IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-ICA-118

KRISTY D. WINLAND,
CLAIMANT BELOW, PETITIONER

V.

CAMDEN-CLARK MEMORIAL HOSPITAL
RESPONDENT.

BRIEF OF RESPONDENT CAMDEN-CLARK MEMORIAL HOSPITAL

Counsel for Respondent
Brian M. Peterson (W.Va. Bar No. 7770)
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Drive
Morgantown, West Virginia 26505
Telephone: (304) 598-4070
Facsimile: (304) 598-9888
brian.peterson@wvumedicine.org

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SUMMARY OF ARGUMENT

This is an appeal of an unemployment claim filed by Kristy Winland against her former employer, Respondent Camden-Clark Memorial Hospital (the "Hospital"). The WorkForce West Virginia Board of Review decided that Ms. Winland committed gross misconduct as defined by West Virginia Code § 21A-6-3 by failing a workplace drug test in violation of the Hospital's drug-free workplace program. The Board of Review's decision should be affirmed because it correctly applies the law to the facts presented.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. As explained below, this case involves a straightforward application of West Virginia Code § 21A-6-3 to a discharge for a failed drug test.

ARGUMENT

A. Standard of Review is De Novo for Questions of Law, and Clearly Erroneous for Questions of Fact.

The West Virginia Supreme Court of Appeals has held that "[t]he 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 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).

Although "[u]nemployment compensation claims are to be liberally construed in favor of employees due to the remedial nature of the unemployment compensation statutes" *Childress v. Muzzle*, 222 W.Va. 129, 133, 663 S.E.2d 583, 587 (2008), "[i]t is also important for the Court to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Act." *Id*. Furthermore, "the basic policy and purpose of the Act is advanced ... when benefits are denied to those for whom the Act is not intended to benefit [.]" *Id.*; *see also Bd. of Educ. of Webster Cnty. v. Hanna*, 234 W. Va. 196, 199, 764 S.E.2d 356, 359 (2014).

B. Petitioner's Failure of a Workplace Drug Test Was Gross Misconduct.

Based on the record, the Board of Review correctly determined that Petitioner Kristy Winland was discharged for gross misconduct for failing a workplace drug test by testing positive for, among other drugs, fentanyl, without a prescription. The positive result was confirmed by a licensed medical doctor acting as a medical review officer (MRO) (D.R.0063-0064, Transcript of February 23, 2023 Telephonic Hearing (hereafter "Tr." at Ex. ALJ-4).

Petitioner Winland was employed as a registered nurse in the Hospital's Women's and Children's Unit in the OB/GYN department. (D.R.0039 at Tr. p. 19). Her RN position had direct patient care responsibilities and was safety-sensitive. (*Id.*) The Hospital has a drug-free workplace policy made available to its employees, including the Petitioner, that prohibits illegal drug use. (D.R.0039 at Tr. pp. 19-20) The Claimant was drug tested when she reported for work on December 16, 2022. (D.R.0039 at Tr. p. 22)

The reason Ms. Winland was tested was due to a report the Hospital received from a former employee who passed on to Human Resources a text message he received from Ms. Winland that said, "It's Kristy Heyyyy stranger, it's your favorite sister in law Kristy!!!! Can you please hook a sister up with an 8" (D.R.0039 at Tr. pp. 23-24 and D.R.0065 Tr. at Ex. ALJ-5) This text message was interpreted by the Hospital to mean the Claimant was seeking an "8-ball," *i.e.* illegal drugs. [1] (D.R.0039-0040 at Tr. pp. 24-25)

For collected urine specimens that are non-negative at the initial urine screening, the Hospital sends the specimens off to an outside lab for confirmatory testing. (D.R.0039 at Tr. p. 23) The medical review officer (MRO) from the independent lab, who is a licensed medical doctor, contacted Ms. Windland to discuss the test and to see what prescription drugs Ms. Winland had a valid, current prescription for. (D.R.0046 at Tr. p. 49) The test results the Hospital received from the testing lab, certified by the MRO, showed "positive" for amphetamine, methamphetamine, d-methamphetamine, l-methamphetamine, fentanyl, norfentanyl, and norfentanyl (fentanyl metab). (D.R.0063-0064 at Tr. Ex. ALJ-4) While Ms. Winland testified at the unemployment hearing that she had a valid prescription amphetamines (although she presented no prescription at the hearing), she later admitted she did not have a valid current prescription for fentanyl, for which she also tested positive. (D.R.0046 at Tr. p. 50). Petitioner does not deny that, because she had no prescription for fentanyl and fentanyl was detected in her urine, a positive test result for fentanyl was correct. (*Id.*)

[1] "An 8 ball (also commonly called eight ball) is approximately an eighth of an ounce (ranging from 3 to 3.5 grams) of an illegal drug, most often cocaine." *See Merriam-Webster.com* available at https://www.merriam-webster.com/wordplay/what-does-8-ball-mean (last visited 10/16/2023).

Under West Virginia law, "an act of misconduct shall be considered gross misconduct where the underlying misconduct consists of … (3) certain instances of use of alcohol or controlled substances as delineated in West Virginia Code § 21A–6–3 [.]" Syl. Pt. 4, in part, *Dailey v. Bd. of Review, W.Va. Bureau of Emp't Programs*, 214 W.Va. 419, 589 S.E.2d 797 (2003). Under W.Va. Code § 21A-6-3(2), "gross misconduct" includes, among other things, "reporting to work in an intoxicated condition, or being intoxicated while at work; reporting to work under the influence of any controlled substance, as defined in chapter sixty-a of this code without a valid prescription, or being under the influence of any controlled substance, as defined in said chapter without a valid prescription, while at work….[or] violation of an employer's drug-free workplace program." Three of the substances for which Ms. Winland tested positive – amphetamine, methamphetamine, and fentanyl – are listed as Schedule 2 controlled substances under Chapter 60A of the West Virginia Code, *see* W.Va. Code § 60A-2-206, and are thus illegal for non-prescribed use. The Board of Review thus correctly determined that Ms. Winland violated the Hospital's drug-free workplace policy by testing positive at work for controlled substances for which she admittedly had no prescription. (D.R. 0069-0071)

C. Petitioner's Assignments of Error Are Without Merit

In her brief, the Petitioner raises four assignments of error, none of which are valid. Each will be addressed in turn.

1. Petitioner's first assignment of error cites no actual errors.

Petitioner's first assignment of error states that the "Board of Review makes several determinations that are either not supported by the record or are the result of a mischaracterization of the testimony…." (Petitioner's Br. at §I.A, pp. 1-2; §V.A. p.6) However, this assignment of error fails to provide any detail as to which facts found by the Board of Review are

mischaracterized or unsupported. Therefore, the Petitioner's first assignment of error is without merit.

2. The Board of Review did not overlook or mischaracterize facts.

In her second assignment of error, the Petitioner claims that the Board of Review "mischaracterize[d] the facts surrounding the issue of why another follow-up drug test was not conducted" and "overlook[ed] the fact that Petitioner's prescription drugs did not show up in her drug screen. (Petitioner's Br. at §I.B., p. 2) However, the Board of Review's factual findings are directly supported by the evidence adduced at the hearing before the administrative law judge. The Board of Review's finding that "the claimant had an opportunity to commission a second test by a different laboratory, but declined to do so, apparently based upon her belief that the same would be invalid" (D.R. 0070) is directly supported by the transcript. (D.R.0046 at Tr. p. 52) ("Q. That was your decision. You made a decision not to have the other sample tested. Right? A. [By Ms. Winland] The—the sample that had—did not have my amphetamines and Adderall? Yes. That is correct, because I don't—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.")

The Petitioner also claims that the Board of Review overlooked Petitioner's argument that there were "clear errors in the testing" because she testified that she took a daily prescription of Adderall that contains amphetamines, (D.R. 0044, Tr. at 41-42) yet did not test positive for amphetamines. (Petitioner's Br. at p. 2) This entire argument makes no sense, however, because the MRO *did* confirm a positive test for amphetamines. (D.R. 0063) Thus, the Board Review correctly ignored the entire argument on that point. Instead the Board of Review relied on the MRO-certified test results in finding gross misconduct.

The Petitioner next asserts that the Board of Review ignored the fact that the Hospital declined her offer to submit to a second drug test. (Petitioner's Br. at pp. 2-3) However, the test administered by the Hospital resulted in a confirmed positive result for seven controlled substances. The results were not inconclusive, nor were they invalid. Therefore, a second test was not necessary. Again, the evidence showed that the Petitioner was given the opportunity to have her split sample tested by a second certified lab with a different MRO if she chose, but she declined. Therefore, it was not error for the Board of Review not to consider the fact that she offered to provide a second sample to be tested weeks after the first test.

3. The Board of Review did not err by failing to reference the text message that precipitated the drug test.

In her third assignment of error, the Petitioner argues that "[c]onsidering the burden of proof in this matter lies with the Respondent, it is more than troubling that the Board of Review makes no mention whatsoever as to the disputed nature of the text message, the ultimate reason provided by Respondent to conduct the screen." (Petitioner's Br. at §V.C. p. 8) However, the text message (*see* D.R. 0065) is merely a piece of background information that the Hospital supplied to explain why it was motivated to test the Petitioner for illegal drugs in the first place when she arrived at work on December 16, 2022. The text message indicated to the Hospital that the Petitioner was drug seeking. (D.R. 0039 at Tr. p. 24) However, the text message is not necessary to the Board of Review's decision. Under West Virginia workplace drug testing law, an employer is not required to show probable cause or reasonable suspicion to drug test a safety-sensitive employee. *Twigg v. Hercules Corp.,* 406 S.E.2d 52 at 55 (1990) ("Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy … where an employee's job responsibility involves public safety or the safety of others.") Safety-sensitive employees can be tested by private employers randomly without any signs of impairment

or other suspicion of drug use. The Board of Review's factual conclusion that the Petitioner, a registered nurse with direct patient care responsibilities employed at a hospital, is in a safety-sensitive job position is not disputed. Accordingly, the text message was merely background and its omission from the Board of Review's decision is not clear error.

4. The Board of Review did not mischaracterize the Petitioner's explanation of the presence of fentanyl in her drug screen.

Petitioner's fourth assignment of error asserts that "[i]n its Decision, the Board of Review incorrectly states that Petitioner made no explanation of the presence of fentanyl in her drug screen other than 'her self-serving denial of using or taking the drug.'" (Petitioner's Br. at §V.D. p. 8) The Petitioner argues that the Board's statement is "simply not true" because the Petitioner testified at the hearing that test results were flawed because "the actual prescription drugs that Petitioner takes on a daily basis" did not "show up" on the test results. (*Id.* at 9) However, as explained above, the Petitioner's argument that the test was flawed because it did not contain a confirmed positive for amphetamines is belied by the record, which shows a confirmed positive result for amphetamines. (D.R.0063 at Test Result Line 2) The only other prescription drug the Plaintiff claimed she was taking was Clorazepate (Dr.0044 Tr. at 42), which was not even among the substances tested for according to the report. (*See* List of substances tested for at D.R. 0063-0064) Accordingly, the only probative evidence the Board of Review had regarding Petitioner's confirmed positive test for fentanyl was the Petitioner's denial that she ever used the drug. The Board of Review's factual finding that "[n]o explanation of the claimant to the presence of Fentanyl in her drug screen was made other than her self-serving denial of using or taking the drug" was therefore an accurate commentary on the evidence.

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5. The Board of Review correctly interpreted W.Va. Code §21A-6-3(2).

Petitioner's final assignment of error alleges that the Board of Review erred in its interpretation of West Virginia Code § 21A-6-3(2) because the Hospital failed to show the Petitioner exhibited physical signs of impairment when she presented to work on December 16, 2022. (Petitioner's Br. at 10-11) However, evidence of impairment is not required under the law in order to show "gross misconduct."

Under West Virginia law, "an act of misconduct shall be considered gross misconduct where the underlying misconduct consists of … (3) certain instances of **use** of alcohol or controlled substances as delineated in West Virginia Code § 21A–6–3[.]" Syl. Pt. 4, in part, *Dailey v. Bd. of Review, W.Va. Bureau of Emp't Programs*, 214 W.Va. 419, 589 S.E.2d 797 (2003) (emphasis added). Under W.Va. Code § 21A-6-3(2), "gross misconduct" includes

> reporting to work in an intoxicated condition, or being intoxicated while at work; reporting to work under the influence of any controlled substance, as defined in chapter sixty-a of this code without a valid prescription, or being under the influence of any controlled substance, as defined in said chapter without a valid prescription, while at work….[or] **violation of an employer's drug-free workplace program**…."

W.Va. Code § 21A-6-3(2) (emphasis added). By the very terms of this subsection, an employer can prove gross misconduct by showing that the employee either "report[ed] to work under the influence of any controlled substance … without a valid prescription" **or** "violat[ed] … an employer's drug-free workplace program." *Id.* Under West Virginia law, a drug-free workplace program can prohibit *use* of any controlled substance[2] without a prescription. *See Dailey, supra;*

[2] The Petitioner does not dispute that amphetamine, methamphetamine, and fentanyl are all listed as Schedule 2 controlled substances under Chapter 60A of the West Virginia Code, W.Va. Code § 60A-2-206, and are thus illegal for non-prescribed use.

see also W.Va. Code § 21-3E-10 (2017) ("If the confirmatory drug or alcohol test of an employee is 'positive,' and the employee is in a sensitive position where an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, the employer may … take any other action, including termination or other adverse employment action, consistent with the employer's policy for confirmed positive drug or alcohol test for employees in sensitive positions, provided there are not applicable contractual provisions that expressly prohibit such action.") The Board of Review explicitly concluded in its decision that "[t]he claimant was discharged … because of a positive drug screen in violation of the employer's policy." (D.R.0070) This fact standing alone satisfies the definition of gross misconduct.

The Board of Review's conclusion that Petitioner was terminated for violating the employer's drug-free workplace policy is fully supported by the record, which establishes that the Petitioner was in a safety-sensitive position (D.R.0038 at Tr. p. 19), that the Hospital had a drug free workplace policy prohibiting illegal drug use (see D.R.0039 at Tr. p. 21), that Petitioner was given a copy of the drug-free workplace policy, (D.R.0039 at Tr. p. 22), that the Petitioner tested positive for multiple controlled substances for which she had no current valid prescription (including fentanyl) (D.R.00063-64; D.R.0050 at Tr. p.50) that Petitioner's confirmed positive test results violated the Hospital's drug-free workplace policy, (D.R.00039 at Tr. p. 22), and that Petitioner was terminated as a result. (*Id.*) Accordingly, the Board of Review's conclusion that the Petitioner was terminated for using illegal drugs in violation of the Hospital's drug-free workplace policy should not be disturbed on appeal. *Syl. Pt. 3 in part, Adkins* ("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.")

The Board of Review did not misinterpret W.Va. Code § 21A-6-3(2) as Petitioner alleges. Based on the facts contained in the record, the Board of Review's determination that the Petitioner committed "gross misconduct" by violating the Hospital's drug-free workplace program by using illegal drugs, even absent indicia of present impairment at the time of testing, is a correct interpretation of West Virginia Code § 21A-6-3(2) , and must be affirmed.

CONCLUSION

None of the Petitioner's five assignments of error are meritorious. The Board of Review correctly found that the Petitioner's confirmed positive drug test showing that she was using illegal drugs in violation of the employer's drug-free workplace policy constitutes "gross misconduct" under West Virginia Code § 21-6-3(2). Accordingly, the Court should affirm the decision of the Board of Review.

DATED this 16th day of October, 2023.

Respectfully Submitted,

CAMDEN-CLARK MEMORIAL HOSPITAL
Respondent, By Counsel

/s/ Brian M. Peterson
Brian M. Peterson (W.Va. State Bar No. 7770)
West Virginia United Health System, INC.
1238 Suncrest Towne Centre Drive
Morgantown, WV 26505
Telephone: (304) 598-4070
Facsimile: (304) 598-9888
brian.peterson@wvumedicine.org

CERTIFICATE OF SERVICE

I, Brian M. Peterson, do hereby certify that on October 16, 2023, I served the foregoing "**BRIEF OF RESPONDENT CAMDEN-CLARK MEMORIAL HOSPITAL"** on counsel of record using the Court's E-Filing System.

/s/ Brian M. Peterson
Brian M. Peterson (W.Va. Bar No. 7770)
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Drive
Morgantown, WV 26505
Telephone: (304) 598-4070
Facsimile: (304) 598-9888
brian.peterson@wvumedicine.org

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