

**WEST VIRGINIA  
INTERMEDIATE COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

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**KRISTY D. WINLAND,**

Claimant Below, Petitioner,

v.

**CAMDEN-CLARK MEMORIAL HOSPITAL,**

Employer Below, Respondents,

and

**WORKFORCE WEST VIRGINIA,**

Respondent Below, Respondent.

**DOCKET NO. 23-ICA-199**  
B.O.R. Case No. R-2023-0245  
(Workforce WV Board of Review)

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**PETITIONER'S BRIEF**

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## Table of Contents

<b>I.</b>	<b>Assignment of Error</b>	<b>1</b>
<b>II.</b>	<b>Statement of the Case</b>	<b>5</b>
<b>III.</b>	<b>Summary of the Argument</b>	<b>5</b>
<b>IV.</b>	<b>Statement Regarding Oral Argument and Decision</b>	<b>6</b>
<b>V.</b>	<b>Argument</b>	<b>6</b>
	<b>A. The Decision of the Workforce West Virginia Board of Review is not supported by the facts and testimony available to the Board of Review at the time of its Decision.</b>	<b>6</b>
	<b>B. The Board of Review mischaracterizes the facts surrounding the issue of why Petitioner did not submit to a follow-up drug screen after her failed test.</b>	<b>7</b>
	<b>C. The Board of Review makes no mention of the disputed text message that initiated the drug screen and ultimately led to Petitioner’s termination.</b>	<b>8</b>
	<b>D. The Board of Review incorrectly characterized Petitioner’s explanation of the presence of fentanyl in her drug-screen.</b>	<b>9</b>
	<b>E. The Board of Review wrongly expands upon the meaning of West Virginia Code §21A-6-3(2).</b>	<b>10</b>
<b>VI.</b>	<b>Conclusion</b>	<b>12</b>

## ***Table of Authorities***

W. Va. Code § 21A-6-3(2)

W. Va. Code § 21A-6-3

W. Va. Code § 21A-6-1

**BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS**

**KRISTY D. WINLAND,**  
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**Case No.: 23-ICA-199**

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Employer Below, Respondent.

and

**WORKFORCE WEST VIRGINIA,**  
Respondent Below, Respondent

**PETITIONER'S BRIEF**

Comes now, the Petitioner, Kristy Winland, by counsel, Anthony Brunicardi, Walt Auvil, and Kirk Auvil, of The Employment Law Center, PLLC, and hereby submits the following Petitioner's Brief.

**I. ASSIGNMENTS OF ERROR**

Pursuant to W. Va. Code § 6C-2-5(b) a party may appeal the decision of the administrative law judge on the grounds that the decision: (1) Is contrary to law or a lawfully adopted rule or written policy of the employer; (2) Exceeds the administrative law judge's statutory authority; (3) Is the result of fraud or deceit; (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

It is Petitioner's position that the Board of Review's decision below is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The assignments of error are included below:

A. Here, the Board of Review reversed the underlying Administrative Law Judge (hereinafter “ALJ”) Decision that ruled that the Claimant was terminated, not for misconduct, and was therefore entitled to unemployment benefits. (D.R. 0028-31). In its reversal of the ALJ’s Decision, 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 and events leading up to the Board of Review’s Decision.

B. The Board of Review mischaracterizes the facts surrounding the issue of why another follow-up drug test was not conducted and overlooks the fact that Petitioner’s prescription drugs did not show up in her drug screen. In referring to the lack of a follow-up drug test, the Board of Review places blame on the Petitioner stating that it was her “unwillingness to take that course of action.” (D.R. 0070). The Board of Review states that a review of the ALJ Hearing transcript reflects “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).

This characterization of events is entirely misleading and not in line with the evidence in the record. In reality, Petitioner reached out to the physician to discuss the results of the drug test and found out that not only were there errors in the test that showed Petitioner was testing positive for drugs she had not taken, but her prescription drugs that she does take did not yield a positive result on the test, placing a great deal of concern as to the accuracy of the test and/or specimen that was tested. Petitioner was *not* given an opportunity to take another drug test, only to have the likely flawed specimen retested with Petitioner having to cover the cost. 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). Further, Petitioner testified that on the day she

was notified of her termination that she reached out to Tanya and said, “I will come down right now and do a drug test for you right now, and that’s when, you know, she declined and said that, you know, I was still going to be terminated, like, there was nothing she could do.” (D.R. 0047). Even with the clear errors in the testing, Petitioner was never given the opportunity to take another drug test, only pay out of pocket to have the flawed specimen reexamined. The assigned ALJ that had the opportunity to hear evidence and question Petitioner during the hearing concluded that based on the evidence presented by both sides, that it was “less likely than not that the test is accurate based upon the evidence at hearing.” (D.R. 0030).

**C.** The Board of Review Decision makes no reference to the disputed text message that allegedly led to Petitioner’s drug screening. (D.R. 0069-73). It is Respondent’s argument that the text message that was allegedly sent from Petitioner to Respondent’s former HR Representative is the reason that she was called in for a drug screening. Considering 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. Rather, the Board of Review wrongly uses the disputed test results as an after the fact justification for the initial testing.

**D.** In 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.” (D.R. 0071). First of all, any testimony offered by Petitioner that was denying the accusations against her could be characterized as “self-serving,” so Petitioner is not sure what the Board of Review is attempting to express in that statement. Secondly, the statement is simply not true. There is evidence throughout the record, including testimony from Petitioner in response to questions from her own attorney, the underlying ALJ, and Respondent’s attorney, that

discuss in detail her reasons and evidence to believe that the drug screen showing a positive test for fentanyl was inaccurate, mainly by showing that the test could not be accurate if it does not show the actual prescription drugs that Petitioner takes on a daily basis. This clear error in the testing evidenced by her daily medications not being present on the screening are much more than “self-serving” denials of using the drug.

E. The Board of Review wrongly expands upon the West Virginia Legislature’s meaning of “reporting to work under the influence of” within West Virginia Code §21A-6-3(2) without citing any authority supporting their interpretation. The applicable provisions of West Virginia Code §21A-6-3(2) references gross misconduct as including “reporting to work under the influence of any controlled substance, as defined in Chapter 60A of this code without a valid prescription.” In its reversal of the ALJ’s determination that the term “under the influence” implied some indication of impairment, the Board of Review asserts that “it 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.” (D.R. 0070). The Board of Review’s expansion in interpreting the Legislature’s intent is improper and provides no authority as to why the ALJ’s interpretation was unreasonable. As the underlying ALJ stated in his March 3, 2023, Order, “if the Legislature had wanted benefits denied in the event of a positive drug screen, it would have said so.” (D.R. 0029). The Legislature purposefully worded the statute to require more than a mere positive screen. In dismissing the ALJ’s argument, the Board of review simply states that the interpretation is flawed, again without citing any authority to support their belief. Accordingly, the Board of Review’s reversal of the underlying ALJ’s decision should be reversed.

## **II. STATEMENT OF THE CASE**

This administrative appeal stems from an Order by the WORKFORCE West Virginia Board of Review (hereinafter, “Board of Review”) that was entered on April 24, 2023. (D.R. 0069-73). Petitioner’s claims are related to her application for unemployment compensation benefits following her termination from employment with Camden-Clark Memorial Hospital that occurred after a disputed, positive drug screen. Petitioner disputes the accuracy of the drug screen for numerous reasons including the presence of drugs that she had not taken as well as the fact that her actual daily prescription medications did not show up on the screen.

Petitioner initially received an award of full unemployment compensation benefits and a determination of “no misconduct” by the underlying Administrative Law Judge in this matter before the Decision was reversed by WORKFORCE West Virginia’s Board of Review resulting in the forfeiture of Petitioner’s unemployment compensation benefits and a finding that her termination was the result of “gross misconduct.” (D.R. 0028-31); (D.R. 0069-73). Petitioner files this appeal seeking relief in the form of a full award of unemployment compensation benefits and a finding that her termination was the result of “no misconduct.”

## **III. SUMMARY OF THE ARGUMENT**

The Workforce West Virginia Board of Review made several errors in overturning the Decision of the Administrative Law Judge to award Petitioner full unemployment compensation benefits following her termination from Respondent, Camden-Clark Memorial Hospital. The errors made by the Board of Review were both factual and legal, resulting in Petitioner’s award of unemployment compensation ultimately being overturned on appeal. Petitioner files the instant appeal in an attempt to correct any factual errors that were made and apply them to the correct



legal standards so that Petitioner can receive the unemployment compensation benefits she is entitled to.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to the criteria listed in Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioner does not believe oral argument to be necessary in this case.

#### **V. ARGUMENT**

The Board of Review reversed the underlying Administrative Law Judge Decision that ruled that the Claimant was terminated, not for misconduct, and was therefore entitled to unemployment benefits. (D.R. 0069-73). For the following reasons, the Decision of the Board of Review should be Reversed and Petitioner should receive a full award of unemployment compensation benefits.

##### **A. The Decision of the Workforce West Virginia Board of Review is not supported by the facts and testimony available to the Board of Review at the time of its Decision.**

In its reversal of the ALJ's Decision, 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 and events leading up to the Board of Review's Decision. To support their characterization of the facts, the Board of Review applies weight to each allegation and factual response so that they can determine which parties argument is stronger. (D.R. 0070). This way of analyzing the claim may be appropriate if you properly apply the weight of the evidence based on information on the record, but the Board of Review strays from the record and even from the language used in West Virginia Code in their analysis. In doing so, the Board characterizes Petitioner's arguments as merely self-serving while expanding on legislation in order to justify the actions of Respondent despite the lack of any factual information provided by Respondent to support the allegation that Petitioner

used illegal substances while at work, other than the deeply flawed drug-screen that Petitioner offers strong evidence to combat.

**B. The Board of Review mischaracterizes the facts surrounding the issue of why Petitioner did not submit to a follow-up drug screen after her failed test.**

In referring to the lack of a follow-up drug test, the Board of Review places blame on the Petitioner stating that it was her “unwillingness to take that course of action.” (D.R. 0070). The Board of Review states that a review of the ALJ Hearing transcript reflects “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).

This characterization of events is entirely misleading and not in line with the evidence in the record. In reality, Petitioner reached out to the physician to discuss the results of the drug test and found out that not only were there errors in the test that showed Petitioner was testing positive for drugs she had not taken, but her prescription drugs that she does take did not yield a positive result on the test, placing a great deal of concern as to the accuracy of the test and/or specimen that was tested. Petitioner was *not* given an opportunity to take another drug test, only to have the likely flawed specimen retested with Petitioner having to cover the cost. 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). Further, Petitioner testified that on the day she was notified of her termination that she reached out to Tanya and said, “I will come down right now and do a drug test for you right now, and that’s when, you know, she declined and said that, you know, I was still going to be terminated, like, there was nothing she could do.” (D.R. 0047).

Even with the clear errors in the testing, Petitioner was never given the opportunity to take another drug test, only pay out of pocket to have the flawed specimen reexamined. The assigned

ALJ that had the opportunity to hear evidence and question Petitioner during the hearing concluded that based on the evidence presented by both sides, that it was “less likely than not that the test is accurate based upon the evidence at hearing.” (D.R. 0030). The Board of Review does nothing to dispute the ALJ’s determination that the test was most-likely flawed, and instead dismisses the argument altogether without addressing the clear errors included in Petitioner’s drug-screen results.

**C. The Board of Review makes no mention of the disputed text message that initiated the drug screen and ultimately led to Petitioner’s termination.**

It is Respondent’s argument that the text message that was allegedly sent from Petitioner to Respondent’s former HR Representative is the reason that she was called in for a drug screening in the first place. (D.R. 0011); (D.R. 0039). This is an employee with no previous employment issues who has at no time been alleged to have reported to work in the past showing any sort of visual impairment whatsoever. (D.R. 0040).

Importantly, the sending of this message by Petitioner to Respondent’s former HR Representative has been disputed by Petitioner throughout the proceedings. Additionally, any interpretation made by Respondent as to the meaning of the disputed text message has also been denied by Petitioner.

Considering 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. Rather, the Board of Review wrongly uses the disputed test results as an after the fact justification for the initial testing.

**D. The Board of Review incorrectly characterized Petitioner's explanation of the presence of fentanyl in her drug-screen.**

In 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." (D.R. 0071).

First, any testimony offered by Petitioner that was denying the accusations against her could be characterized as "self-serving," so Petitioner is not sure what the Board of Review is attempting to express in that statement. Under this logic, any individual who is accused of any wrongdoing would have no way of disputing the allegations absent documentary evidence. Petitioner is not denying the use of fentanyl because the denial is "self-serving," she is denying using fentanyl because she has never used the drug and her under oath testimony requires that she tell the truth.

Secondly, the statement is simply not true. There is evidence throughout the record, including testimony from Petitioner in response to questions from her own attorney, the underlying ALJ, and Respondent's attorney, that discuss in detail her reasons and evidence to believe that the drug screen showing a positive test for fentanyl was inaccurate, mainly by showing that the test could not be accurate if it does not show the actual prescription drugs that Petitioner takes on a daily basis. (D.R. 34-48); (D.R. 0028-31).

The Board of Review brushes over the fact that Petitioner's daily prescription medications did not show up in her drug screen without providing any interpretation as to the accuracy of a drug-screen that fails to include medications that are taken daily by an individual. Instead of actually addressing the errors in the testing, the Board of Review places full blame for the flawed testing on Petitioner due to her unwillingness to have the same flawed specimen re-tested. (D.R.

0070). In doing so, the Board of Review acknowledges that they do not know if the test was accurate, but instead of requiring Respondent to provide evidence for why the drug-screen is accurate, they wrongly place the burden on Petitioner to prove the accuracy of the specimen. (D.R. 0070).

These clear errors in the testing evidenced by her daily medications not being present in the drug-screening are much more than “self-serving” denials of using the drug.

**E. The Board of Review wrongly expands upon the meaning of West Virginia Code §21A-6-3(2).**

West Virginia Code §21A-6-3 provides the law regarding disqualification of unemployment compensation benefits. In Section 2 of Chapter 21A, Article 6, the West Virginia Legislature provides that “Gross Misconduct” includes “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.” As interpreted by the underlying ALJ in his Decision, “if the West Virginia Legislature wanted benefits denied in the event of a positive drug screen, it would have said so. (D.R. 0029). The phrase “under the influence” implies some indication of impairment.” (D.R. 0029).

Rather than reviewing the language in West Virginia Code and applying it as written, the Board of Review decides to take it upon themselves to expand upon the meaning of this section and come up with their own interpretation as to why the Legislature used the language they did. The Board of Review dismisses the underlying ALJ argument and expands upon the legislation by arguing that “it cannot be reasonably construed that the Legislature intended impairment at work to be deemed to have occurred only when objective observations were made while an employee

was at work.” (D.R. 0070). The Board of Review then explains what a reasonable interpretation of the legislation is in their view, stating that “it is reasonable to conclude that an employee reported to work under the influence of a controlled substance if a drug screen taken in close proximity in time to the claimant’s work hours and reflects a positive result for controlled substances, for which an employee did not have a valid prescription.” (D.R. 0070). A quick reading of the legislation compared to the Board of Review’s interpretation shows the obvious flaws in the Board’s interpretation. Not only does this interpretation not follow the clear language included in West Virginia Code §21A-6-3(2), but it does nothing to address the fact that Petitioner is outright denying the accuracy of the specimen and/or testing.

Despite the fact that Petitioner does not believe that it is necessary based off of the language included within West Virginia Code, in order to fully address the Board of Review’s Decision, she expands upon the allegations to show the flawed reasoning applied in the Board’s Decision. Even if the drug-screen did not show numerous errors, as it does, the presence of fentanyl in Petitioner’s drug-screen raises immediate questions of accuracy based off of the lack of any observable impairment shown by Petitioner. Fentanyl is not the type of drug that individuals take casually and go about their day with no signs of impairment. Fentanyl is an extremely dangerous, addictive, and powerful drug that causes extreme levels of impairment that would be highly noticeable especially in the employment setting where an individual is having to keep up with demanding tasks. As the record supports, Petitioner never showed any indication of impairment whatsoever and had no issues with her job performance. (D.R. 0034-48). This fact coupled with the clear errors in the drug-screen not showing Petitioner’s daily medications is enough to support the conclusion that the drug-screen is more likely than not flawed.

## VI. CONCLUSION

The Workforce West Virginia Board of Review decision to disqualify Petitioner from receiving any unemployment compensation benefits is not supported by the facts of this case or the applicable West Virginia Legislation. Accordingly, due to the legal and factual errors made by the Workforce West Virginia Board of Review, the underlying decision should be REVERSED, and Petitioner should be awarded full benefits in accordance with West Virginia Code §21A-6-1.

Respectfully submitted,

KRISTY WINLAND,  
Petitioner by Counsel



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**CERTIFICATE OF SERVICE**

The undersigned counsel for Petitioner hereby certifies that on the **30<sup>th</sup> day of August 2023**, he served a true copy of **PETITIONER'S BRIEF** 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:

**Brian Peterson, Esq.**  
Camden-Clark Memorial Hospital  
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