IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

KRISTY D. WINLAND,

PETITIONER (Claimant Below),

v. **Case No. 23-ICA-199**
(Case No: R-2023-0245)

CAMDEN-CLARK MEMORIAL HOSPITAL,

RESPONDENT (Employer Below),

&

WORKFORCE WEST VIRGINIA,

RESPONDENT (Respondent Below).

SUMMARY RESPONSE FILED ON BEHALF OF RESPONDENT WORKFORCE WEST VIRGINIA

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STATEMENT OF THE CASE

Identification of the Parties

Kristy D. Winland was the Claimant below and is the Petitioner in the current proceeding. Camden-Clark Memorial Hospital was the Employer below and in the current proceeding. WorkForce West Virginia, Respondent, is an agency of the State of West Virginia and is the state administrator of unemployment compensation.

Procedural History

The Petitioner filed a traditional unemployment compensation claim on January 17, 2023, effective for the week ending January 20, 2023, after she had been discharged by Camden-Clark Memorial Hospital, Inc., the former Employer, on December 30, 2022.[1] The Petitioner had worked for this Employer as a registered nurse from March 1, 2011, to December 30, 2022.[2] This claim was referred to Respondent's Deputy for a decision on the Petitioner's potential eligibility and disqualification for benefits. Respondent WorkForce had requested information from the former Employer on January 25, 2023[3], which the former Employer provided to the Respondent's Deputy on January 26, 2023.[4] The Deputy issued a decision dated and mailed January 27, 2023, and found "that the claimant was discharged for failing a drug test. The Employer has presented evidence that the claimant was under the influence of a controlled substance while at work." The Deputy subsequently held that the Petitioner had committed an act of "gross misconduct" and Petitioner was disqualified from the receipt of unemployment compensation benefits until she had returned to

[1] D.R. 0052 - 0060
[2] D.R. 0052 - 0060
[3] D.R. 0014
[4] D.R. 0066 - 0067

covered employment and had worked at least thirty (30) days in covered employment.[5] The Petitioner filed an appeal of this decision on February 2, 2023.[6]

A hearing before the administrative law judge was scheduled to occur on February 23, 2023, by notice mailed February 10, 2023.[7] A hearing took place on the scheduled date at which both the Petitioner and the former Employer testified.[8] The administrative law judge issued a decision dated and mailed March 3, 2023, which held that "the "decision of the deputy is reversed. The claimant is not disqualified. The claimant was discharged, but not for misconduct."[9]

The former Employer filed an appeal of the administrative law judge's decision to the three-member panel Board of Review dated March 7, 2023.[10] The Board of Review notified the parties of the appeal by letter dated March 13, 2023.[11] The Board subsequently notified the parties of the scheduling of a review that would take place on April 20, 2023, in its letter dated April 6, 2023.[12] This letter also advised the parties that the Board would conduct its review of the appeal based upon the "existing record, including all file evidence, hearing transcript, and any argument, brief, statement of position either or both of the parties care to submit, at the BOARD meeting which will occur on April 20, 2023." After its review on the stated date, the Board of Review reversed the decision of the administrative law judge and held that the Petitioner was discharged from gross misconduct and was disqualified from the receipt of unemployment compensation benefits until the Petitioner "returne[d] to covered

[5] D.R. 0004 - 0006
[6] D.R. 0002
[7] D.R. 0025
[8] D.R. 0034 - 0048
[9] D.R. 0028 - 0031
[10] D.R. 0033
[11] D.R. 0032
[12] D.R. 0068

employment and has worked therein at least thirty working days" in its decision dated April 24, 2023, and mailed April 28, 2023.[13] The Petitioner filed a Notice of Appeal in this Court on May 18, 2023.

Statement of Facts

The Petitioner had been employed as a registered nurse by Camden-Clark Memorial Hospital for approximately eleven years prior to her discharge. The Petitioner was considered to work in a safety sensitive position.[14] Paul Schindler, a former human resources employee, had received a text from the Petitioner. This text stated, "It's Kristy Heyyyy stranger, it's your favorite sister in law Kristy!!!! Can you please hook a sister up today with an 8."[15] This text message had mistakenly been texted by the Petitioner to Mr. Schindler's phone.[16] Mr. Schindler subsequently telephoned the human resources department and was asked to forward the text message to the former Employer's human resources department.[17] Based upon this text message which appeared to be a request to help the Petitioner find an illegal drug or drugs,[18] the human resources department made a decision to request the Petitioner to take a drug test when she reported to work on her next scheduled work day based upon the text sent by the Petitioner to Mr. Schindler's phone and the forwarding of that text to the former Employer's human resources department.[19]

When the Petitioner reported to work on December 16, 2022, she was met by her manager, Ellen Augustine, who escorted the Petitioner to an employee health center.[20]

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[13] D.R. 0069 - 0073
[14] D.R. 0038; p. 19
[15] D.R. 0065
[16] D.R. 0040; p. 26
[17] D.R. 0039; p. 23
[18] D.R. 0039 - 0040; pp. 24 -25
[19] D.R. 0039; p. 24
[20] D.R. 0040; p. 27

Elizabeth Bennett, an employee health nurse, then performed an initial screening test which was not negative.[21] As the initial screening test was not negative, the Petitioner's urine sample was sent to a third party laboratory for testing.[22] The Petitioner was escorted to her vehicle after the initial screening was completed.[23]

The drug screening results were entered into the record.[24] It reflects that the urine sample was collected on December 16, 2022, at 7:16 a.m., and this sample arrived at the third-party laboratory on December 21, 2022. The results were received on December 28, 2022, and the medical review officer verified the results later that same day. This test reflected a positive result for the following drugs:

Amphetamine
D-Methamphetamine
Fentanyl
L-Methamphetamine
Methamphetamine
Norfentanyl
Norfentanyl (Fentanyl Metabolite)

Tonya Cline, the former Employer's business partner, participated in a telephone conference with the Petitioner and Ms. Augustine on December 30, 2022. Ms. Cline advised the Petitioner of the results of the drug screen and that she had been discharged from her employment as of that date due to the results from the drug screen.[25]

[21] D.R. 0041; p. 30
[22] D.R. 0041; p. 31
[23] D.R. 0041; p. 32
[24] D.R. 0063 - 0064
[25] D.R. 0042; pp. 35 - 36

SUMMARY OF ARGUMENT

Reporting to work under the influence of illegal substances constitutes gross misconduct. An employee discharged for this reason is disqualified from receipt of unemployment benefits. The administrative law judge clearly erred in finding that the positive results for the drug test did not constitute reporting at the workplace under the influence of illegal drugs. A text from Petitioner which was forwarded to the former Employer provided reasonable suspicion that Petitioner was using illegal substances and justified requiring Petitioner to submit to a blood test. Petitioner's contention that the test was flawed in some way has no corroboration other than her own assertions. The Board of Review did not err in reversing the decision of the administrative law judge and holding that the Petitioner had been discharged due to an act of gross misconduct.

ARGUMENT

- **Standard of Review**

  > 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. 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).

- **The Board of Review correctly reversed the decision of the Administrative Law Judge and determined that the Petitioner's termination from employment resulted from Petitioner's gross misconduct.**

  W. Va. Code § 21A-6-3, (2020), in pertinent part provides:

  > Upon the determination of the facts by the commissioner, an individual is disqualified for benefits:

...

(2) For the week in which he or she was discharged from his or her most recent work for misconduct and the six weeks immediately following that week; or for the week in which he or she was discharged from his or her last 30-day employing unit for misconduct and the six weeks immediately following that week. The disqualification carries a reduction in the maximum benefit amount equal to six times the individual's weekly benefit. However, if the claimant returns to work in covered employment for 30 days during his or her benefit year, whether or not the days are consecutive, the maximum benefit amount is increased by the amount of the decrease imposed under the disqualification; except that:
If he or she were discharged from his or her most recent work for one of the following reasons, or if he or she were discharged from his or her last 30 days employing unit for one of the following reasons: Gross misconduct consisting of willful destruction of his or her employer's property; assault upon the person of his or her employer or any employee of his or her employer; if the assault is committed at the individual's place of employment or in the course of employment; 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 60A 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; adulterating or otherwise manipulating a sample or specimen in order to thwart a drug or alcohol test lawfully required of an employee; refusal to submit to random testing for alcohol or illegal controlled substances for employees in safety-sensitive positions as defined in §21-1D-2 of this code; violation of an employer's drug-free workplace program; violation of an employer's alcohol-free workplace program; arson, theft, larceny, fraud, or embezzlement in connection with his or her work; or any other gross misconduct, he or she is disqualified for benefits until he or she has thereafter worked for at least 30 days in covered employment: *Provided,* That for the purpose of this subdivision, the words "any other gross misconduct" includes, but is not limited to, any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from the act or acts.

The issue is whether Petitioner's reporting to work under the influence of illegal drugs constituted gross misconduct. If so, the Deputy was correct in holding that the Petitioner was disqualified from the receipt of unemployment compensation benefits until she had returned to covered employment and had worked at least thirty (30) days in covered employment. The administrative law judge reversed the Deputy's decision. The Board of Review reversed the decision of the administrative law judge, in effect restoring the decision of the Deputy. Respondent WorkForce contends that the decision of the Board of Review is correct and soundly based upon the evidence of the record. Accordingly it should be affirmed by this Court.

The evidence of the record indicates that the Petitioner was a registered nurse and worked in a safety-sensitive position caring for patients in the former Employer's Women's and Children's Unit. A former employee, Paul Schindler, had received a text sent by the Petitioner by mistake. Mr. Schindler, a former employee, called the Employer and forwarded the text to the former Employer's human resources department. This text is, frankly, a request for assistance in locating illegal street drugs. Based upon this text, the human resources department made a decision to request the Petitioner to submit to drug testing or screening on her next scheduled work day which was December 16, 2022. Respondent WorkForce West Virginia contends that this text provided reasonable grounds for requiring Petitioner to submit to a drug test under existing case law.

The West Virginia Supreme Court of Appeals held that 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 it is conducted by an employer based upon reasonable good faith

objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others. Syllabus Point 2, Twigg v. Hercules Corp., 185 W.Va. 155, 406 S.E.2d 52 (1990). Further, the United States Court of Appeals, Fifth Circuit, has held that reasonable suspicion represents a low threshold requiring some minimal level of objective justification for requiring testing. See U.S. v. Castillo, 804 F.3d 361, 367 (5th Cir. 2015). Finally, the United States Supreme Court has held that, "Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (citations and internal quotation marks omitted).

When the Petitioner reported to work on December 16, 2022, she was met by her manager and escorted to an employee health center. She underwent the drug screening at this center at 7:16 A.M. The initial results were "not negative" and the Petitioner's urine sample was sent to an off-site laboratory for additional testing. The results from this testing reflected the presence of the following drugs in the Petitioner's urine sample: Amphetamine; D-Methamphetamine; Fentanyl; L-Methamphetamine; Methamphetamine; Norfentanyl; and Norfentanyl (Fentanyl Metabolite).

The administrative law judge found that there was no proof that the Petitioner was "under the influence" of any controlled substance without a valid prescription as no testimony was offered regarding any external symptoms such as rapid or rambling speech or larger than usual pupils in the eyes on December 16, 2022, and held that if the West Virginia Legislature had intended a positive drug screen to result in the denial

of unemployment compensation benefits, "it would have said so."[26] The administrative law judge acknowledged the positive drug screen, but deemed the test unreliable. "However, it is less likely than not that the test is accurate based upon the evidence at the hearing. The claimant's prescription may create a false positive. The lack of other prescriptions showing up in the results also creates suspicion."[27]

The Board of Review reversed the administrative law judge, stating that "[i]t cannot be reasonably construed that the Legislature intended impairment at work to be deemed to have occurred only when objective observations were made of impairment while an employee was at work.[28] The Board of Review held, "[i]t is reasonable to conclude that an employee reported to work under the influence of a controlled substances if a drug screen taken in close proximity in time to the claimant's work hours and reflects a positive results for controlled substances, for which an employee did not have a valid prescription."[29]

The Board's finding and holding is a more reasoned approach and corresponds to W. Va. Code §21A-6-3(2) (2020), which states, in part, "Gross misconduct consisting … reporting to work under the influence of any controlled substance, as defined in chapter 60A of this code without a valid prescription…". Amphetamine, methamphetamine, fentanyl, and Norfentanyl are currently listed as Schedule II drugs in W. Va. Code §60A-2-206. The Petitioner testified that she had a valid prescription for an amphetamine and an unidentified benzodiazepine, but did not for fentanyl. She did not testify whether she had a valid prescription for either methamphetamine or

[26] D.R. 0029
[27] D.R. 0030
[28] D.R. 0070
[29] D.R. 0070

Norfentanyl. The former Employer tested the Petitioner immediately upon her arrival at work on December 16, 2022. As this drug screen was conducted immediately after the Petitioner's arrival at work on that date, it reflects that the Petitioner was under the influence of the drugs that she tested positive for when she arrived for work on that date.

The Petitioner also contends that the Board of Review's decision is incorrect as it did not address the text received by Mr. Schindler, a former employee, who then forwarded the text to the former Employer's human resources department. This text provided reasonable suspicion to the former Employer that the Petitioner was seeking illegal drugs. Moreover, the Petitioner held a safety-sensitive decision. Either factor was sufficient to warrant obtaining a drug screen from the Petitioner. See Twigg v. Hercules Corp., 185 W.Va. 155, 406 S.E.2d 52 (1990).

Finally, the Petitioner attempts to argue that the urine test was invalid as it allegedly failed to list a benzodiazepine identified as Clorazepate that was allegedly prescribed to her. The drug screen does not list Clorazepate as a tested drug. However, there are other explanations for the reason why the Petitioner's benzodiazepine did not show as a positive in her drug screen such as the simple fact that the Petitioner may not have taken the benzodiazepine sufficiently ahead of time for it to show as a positive on her drug screen. Although the Petitioner objects to characterizing her excuses as "self-serving", that is exactly what they are. With nothing more than her assertions, she attempts to explain away the fact that she was tested and found positive for a number of illegal drugs. The Board of Review was correct in finding these assertions to be unconvincing.

The Petitioner also asserts that the Board of Review erred in not showing deference to the administrative law judge's decision. Respondent contends that this is one of those instances where the decision of the administrative law judge is not due such deference.

The Supreme Court of Appeals of West Virginia examined "...the rare circumstance wherein application of the requisite deference is not supported by common sense" in the memorandum decision in Smith v. Board of Education of Berkeley County, No: 14-0851 (W. Va. May 15, 2015). In this decision the Court reviewed a circuit court's reversal of the Board of Review's decision that the claimant therein was not disqualified from the receipt of unemployment compensation benefits. The claimant, a public school teacher, is alleged to have instigated an incident which caused a fellow teacher to become so ill that medical care was needed. In this case, the circuit court had reviewed the record before the Board of Review and the transcript of the claimant's disciplinary hearing before the county board of education and subsequently reversed the decision of the Board of Review and disqualified the claimant on the grounds of gross misconduct. In its review of the circuit court's decision, the Court cited Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783-784 (Tenn.1999), which states, in part,

> "In contrast, appellate review of documentary proof, such as depositions or other forms of testimony presented to the trial court in a "cold" record, differs considerably. When reviewing documentary proof, all impressions of weight and credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial [Citations omitted.] …."

In the memorandum decision in Williamson v. Independence Coal Co., No: 12-0885 (W. Va. May 24, 2013), the Supreme Court of Appeals of West Virginia reviewed a circuit court decision that affirmed the decision by the Board of Review to deny unemployment compensation benefits to the claimant therein on the grounds that she was discharged due to an act of gross misconduct. The deputy and the administrative law judge found that the claimant was discharged due to simple misconduct. The Court affirmed the circuit court decision finding that the administrative law judge had not considered the claimant's failures to observe the employer's safety policy and the claimant's history of not cooperating with her co-workers and supervisors. The Court found that the:

> ALJ's finding of no misconduct is entitled to less deference" and held, "[t]he deference accorded … [a] factfinder may evaporate if upon review of its findings the appellate court determines that (1) a relevant factor that should have been given significant weight is not considered…". *Id at 4.*

The Board of Review did not err in its evaluation of the instant case. Its decision to reverse the decision of the administrative law judge and to hold that the Petitioner had committed gross misconduct is sound. Petitioner makes a number of arguments, but they all fail for reasons elucidated above. However, the Respondent will briefly cover those points again for the sake of completeness.

Petitioner's first assignment of error is that the decision of the Board of Review was not based on the evidence of the record. However, as seen above, all of the record supports the decision of the Board of Review except Petitioner's contentions that the test was inaccurate or flawed. No reasonable person would ignore the mountain of evidence in favor of unsubstantiated denials.

Petitioner's second assignment of error is that the Board of Review mischaracterized the factual circumstances surrounding the Petitioner's refusal to have a follow-up drug screen of the remaining sample. While not admitting that the Board of Review mischaracterized the evidence, Respondent asserts that is more or less irrelevant. The only thing that matters is that Petitioner was given the opportunity to have the remaining sample tested and she, for reasons of her own, declined.

The Petitioner's third assignment of error is that the Board of Review made no mention of the disputed text forwarded to the former Employer by Mr. Schindler. Again, this is irrelevant. The text merely established that the former Employer met the low burden of providing a reasonable basis for it to suspect the Petitioner of illegal drug use and to require Petitioner to take the drug test. The text itself was not necessary as proof of Petitioner's illegal drug use. That role is played by the result of the drug test.

The Petitioner's fourth assignment of error is that Respondent mischaracterizes the Petitioner's explanation of why fentanyl was found in her drug screen. Again, the important fact is that that and other drugs were found in the drug screen and Petitioner's explanations have no other basis than her self-serving assertions.

The Petitioner's fifth assignment of error is that the Board of Review wrongly expands the definition of "under the influence". For the reasons given above, Respondent contends that the Board of Review correctly and logically interpreted the statute rather than expanding it.

CONCLUSION

Respondent contends that the determination of the Board of Review in reversing the decision of the administrative law judge and holding that the Petitioner had been

discharged due to an act of gross misconduct is not erroneous. This decision is based soundly on the evidence of the record. The Board of Review correctly interpreted the meaning of the term "under the influence" The deference normally accorded to factual findings of the administrative law judge was lessened or evaporated when the administrative law judge failed to take relevant facts into consideration, i.e., the fact that illegal drugs were revealed in Petitioner's drug screen while she was at work and that this meets the definition of "under the influence". The Board of Review did not err when it held that the Petitioner had been discharged for an act of gross misconduct in light of the facts of the entire record. Therefore, Petitioner respectfully requests this Court to affirm the decision of the Board of Review and to deny the Petitioner's appeal.

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CERTIFICATE OF SERVICE

I, Kimberly A. Levy, Counsel to WorkForce West Virginia, hereby certify that I have served a true copy of the foregoing Brief on Behalf of Respondent WorkForce West Virginia upon the following via File & Serve Xpress, on this the 16th day of October, 2023, to:

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