

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Brian Bond,
Plaintiff Below, Petitioner**

vs) **No. 101450** (Kanawha County No. 09-AA-56)

**Workforce West Virginia, and
Ronald E. Radcliff,
Defendants Below, Respondents**

FILED
May 27, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Brian Bond appeals from the circuit court's order affirming a decision of the Unemployment Compensation Board of Review ("Board of Review") denying his claim for unemployment compensation benefits. Petitioner seeks a reversal of the circuit court's order and an award of unemployment compensation benefits. Respondents, Workforce West Virginia and Ronald Radcliff ("Workforce WV"), have filed a response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on February 7, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On September 3, 2008, petitioner was operating a forklift for his then employer GWP Industries, Inc., TA ("GWP"). When petitioner attempted to stop the descent of an overhead door by reaching out from the forklift and pressing a stop button, the door continued its descent and struck the top of the forklift, which led to petitioner's hand being trapped between the forklift and the door frame. Petitioner's right middle finger was amputated, he

lost the use of his ring finger, and he suffered a shoulder and knee injury.¹ Petitioner states that he subsequently learned that the overhead door and controls were not working properly prior to his injury. GWP states that despite petitioner's training on the safe operation of the forklift, he did not follow proper procedure on the date in question, which led to his injury. GWP adds that an examination of the door by a third-party after the accident showed that the operation of the door was not malfunctioning.

On October 29, 2008, petitioner was released to return to work on a light-duty basis. GWP offered a light-duty position to petitioner at a different GWP facility. Petitioner states that he left his employment with GWP because he could not work in this other facility as it was not heated. Thereafter, petitioner filed a claim for unemployment compensation benefits. During the administrative proceedings below, petitioner testified that he was continually asked to do "unsafe things" by GWP and that his safety concerns, which he raised with supervisors, were not addressed. A Workforce WV deputy² determined that petitioner was entitled to unemployment benefits finding that he had left work voluntarily with good cause involving fault on the part of the employer.

GWP appealed the deputy's decision to the administrative law judge ("ALJ"), who upheld the deputy's decision. GWP appealed the ALJ's decision to the Board of Review. Following a hearing, the Board of Review reversed the decisions of the deputy and the ALJ.³ Petitioner appealed the Board of Review's decision to the circuit court.

On June 28, 2010, the circuit court entered an order upholding the Board of Review's decision to deny unemployment benefits. The circuit court found that petitioner was injured due to his failure to follow proper forklift procedure. The circuit court concluded that the

¹Petitioner's claim for workers' compensation benefits was granted.

² Pursuant to West Virginia Code §21A-7-3, the commissioner of Workforce WV shall appoint deputies to investigate and initially determine all claims for benefits with certain delineated, but irrelevant, exceptions.

³ Petitioner states that he did not attend the hearing because he was without legal counsel and thought the hearing was simply a review of previously elicited testimony and evidence.

facts demonstrate that petitioner left work voluntarily and that he failed to show, by a preponderance of evidence, that he quit his job due to an unsafe working condition.

Petitioner argues that the disqualifying provisions of the unemployment compensation law are to be narrowly construed under Syllabus Point 1 of *Peery v. Rutledge*, 177 W.Va. 548, 355 S.E.2d 41 (1987). Petitioner asserts that the circuit court erred by ignoring the ample evidence in the record that he voiced concerns about workplace safety throughout the course of his employment at GWP and by broadly construing a disqualifying provision of the unemployment compensation law.

GWP asserts that a liberal construction in favor of the claimant does not require a court to ignore the plain language of the statute. Under West Virginia Code §21A-6-3(1), an individual is disqualified from receiving unemployment compensation benefits for the week in which he left his most recent work voluntarily without good cause involving fault on the part of the employer, and until he returns to covered employment and has been so employed at least thirty working days. GWP asserts that petitioner failed to prove there was good cause involving fault on its part. GWP asserts that both the Board of Review and the circuit court correctly concluded that petitioner was injured because he failed to follow proper forklift procedure and, although released to return to work on a light-duty basis, he declined to accept the light-duty position offered to him and, instead, quit his job.

Petitioner next argues that under *Peery*, a claimant for unemployment compensation benefits is not guilty of disqualifying “misconduct” when he refuses to perform a job assignment because he reasonably and in good faith believes that performance of the assignment would jeopardize his own health and safety or the health and safety of others. *Id.* Petitioner asserts that he was injured on the job as a direct result of a faulty door control and that he introduced evidence of his legitimate fear for his safety and of his prior safety concerns that went unaddressed. Petitioner argues that GWP failed to rebut the reasonableness of his apprehension.

GWP responds that the burden of proof never shifted to it because petitioner did not introduce evidence of a legitimate fear for his safety. GWP asserts that in addition to there being no evidence to substantiate petitioner’s claim of unsafe working conditions, petitioner’s testimony before the ALJ established that he did not follow proper safety procedure on the date in question. GWP argues that petitioner’s refusal to work in the light-duty position offered to him at a different GWP facility constitutes a voluntary termination of his employment. Although petitioner had some concern of inadequate heat at this new facility, GWP notes that it submitted photographs of two radiant heaters in this facility during the proceedings below. GWP asserts that both the Board of Review and the circuit court

properly concluded that petitioner was disqualified from receiving benefits because he left work voluntarily and failed to show good cause involving fault on the part of the employer.

“The findings of fact of the Board of Review of the West Virginia Department of Employment Security 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). Having reviewed the record and the parties' arguments on appeal under the pertinent standards of review, and after considering the particular facts and circumstances of this case, we affirm.

Affirmed.

ISSUED: May 27, 2011

CONCURRED IN BY:

Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman