STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Gary J. Miller,
Petitioner Below, Petitioner

vs) No. 11-0833 (Kanawha County 10-AA-62)

Deepgreen West Virginia, Inc.,
Respondent Below, Respondent

FILED
April 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Gary J. Miller ("Mr. Miller"), by counsel, James M. Pierson, appeals from the Kanawha County Circuit Court's "Order" entered on January 3, 2011, upholding the decision of the Board of Review of Workforce West Virginia denying Mr. Miller unemployment compensation benefits. Respondent Deepgreen West Virginia, Inc.[1] ("Deepgreen") appears by counsel, Charles R. Bailey.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented 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 of Appellate Procedure.

Mr. Miller was employed by Deepgreen at a mine site in McDowell County, West Virginia, beginning on September 15, 2008. He earned a salary of $1,000 per week. Deepgreen also paid Mr. Miller $6,000 per month under a separate arrangement for his consulting services. Deepgreen states that Mr. Miller failed to report to work upon his return from vacation in early August 2009, after which it sent a letter to him dated August 17, 2009, expressing Deepgreen's position that he had abandoned his job. Conversely, Mr. Miller states that upon his return from vacation, Deepgreen instructed him not to return to the mine site.

Mr. Miller filed a claim for unemployment compensation benefits with the Division of Unemployment Compensation of Workforce West Virginia.[2] On November 25, 2009, a deputy issued an initial decision finding in favor of Mr. Miller based solely on evidence submitted by Mr.

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[1] In the parties' briefs and in the appendix record, the name of the respondent is sometimes spelled "Deep Green," "DeepGreen," and "Deepgreen."

[2] Prior to 2007, Workforce West Virginia was known as the Bureau of Employment Programs. *See* W. Va. Code §21A–1–4 [2009].

Miller. Deepgreen contested Mr. Miller's claim. Following a hearing, the Chief Administrative Law Judge ("Chief ALJ") issued a decision dated January 24, 2010, reversing the deputy's decision. The Chief ALJ found that Mr. Miller quit his job over a dispute concerning his consulting fees and expenses, that Deepgreen regularly paid Mr. Miller's $1,000 a week salary, and that Mr. Miller failed to present sufficient evidence to support a finding that he quit with good cause involving fault on the party of the employer.

Mr. Miller appealed the Chief ALJ's decision to the Board of Review of Workforce West Virginia ("Board"). A hearing was held before the Board and, in a decision dated March 10, 2010, the Board upheld the Chief ALJ's decision denying Mr. Miller unemployment compensation benefits. Mr. Miller appealed the Board's decision to the circuit court, which affirmed the Board's decision. The circuit court found, inter alia, that Mr. Miller had failed to show that the Chief ALJ's findings, as adopted by the Board, were "clearly wrong" and that there was adequate evidence to support the Board's decision.

"'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 purely one of law, no deference is given and the standard of judicial review by the court is *de novo*.' Syllabus Point 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994)." Syl. Pt. 1, *May v. Chair and Members, Board of Review*, 222 W.Va. 373, 664 S.E.2d 714 (2008). After careful consideration of the merits of the parties' arguments and a review of the appendix record, the Court finds no error in the circuit court's conclusions that there was adequate evidence to support the Board's decision and that Mr. Miller failed to show that the Chief ALJ's findings, as adopted by the Board, were "clearly wrong." *Id.* Accordingly, the Court incorporates and adopts the circuit court's "Order" entered on January 3, 2011, upholding the Board's decision and attaches a copy of the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 27, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

GARY J. MILLER,

Petitioner,

vs.

Civil Case No: 10-AA-62
Judge Jennifer Bailey

CHAIR AND MEMBERS, BOARD OF REVIEW; COMMISSIONER, WORKFORCE WEST VIRGINIA; and DEEPGREEN WEST VIRGINIA, INC., Employer,

Respondents.

ORDER

Pending before the Court is the Petition of Gary J. Miller ("Petitioner"), filed April 9, 2010, seeking reversal of the Board of Review's decision affirming the Chief Administrative Law Judge's ("Chief ALJ's") decision to deny Petitioner's unemployment compensation benefits. Deepgreen West Virginia, Inc. ("Respondent") opposes the relief sought in the Petition and requests that the Petition be denied and the ruling of the Board of Review be affirmed. The parties have submitted memoranda of law in support of their respective positions to this Court. Upon consideration of the record before it, the Court is of the opinion that the Petition should be denied, and the ruling of the Board of Review be affirmed for the reasons further explained below.

Findings of Fact

1. Petitioner was employed by Respondent from September 15, 2008, through July 31, 2009, as an expeditor and assistant superintendent at a coal mine, earning a salary of $1,000 per week/$4,000 per month.[1]

[1] At times, the Chief ALJ referred to Petitioner's $1,000 weekly salary as $4,000 per month.

2. Petitioner's supervisor was Allen Robinson, Respondent's Director of Operations.

3. Respondent's corporate secretary was Michael Su, but "Mr. Su did not have operational authority or experience."

4. As the Chief ALJ explained, Petitioner "had somewhat of a unique hiring arrangement with [Respondent]."

5. Petitioner was paid a $1,000 per week salary by Respondent, and Petitioner had an oral agreement with a separate company, New Energy LLC/Mountaineer Coal LLC, for consulting services.

6. New Energy/Mountaineer Coal was proposing to manage the operations at Respondent's site in Pageton, West Virginia.

7. Petitioner did not have a final, written agreement for his consulting services with New Energy/Mountaineer Coal, and the two parties had a dispute regarding his consulting arrangement.

8. Respondent, however, agreed to pay Petitioner for consulting services while Petitioner and New Energy/Mountaineer Coal "worked out their respective differences."

9. In addition, Petitioner "offered [Respondent] the use of his operating account with Miller Logging, LLC, to order and pay for parts and materials."

10. Petitioner and New Energy/Mountaineer Coal were not able to work out their differences, "yet [Respondent] continued to pay [Petitioner's] consulting fee for a period of time."

11. As the Chief ALJ concluded, Petitioner "quit his job over a dispute concerning his consulting fees and expenses."

12. "Nevertheless," according to the Chief ALJ, "[Petitioner] regularly received his salary of $1,000 a week by the [Respondent]."

13. Accordingly,

> [Petitioner] failed to present sufficient evidence [to the Chief ALJ] to support a finding that he quit with good cause involving fault on the part of the [Respondent]. The claimant continued to receive his salary by the [Respondent]. The dispute concerning consulting fees was the main reason [Petitioner] quit his job. [Petitioner] failed to work with Allen Robinson, Director of Operations, to resolve this conflict. [Respondent] was auditing those expenses and questioned some of the expenditures.

14. The Chief ALJ thus reversed the initial decision by the Deputy in this matter, which had awarded benefits to Petitioner,[2] and concluded that Petitioner "left work voluntarily without good cause involving fault on the part of the employer."

15. Petitioner appealed the Chief ALJ's decision to the WorkForce West Virginia Board of Review.

16. Following a March 9, 2010, hearing, the Board of Review adopted the findings of fact by the Chief ALJ and affirmed her decision.

Conclusions of Law

1. Pursuant to West Virginia Code § 21A-6-3(1), an individual is disqualified for benefits if the individual "left his or her most recent work voluntarily without good cause involving fault on the part of the employer[.]"

2. Under the statutory scheme of West Virginia Code §§ 21A-7-1, et seq., the West Virginia Supreme Court of Appeals has observed that "the findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial

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[2] While the Deputy's decision had found for Petitioner, the Deputy rendered that decision without considering Respondent's evidence.

deference unless a reviewing court believes the findings are clearly wrong." Adkins v. Gatson, 192 W. Va. 561, 565, 453 S.E.2d 395, 399 (1994); see also syl. pt. 1, in part, Kisamore v. Rutledge, 166 W. Va. 675, 276 S.E.2d 821 (1981) ("findings of fact by the Board of Review should not be set aside ... [in a case of this nature] unless such findings are plainly wrong").

3. Petitioner's appeal is based on his contention that the Chief ALJ's findings of fact, as adopted by the Board of Review, are "erroneous."[3]

4. Specifically, Petitioner contends that

> (i) the Board of Review's findings fail to address the apparent authority of Respondent's corporate secretary, Michael Su;
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> (ii) the Board of Review failed to find that Respondent, by failing to pay Petitioner's expenses, "created a situation where [Petitioner] did not have enough money to travel to work;"
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> (iii) the Board of Review failed to find that "failing to pay Mr. Miller's pay check for Two Thousand Dollars ($2,000), created good cause for his separation;" and
>
> (iv) the Board of Review failed to find that Petitioner was available to report to work following his early-August 2009 vacation, but was told not to do so by Mr. Su.

5. In short, Petitioner's argument is that the Chief ALJ failed to credit his characterization of the facts, but Petitioner provides no basis for this Court to find that the Chief ALJ's findings, as adopted by the Board of Review, are "clearly wrong."

6. As an initial matter, Petitioner's personal log and his paycheck information are not part of the record evidence in this matter.

7. Petitioner's counsel submitted them along with a request to the Board of Review for remand to the Chief ALJ so that the evidence could be admitted.

8. The Board of Review, however, did not order a remand.

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[3] All of Petitioners assignments of error have to do with factual findings, which this Court must accord deference. *De novo* review of legal conclusions is not needed in this appeal.

9. Accordingly, the log and paycheck information have not been admitted into this matter's record and are not properly before this Court for consideration.

10. Petitioner's argument on appeal is that he quit for cause because he was not fully paid his wages by Respondent.

11. Petitioner specifically contends that because Respondent failed to pay Petitioner "vacation pay and Mr. Miller asserts they also failed to pay his last week of regular pay, . . . Mr. Miller's separation from his employment can hardly be characterized as voluntary."

12. The Chief ALJ, however, found that Petitioner timely received all of the regular salary that he was due from Respondent, and that Petitioner quit "over a dispute concerning the money owed to him for consulting services," which was not part of his regular salary.

13. Petitioner has pointed to nothing in the record – or, for that matter, in the non-record evidence that he incorrectly wishes to be considered – establishing that these findings are clearly wrong.

14. Petitioner's testimony establishes that he abandoned his job because of a dispute about his non-salary consulting fees and expenses and not about any dispute over late-paid or unpaid regular salary.

15. Before the Chief ALJ, Petitioner agreed that Respondent employed him only through July 31, 2009.

16. He nonetheless now contends that he was not paid his salary for his vacation through August 7, 2009,[4] and this led him to quit for cause.[5]

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[4] Petitioner refers to an "employee handbook" that he claims entitled him to one-week of paid vacation. Petitioner, however, did not enter into evidence any employee handbook, and Petitioner's testimony confirms there was not one. Petitioner testified that he was working under an oral agreement with the new owners of Respondent; no written employment or consulting agreement was executed. Petitioner may have been referencing an employee handbook for when he had previously worked for Respondent under different ownership, but no written document governed the terms of Petitioner's

17. Regardless of whether Petitioner should have been paid for his vacation, which he failed to conclusively establish, that is not why he abandoned his job.

18. Petitioner very clearly testified at the hearing that he did not return to work after vacation because of a dispute over consulting fees and expenses and not because he thought he was not going to be paid for his vacation.

19. Moreover, Petitioner has a timing problem.

20. He admittedly did not return to work after August 7, 2009, but he would not have received a paycheck for that time until after mid-August.

21. Thus, at the time that Petitioner chose not to return to work, he was not aware of whether he would be paid for vacation.

22. Accordingly, the Chief ALJ was entirely correct to find that

> 8. The claimant quit his job over a dispute concerning the money owed to him for consulting services. At the end of August 2009, the claimant maintained that the employer owed him over $20,000 in expenses and consulting fees.
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> . . . .
>
> 10. The claimant was seeking payment for his consulting services which were approximately two-months in arrears and had been held up during the employer's review of the reimbursement requests. Nevertheless, his weekly salary was paid on time.

23. Petitioner also has not established that he was entitled to communicate with Respondent's corporate secretary, Mr. Su, to the exclusion of Respondent's Director of Operation, Mr. Robinson.

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employment with Respondent's current owners. Accordingly, Petitioner's contention that he was entitled to one-week's paid vacation also is not properly before this Court, although, as explained herein, the contention is irrelevant.

[5] Petitioner also seems to contend that he also was not paid for the following week in August 2009, but, as stated above, Petitioner agreed at his hearing that his last day of work was July 31, 2009. Petitioner also agreed that he did not report to work following August 7, 2009. Thus, Petitioner certainly admits that he was not entitled to any wages after August 7, 2009.

24. Before the Chief ALJ, Respondent entered evidence that Allen Robinson is Respondent's Director of Operations and that Michael Su is merely its corporate secretary.

25. Mr. Robinson further testified that Mr. Su "[had] no operational authority."

26. The Chief ALJ credited this evidence and testimony in finding that Petitioner's supervisor was Mr. Robinson and that "Mr. Su did not have operational authority or experience."

27. Petitioner has pointed to nothing in the record that would explain why he thought he was entitled to communicate with Mr. Su to the exclusion of communicating with Mr. Robinson once Petitioner returned from vacation on August 7, 2009.[6]

28. The record reflects that Petitioner unilaterally chose to communicate with Mr. Su instead of Mr. Robinson from August 7 until August 19, 2009.

29. By mid-August 2009, however, Petitioner had clearly abandoned his job and had received a letter from Respondent to that effect.

30. Petitioner simply cannot choose to cease communication with his supervisor and choose to not report to work but then claim that he was misled by a corporate secretary.

31. Moreover, Mr. Su's apparent authority to speak for Respondent is irrelevant.

32. Petitioner's testimony was that he communicated with Mr. Su about disputes over his unpaid consulting fees and expenses, not about his salaried work.

33. Petitioner simply offered no explanation for why he thought that he did not have to report to work in order to remain employed.

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[6] Petitioner is wrong to contend that the Chief ALJ found that "Mr. Miller was required to communicate with Michael Su." Finding of Fact ¶ 6 states only that Petitioner "basically ceased communications with Mr. Robinson and started working with another member of Deep Green, Michael Su" during the June 24-July 27 period. The finding indicates that even during that four-week period Petitioner chose to communicate with Mr. Su; the finding does not indicate that Petitioner was required to do so.

34. The Chief ALJ's finding that New Energy/Mountaineer Coal, and not Respondent, was the entity ultimately responsible for Petitioner's consulting fees, makes it irrelevant whether Mr. Su had authority to speak for Respondent regarding those fees.

35. The facts establish that Petitioner failed to report to work because to the disputed consulting fees and expenses that were not part of his separate (oral) employment agreement with Respondent.

36. Petitioner failed to establish that he had any reason for quitting that related to his actual employment.

37. In sum, Petitioner's attempt at a *post hoc* re-characterization of why he quit cannot be squared with the record evidence in this matter.

38. Petitioner has failed to show that the Chief ALJ's findings, as adopted by the Board of Review, are "clearly wrong."

39. There is adequate evidence to support the Board of Review's decision and it should not be disturbed.

40. In view of the foregoing, the Court will not grant the Petition.

It is therefore **ORDERED, DECREED** and **ADJUDGED** that the Petition and the relief sought therein be, and it hereby is, **DENIED**.

Entered this 3rd day of January 2011.

Jennifer F. Bailey

The Honorable Jennifer Bailey, Circuit Judge

Date: 1-4-11
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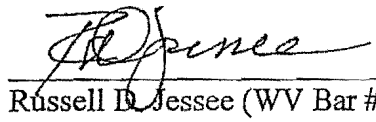

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