

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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DOCKET NO. 23-ICA-199

KRISTY D. WINLAND,
CLAIMANT BELOW, PETITIONER

V.

CAMDEN-CLARK MEMORIAL HOSPITAL
RESPONDENT.

**REPLY BRIEF OF PETITIONER KRISTY WINLAND TO
RESPONSE BRIEFS OF RESPONDENTS CAMDEN-CLARK MEMORIAL HOSPITAL
AND WORKFORCE WEST VIRGINIA**

/s/ Kirk Auvil_____

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I. Petitioner did not commit gross misconduct due to a false positive drug test, particularly since she offered to retest to avoid the false positive

In order for an employee to commit gross misconduct, the employee must affirmatively act, or fail to act when required, in some inappropriate way; that is what conduct means. The mere fact that Claimant's drug test was messed up by the hospital and/or independent laboratory does not constitute any misconduct by the Claimant. Furthermore, the Claimant did not even err through inaction, as she offered to test again¹ and provided clarifying information regarding the errors in the drug test to Camden in a timely manner.² Again, Claimant pointed out that the results of the drug test being assessed as hers failed to even identify the presence of prescription drugs she was taking which should have shown up on the drug screen. Claimant's refusal to have the sample she had given retested also does not rise to the level of misconduct, since that sample apparently lacked traces of prescriptions Claimant knew should be present in the drug screen.³ Camden's disinterest in following up on these representations by the Petitioner cannot be converted into misconduct on the part of the Claimant.

¹A: I actually asked if I could come down the day that they called to terminate me, if I could repeat another drug test because I did not think that was an accurate result.

Q: And you were told--

A: No.

(D.R. 0044-45).

² Q: Okay, well, looking at Exhibit 4, Ms. Winland, can you tell the Judge, what-- I mean, what do you find-- in addition to the fact that you 've never took fentanyl and it's showing positive for fentanyl, anything other than that that seems incorrect to you based upon what you were taking - that is your actual prescriptions - and what these results are showing?

A: The amphetamines, which it should be positive because that's my Adderall, it's like Tonya and the Quest physician said that I did not test positive for the amphetamines. And I said, well, that can't be because I take, you know, Adderall daily, and on this paper it's showing that it is positive, which it should be, but I do not see my-my benzo on there at all, the clorazepate.

Q: Okay, and that should be positive, but it isn't showing as positive?

A: Correct.

(D.R. 0041-42).

³ Petitioner testified that, "I would not want the same specimen sampled if it wasn't mine to begin with because it did not have my daily prescription of medication in it." (D.R. 0046-47).

II. The ALJ concluded that Claimant did not violate the drug-free workplace policy of Camden; the Board of Review improperly substituted its own finding of fact that she did

In order for Claimant to have committed gross misconduct, she would need to have violated the employer's drug-free workplace policy. For the reasons set forth in Claimant's initial brief and in the foregoing point, Claimant's did not violate Camden's drug-free workplace policy and therefore were not gross misconduct on that basis. The ALJ's role was to act as the finder of fact and make credibility determinations, which it did based on all the same evidence that the Board of Review used. Nothing about the ALJ's finding was clearly erroneous, but the Board of Review's tortured reinterpretation of the ALJ's findings is clearly erroneous. Accordingly, Camden's point in claiming that violations of a drug-free workplace policy constitute misconduct is functionally meaningless given that the ALJ properly concluded no such violation had taken place.

III. There is no clear evidence Claimant came to work while intoxicated; the Board of Review's expressed position rests on that assumption

Disregarding the findings of the ALJ, the Board of Review writes in its brief that Petitioner did report to work while "under the influence" of illegal drugs. This is based on the Board's tortured interpretation of the term "under the influence," as the Board's brief sets forth. According to the Board of Review, any positive drug test would constitute an employee being "under the influence" of that drug. The Board makes no mention of the timeframes of the drug tests in relation to the drugs being tested for; the Board merely states the naked proposition that "under the influence" at work means bearing any trace of the substance being tested for.

It is clear that this definition of "under the influence," created in isolation by the Board of Review to serve its own ends in this matter, does not jibe with any legal doctrines or concepts

that have arisen around this issue. Under West Virginia law, “under the influence” functions as a legal term representing the legal threshold at which a person’s ability to function normally is impaired to a legally significant degree. "A person is 'under the influence' if the person (1) consumed, used, took, or ingested alcohol, controlled substances, or drugs and (2) the alcohol, controlled substances, drugs, or any combination thereof impaired the person's ability to operate a motor vehicle with ordinary care." Casto v. Frazier, 21-0371 (W. Va. Jun 15, 2023).

There is no testimony to indicate that the Petitioner was somehow impaired or “under the influence” of drugs at work as the Board of Review writes. Indeed, after Camden reported Claimant to the nursing board, the board cleared Claimant of any wrongdoing. And the only testimony on this point came from the Petitioner who denied the allegations categorically, as Camden did not bring any employees to offer any testimony to the contrary. Furthermore, the Board of Review offers in its brief that there is no reason for the ALJ to have disputed the veracity of the drug test upon which the Respondents rely in their briefs. However, as set forth previously herein, all parties had a good reason to scrutinize the results, since the drug screen lacked evidence of prescription drugs that Petitioner was taking at the time she gave the sample. The Board of Review nevertheless overturned the ALJ’s determination that the drug test alone was not evidence of gross misconduct, based solely on that seemingly flawed test.

CONCLUSION

Given the liberality of the unemployment system and the highly contested and equivocal nature of the drug tests at issue, the Administrative Law Judge's determination that the Claimant was terminated, but not for misconduct, was supported. The Board of Review's reversal of the Administrative Law Judge's determination was unsupported by the record and the evidence and should be reversed and the Claimant ordered reinstated to her benefits.

Respectfully submitted,

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BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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v.

Case No.: 23-ICA-199

**CAMDEN-CLARK MEMORIAL
HOSPITAL,**
Employer Below, Respondent.

and

WORKFORCE WEST VIRGINIA,
Respondent Below, Respondent

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner hereby certifies that on the **2nd day of November 2023**, he served a true copy of **REPLY BRIEF OF PETITIONER KRISTY WINLAND TO RESPONSE BRIEFS OF RESPONDENTS CAMDEN-CLARK MEMORIAL HOSPITAL AND WORKFORCE WEST VIRGINIA** upon counsel of record by electronic service through File&ServeXpress e-filing, and/or depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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