission check beginning November 28, 2008 to March 17, 2012.

For periods in which he did not receive a commission check, Petitioner filed claims and was paid unemployment compensation benefits between \$339 and \$424 per week. For periods in which he did receive a commission check, Petitioner did not file claims and did not receive unemployment compensation benefits. Because he did not file claims during periods in which he did not receive commission checks, Petitioner did not report such income. Respondent Outdoor Express did report all compensation, in the form of commissions, on a quarterly basis to the Unemployment Compensation Office.

On November 13, 2012, and November 16, 2012, Deputy Commissioner Susan Newsome issued decisions finding that Petitioner was neither totally nor partially unemployed during twenty-two (22) separate periods in which he filed claims for unemployment benefits. These decisions included a finding that overpayments were made to Petitioner which must be repaid. Petitioner

filed a timely appeal of Newsome's decision, which was heard on January 8, 2013 by Administrative Law Judge William F. Byrne.

On February 22, 2013, Judge Byrne affirmed the decisions of Deputy Commissioner Newsome, finding that Petitioner was neither totally nor partially unemployed, and finding an overpayment occurred, which is recoverable "in accordance with the statute."

Petitioner filed a timely appeal of Judge Byrne's decisions to the Board of Review, WorkForce West Virginia. Without providing any detail whatsoever, the Board of Review, on May 13, 2013, found that Judge Byrne "made a proper ruling" and adopted the finding of the Judge in its entirety in each and every one of the 22 cases.¹

Petitioner appealed the decisions of the Board of Review to the Circuit Court of Kanawha County. Petitioner's appeal to the Circuit Court asserted the lower decisions were erroneous because both the Board of Review and Judge Byrne: (1) erroneously found that Petitioner was not totally or partially unemployed during the relevant periods; (2) Failed to consider that Respondent WorkForce advised Respondent Outdoor Express on issuing Low Earning Reports (LERs) which form the basis for Petitioner's claims; (3) inaccurately attributed income for Petitioner to the time periods for which claims were filed; and (4) improperly found Respondent entitled to recover benefits paid for which they are either partly or entirely barred from recovering. On February 25, 2014, The Circuit Court issued its Final Order Affirming Decisions of Board of Review. Without addressing Petitioner's assignments of error whatsoever, the Circuit Court adopted the findings of fact as presented by the Respondents and issued an Order finding Petitioner not eligible for unemployment benefits.

¹ Petitioner appealed the Board of Review final decisions in the following cases: R-2012-5410, R-2012-5411, R-2012-5412, R-2012-5413, R-2012-5414, R-2012-5415, R-2012-5416, R-2012-5417, R-2012-5418, R-2012-5419, R-2012-5420, R-2012-5421, R-2012-5422, R-2012-5423, R-2012-5424, R-2012-5425, R-2012-5426, R-2012-5427, R-2012-5428, R-2012-5429, R-2012-5430, and R-2012-5431.

SUMMARY OF ARGUMENT

Petitioner is employed in an industry where business tends to be seasonal and is paid on a commission basis. The Circuit Court's finding that Petitioner is ineligible for benefits is unsupported by the evidence. There was no finding that the guidance provided to Petitioner and to Respondent Outdoor Express by Respondent WorkForce was inaccurate.

Administrative Law Judge Byrne noted that the Department needs to provide better guidance in the area of seasonal and commission based employment, but failed to state specifically whether the guidance that was provided was entirely inaccurate. Guidance provided by the local WorkForce office may have been accurate in this instance and should have been given deference by the Circuit Court.

The Circuit Court placed undue emphasis on the fact that Petitioner had earnings between 2008 and 2012. By definition, a person who is "partially" unemployed must have some income. That Petitioner met his burden to attempt to earn a living should not be held against him. To hold such efforts against him runs afoul of the intent of Congress.

If Petitioner received benefits in error, due to the guidance from the local WorkForce office, such error should not entitle Respondent WorkForce to recover the benefits paid. Any benefits paid in error more than two years prior to the initiation of this matter by the Deputy Commissioner cannot be recovered.

STATEMENT REGARDING ORAL ARGUMENT

The principle issues in this case have been authoritatively decided by the Court as presented in this brief and record on appeal, *infra*. Therefore oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed, in which case those issues are appropriate for a Rule 19 argument.

ARGUMENT

Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof. Syllabus Point 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954), Syl. Pt. 2, *Childress v. Muzzle*, 222 W.Va. 120, 663 S.E.2d 583 (2008), Syl. Pt. 5, *Verizon Services Corp. v. Epling*, 230 W.Va. 439, 739 S.E.2d 290 (2013). Findings of fact of the Board of Review 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 of judicial review by the court is de novo. Syl. Pt. 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E. 2d 395 (1994), Syl. Pt. 1, *Childress v. Muzzle*, Syl. Pt. 1, *Verizon Services Corp. v. Epling*. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. Syl Pt. 4, *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981).

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

The Circuit Court, in affirming the lower decisions, placed great weight on the fact that Petitioner went to work at Outdoor Express during the time periods in which he received no compensation. In his decision, affirmed by the Board of Review, Judge Byrne stated, “[d]uring all relevant time periods the claimant was performing services for this employer, and, therefore does not meet the requirement of being totally or partially unemployed.” Such reliance on Petitioner’s actions is misplaced.

The unemployment compensation program is an insurance program, and not an entitlement program, and is designed to provide a measure of security to the families of unemployed persons who become involuntarily unemployed through no fault of their own. It is not intended to apply to

those who willfully contribute to the cause of their own unemployment. *Childress v. Muzzle*, 222 W.Va. 129, 133, 663 S.E.2d 583, 587 (2008), *See also Hill v. Board of Review*, 166 W.Va. 648, 651, 276 S.E.2d 805, 807 (1981) (quoting *Board of Review v. Hix*, 126 W.Va. 538, 541, 29 S.E.2d 618, 619 (1944)). The obligation of employees under the Act is to do whatever is reasonable and necessary to remain employed. *Childress*, 222 W.Va. 129, 133, 663 S.E.2d 583, 587. The West Virginia Supreme Court of Appeals stated in *State v. Hix*, 132 W.Va. 516, 54 S.E.2d 198 (1949) that “the purpose of the Unemployment Act of 1936 was to encourage employment...[a]ny interpretation of the act, which encourages people not to work, can scarcely be considered as having been within the intent of the Legislature or of the proponents of the unemployment compensation system...” The reviewers below, by their decisions, would require that Petitioner not work at all in order to receive benefits. This position is clearly not within the intent of the Legislature as noted in *Hix*.

West Virginia Code Chapter 21A, Article 1A, Section 27 refers to an employee performing no services and “with respect to which no wages are payable”. The statute makes a direct correlation between the services and payable wages. This connection between services and payable wages is also noted in *Kisamore v. Rutledge*, 16 W.Va. 675, 276 S.E.2d 821 (1981). The question, therefore, is not whether Petitioner performed services, as in Judge Byrne’s decision, but rather, whether Petitioner performed services for which wages are payable. The answer to that question during the relevant periods is no.

The Commonwealth Court of Pennsylvania considered a similar situation involving an employee who was paid only on a commission basis in the case of *Kelly v. Unemployment Compensation Board of Review*, 840 A.2d 469 (2004). In that case, the claimant, Kelly, worked as a real estate salesperson. The Court noted that a “commission” is a fee earned by an agent for

transacting an item of business, and that this fee is normally a percentage of the money received by the agent responsible for conducting the business. The Pennsylvania Court did not consider the question of whether Kelly was partially unemployed, but found only that Kelly performed work, i.e. real estate sales, with an expectation of payment in the future and was therefore not “unemployed.” The determinative factor was that Kelly performed services for which a commission would eventually be paid to him.

Petitioner is paid wages in the form of a commission when he sells a recreational vehicle. The service for which he receives wages is completing a sale. If Petitioner is physically present at work, but does not sell a recreational vehicle, he is not performing a service for which wages are payable. (Hr’g Tr.pp. 13-14, 44-45) **A.R. 84, 91-92**. During the relevant periods, Petitioner may have been physically present at Respondent Outdoor Express’ place of business, sometimes for 40 hours per week. Petitioner was meeting his obligation to do whatever was reasonable and necessary to remain employed. *Childress*, 222 W.Va. 129, 133, 663 S.E.2d 583, 587. But, without available customers willing to buy a recreational vehicle, he was not always performing a service for which wages are payable.

The Circuit Court made erroneous finding of fact that Petitioner was never [totally or] partially unemployed due to the fact that the Petitioner had full-time work wages of forty (40) hours per week. However, the record shows that Petitioner did not always report to work 40 hours per week, and also supports a finding a 40-hour work week was not necessarily full time work. Petitioner did not always put in full-time hours during the time periods for which benefits were claimed. (Hr’g Tr. p. 41) **A.R. 91**. Likewise, Petitioner did not receive 40-hour wages during the relevant periods as the Circuit Court suggests. Petitioner testified that when he was earning commissions for recreational vehicle sales, a normal work week might be up to 60 hours. In other

words, in this type of business, in order to earn commissions, working 40 hours per week did not constitute full time employment. (Hr'g Tr. p. 61) **A.R. 96.**

The record does not contain evidence to show the true number of hours Petitioner actually worked each week. Some weeks, when he was splitting time with another employee, it may have been less than 30 hours, other weeks in which business was good and Petitioner was selling to customers, he may have worked as many as 60 hours. During the periods for which he filed claims, he was not performing services on a full time basis for which a commission would be paid.

II. 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

The Circuit Court, in affirming the decisions of the Board of Review, failed to consider that Respondent Outdoor Express' and Petitioner's actions relevant to this matter were taken after receiving guidance from Respondent WorkForce and continued for several years with that agency's full knowledge and approval. The agency has since decided that Petitioner, who would often go weeks or even months without earning or receiving wages, was not eligible for unemployment compensation benefits.

The Martinsburg WorkForce office advised Respondent Outdoor Express on issuing Low Earning Reports (LERs) during periods when employees did not receive commission payments. Judge Byrne acknowledged in his decision that "with the misunderstood blessing of the local office, the employer began issuing LERs to the claimant for any slow time during which the claimant did not "earn" (actually physically receive) a commission. Frank Subasic of Outdoor Express testified that he was "frequently advised by WorkForce office" about unemployment

compensation and how to go about reporting, issuing LERs and filing claims. (Hr'g Tr. pp. 42-47, 51-56, 59-60) **A.R. 91-95.**

Judge Byrne also noted the deficiencies in the Department's processes. In his decision he notes, "it is incumbent upon the Department to provide more clear and precise instructions to employers and employees that are affected by seasonal activities, and who operate on a commission basis." Judge Byrne also notes that there may be need for statutory or regulatory clarification. This leaves open the possibility that the guidance given by the local office wasn't entirely incorrect and that further instruction from the Department would have prevented this matter from reaching this point.

When a regulation contains an ambiguity, a reviewing court is required to afford deference to the interpretation of the administrative agency that is responsible for promulgating and enforcing that regulation. *Cookman Realty Group v. Taylor*, 211 W.Va. 407, 411, 566 S.E.2d 294, 298 (2002). In this case, the local office responsible for implementing the regulations advised Respondent Outdoor Express to issue Petitioner LERs so that he could file claims for benefits. The Circuit Court failed to give deference to the local office's determination and instead found that Petitioner was ineligible for benefits because he was neither totally nor partially unemployed.

If Petitioner received unemployment compensation benefits that he should not have received, it was clearly the result of an error by the Department. Judge Byrne noted that no fraud was intended by the Petitioner and none was alleged by the Department. No one misrepresented what was happening. Respondent Outdoor Express and Petitioner followed the guidance of the local WorkForce office. Respondent Outdoor Express issued LERs as instructed, reported employee earnings on a quarterly basis as instructed, and Petitioner filed claims for benefits only for the periods in which he was paid no compensation.

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

The Circuit Court, in affirming the findings and decision below erroneously attributes income to Petitioner during periods in which no income was received and for which claims were filed. Administrative Law Judge Byrne appears to have been greatly influenced by the fact that Mr. Myers earned any income whatsoever. Judge Byrne states, “one of the striking facts here is that over the relevant time period (late 2008 to late 2012), the claimant was paid more than \$164,000 of commissions...”

Petitioner did not file claims for benefits for the entire 4-year period as described by Administrative Law Judge Byrne. Petitioner filed claims only for those periods in which he did not receive commission checks. He did not file claims when he received commission checks. The fact that he earned commissions during some periods and received no pay whatsoever in other periods is the nature of the seasonal worker and one who works on commission. It also epitomizes the nature of those who are partially unemployed. Sometimes they may receive full pay and other times they do not.

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

Petitioner and Respondent Outdoor Express followed the guidance and instructions received from their local WorkForce office in Martinsburg, West Virginia. None of the decisions below included a determination on the accuracy of the guidance provided to Petitioner and Respondent Outdoor Express. As a result, it has not been expressly determined that the WorkForce office provided incorrect guidance. The Administrative Law Judge below, in his decision adopted in its entirety by the Board of Review and affirmed by the Circuit Court, acknowledges that the

Department needs to provide more clear and precise instructions for employers and employees when commission-based pay is involved.

Petitioner's arguments above are incorporated herein in support of a finding that Petitioner was entitled to the benefits he received. It may be found therefore, that the guidance received from the WorkForce office was not incorrect. Respondent WorkForce West Virginia therefore cannot recover the benefits paid to Petitioner.

If it is determined that the guidance from the local WorkForce office was incorrect and Petitioner was not entitled to benefits, then the benefits paid to Petitioner were paid in error. Respondent WorkForce West Virginia is not entitled to recover all of the benefits that were paid in error. Collection of benefits paid in error is barred after two years. W.Va.Code 21A-10-21. Therefore, Respondent WorkForce West Virginia is barred from collecting any benefits paid to Petitioner prior to two years before the dates of the Deputy Commissioner's decisions, those being November 13 and 16, 2012. Benefits paid to Petitioner on or before November 13, 2010, cannot be collected.

CONCLUSION

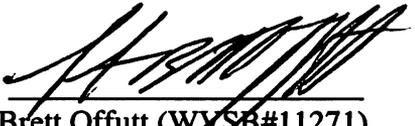
The unemployment compensation laws of West Virginia are clearly intended to cover employees who work in seasonal industries and/or are paid on a commission basis. Implementation of these laws is not clear in these instances. There is need for more clear and precise instructions to employers and employees in these instances and may be need for statutory or regulatory clarification as well. The statute as written makes a correlation between services provided and whether wages are payable for those services. Petitioner was often present at his employer's place of business, but was not providing services for which wages would be payable, i.e., selling

recreational vehicles. Petitioner was therefore not fully employed during all periods relevant in this matter and was entitled to receive benefits.

Both the claimant, Petitioner Larry Myers and his employer, Respondent Outdoor Express, relied on guidance provided by their local WorkForce West Virginia office in Martinsburg. Petitioner should not be penalized for relying on the local office's interpretation of the rules. If the court finds now that the local office's instructions were in error, Petitioner should not bear the consequences of their mistake. It was through no fault of his own that benefits were paid to him for a period of approximately four years.

Finally, if it is found that Petitioner received benefits in error, the statute provides that he cannot be made to repay any such benefits paid more than two years prior to the Deputy's initial decision in this matter.

WHEREFORE, the Circuit Court's Final Order finding Petitioner ineligible to receive benefits because he was neither totally nor partially unemployed should be reversed. The decision that payments made to Petitioner shall be recovered should be reversed on these bases as well.

Signed: 
Steven Brett Offutt (WYSB#11271)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2014, I served the foregoing Petitioner's Brief upon the Respondents, through their counsel of record, by mailing a true copy thereof with the United States Postal Service addressed as follows:

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