IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 24-ICA-39

DEBORAH BEHELER BALDWIN,

Claimant Below/Petitioner,

v.

SCOTT A. ADKINS, in his official capacity as Acting Commissioner of WORKFORCE WEST VIRGINIA, and WORKFORCE WEST VIRGINIA BOARD OF REVIEW,

Respondents.

Appeal from WorkForce Board of Review
Case No. R-2023-1780 (R-2-J)

Respondents' Brief

Roberta F. Green, Esq. (WVSB #6598)
rgreen@shumanlaw.com
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for Respondents

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STATEMENT OF THE CASE

I. Introduction

Petitioner Deborah Beheler Baldwin's appeal arises out of an administrative determination that she received overpayments of unemployment benefits, and Baldwin challenges the WorkForce West Virginia Board of Review's findings. The Board of Review correctly determined that Baldwin received overpayments of unemployment compensation benefits for the weeks ending April 11, 2020, and April 18, 2020, and that those overpayments were the result of Baldwin's misrepresentations and/or nondisclosure. Therefore, the Board of Review correctly determined that collection of Baldwin's overpayments is subject to the five-year statute of limitations in West Virginia Code § 21A-10-8.

In April 2020, Baldwin was employed at Alliance Healthcare Services, Inc. D.R. 15. Baldwin filed unemployment compensation claims for the weeks ending April 11, 2020, April 18, 2020, and May 9, 2020. D.R. 16-21. For each claim, Baldwin completed a claim certification. D.R. 16-21. For the week ending April 11, 2020, Baldwin was asked the question, "Did you work during the week, including self employment?" D.R. 17. Baldwin responded, "No." D.R. 17. Baldwin was asked the same question for the week ending April 18, 2020, and she also responded, "No." D.R. 19. Baldwin was asked the same question for the week ending May 9, 2020, and Baldwin responded, "Yes," which then prompted her to respond to additional questions and to provide her total earnings for the week, which she reported to be "$451.20." D.R. 21.

Based upon Baldwin's claim certifications, she was paid unemployment compensation benefits for each of those three weeks. D.R. 11. On August 9, 2023, WorkForce determined that Plaintiff Baldwin was overpaid $2,054, stating, "[a]n overpayment determination has been made on your unemployment compensation claim that you have received benefits payments to which you were not entitled due to the reason checked below: … Earnings, pensions, social security

benefits, or other incomes were not deducted." D.R. 46. The Overpayment Determination was based upon a crossmatch conducted using a Claims Audit Form provided by Baldwin's employer. D.R. 48. Baldwin's employer provided employment information, including hours worked and total gross wages. D.R. 48. Contrary to Baldwin's claim certification, her employer reported that Baldwin worked 34.66 hours and was paid $651.61 for the week ending April 11, 2020.[1] D.R. 48. Contrary to Baldwin's claim certification, her employer reported that Baldwin worked 29.16 hours and was paid $547.38 for the week ending April 18, 2020. D.R. 48. Baldwin appealed the Overpayment Determination. D.R. 2.

On September 26, 2023, Baldwin's appeal was heard by ALJ Carl Hostler, and, on October 11, 2023, ALJ Hostler issued a decision. D.R. 33-35. At the hearing, Amber Harper with the CrossMatch Unit of WorkForce West Virginia succinctly summarized the issues:

> The three weeks in questions are, like you said, April 11, 2020, April 18, 2020, and May 9. It looks like for the week ending April 11, according to employer, she was paid $651.51, and she indicated on her weekly certification that she did not work and had 0 wages. For benefit week ending April 18, 2020, the employer stated—indicated on the form that she was paid $547.38, but she did not claim any earnings that week. And then on the third week which was the benefit week ending May 9, 2020, there was a small discrepancy, the employer indicated she was actually paid $457.97, and she reported $451.20.

D.R. 39-40. Baldwin testified that she did not "feel like [she] made a mistake[,]" that she did not "feel like [she] owe[d] it[,], and that she "didn't do anything wrong." D.R. 40. Upon ALJ Hostler's questioning, however, Baldwin testified, "I got wages for those weeks." D.R. 40. ALJ Hostler questioned Baldwin as to why she reported not working or earning wages, and Baldwin testified there was no reason and that it was "possible" it was just a mistake. D.R. 40.

[1] The employer wrote on the form that Baldwin's total gross wages were $745.61; however, she worked 34.66 hours at $18.80 per hour, which is $651.61. D.R. 48. It is unclear whether the employer miscalculated or reported wages from the prior week. Regardless of whether the accurate compensation was $745.61 or $651.61, Baldwin was ineligible for benefits based upon her earnings.

ALJ Hostler made several relevant findings of fact, including that "WorkForce West Virginia, by way of a routine audit, became aware that [Baldwin] was receiving more earnings from employment than reported by the claimant." D.R. 34. Importantly, ALJ Hostler determined that Baldwin's "benefits have proven to be overpaid due to the claimant underreporting some of her income." D.R. 34. ALJ Hostler made a legal determination that West Virginia Code § 21A-10-21 applied to Baldwin's overpayment, ultimately concluding that "the claimant received an overpayment, but WorkForce West Virginia is time barred from collecting it." D.R. 34. WorkForce appealed the ALJ's decision to the Board of Review. D.R. 36.

II. Board of Review Decision

On December 12, 2023, the Board of Review determined that the ALJ applied the wrong Code section to Baldwin's overpayment:

> In making the determination, the Administrative Law Judge applied West Virginia Code §21A-10-21 which provides a two-year limitation for the agency to recover benefits paid to a claimant by reason of error, irrespective of the nature of said error. It is the decision of the Board of Review that the Administrative Law Judge failed to apply the appropriate statute for benefits paid to the claimant for weeks ending April 11, 2020, and April 18, 2020. In that the claimant did not disclose on her weekly certification that she worked and earned wages for the two weeks in question, the Board concludes that the payment of benefits to the claimant was not the result of an error; rather, it was made because of the claimant's nondisclosure that she did work and had earnings for the weeks in question. As such, the Board finds that the applicable code for this nondisclosure is West Virginia Code §21A-10-8. The statute of limitations set forth therein is five-years when a person who, by reason of nondisclosure or misrepresentation, has received a sum as a benefit that the claimant was not entitled to receive.

D.R. 57. The Board of Review ("BOR") acknowledged that the undisputed facts before the ALJ showed that Baldwin worked and received wages the weeks ending April 11, 2020, and April 18, 2020, and Baldwin failed to disclose that information on her weekly claim certifications. D.R. 57. "In that the claimant had earnings for benefit week ending April 11, 2020, and April 18, 2020, it was the claimant's duty to report those earnings on her weekly certifications; she failed to disclose

that information and, as a result, received benefits to which she was not entitled." D.R. 57. Therefore, the BOR ruled that the applicable statute of limitations for recoupment of overpayments for the weeks ending April 11, 2020, and April 18, 2020, is five years and "that WorkForce West Virginia is not prohibited from pursuing an overpayment for those weeks." D.R. 57.

On the other hand, the BOR determined that the overpayment made for the week ending May 9, 2020, was time-barred from recoupment. D.R. 57. The BOR determined that Baldwin reported on her weekly claim certification that she did work and earned $451.20, but she actually earned $457.97, a difference of $6.77. D.R. 57. Because Baldwin disclosed that she worked and disclosed wages, the BOR determined that the misreported amount of wages was an error governed by West Virginia Code § 21A-10-21 rather than a misrepresentation or nondisclosure governed by West Virginia Code § 21A-10-8. D.R. 57. Therefore, the BOR ruled that the ALJ "did not err in determining that WorkForce West Virginia was barred from recovering the overpayment for the week ending May 9, 2020." D.R. 57.

The BOR's decision includes information and instructions regarding when, where, and how to file an appeal of its decision to this Court. D.R. 58-59. Baldwin had 30 days from the date of mailing of the decision, December 26, 2023, to file an appeal to this Court. D.R. 59. Thus, Baldwin had until January 25, 2024, to file an appeal. Baldwin filed her appeal on January 26, 2024.

SUMMARY OF ARGUMENT

The Board of Review correctly determined that Baldwin received overpayments for the benefit weeks ending April 11, 2020, April 18, 2020, and May 9, 2020. The BOR also correctly determined that Baldwin's failure to report that she worked or earned wages for the weeks ending April 11, 2020, and April 18, 2020, was a nondisclosure for which the applicable statute of limitations for recoupment is five years, pursuant to West Virginia Code § 21A-10-8. Respondent

Adkins does not contest the BOR's decision that the overpayment for the benefit week ending May 9, 2020, was the result of an error and, therefore, is time barred from recovery by the two-year statute of limitations contained in West Virginia Code § 21A-10-21.

This Court does not, however, need to reach the merits of Baldwin's appeal. The BOR mailed its decision to Baldwin on December 26, 2023; therefore, Baldwin was required to file an appeal by January 25, 2024. Baldwin failed to meet the appeal deadline. Instead, Baldwin filed a Notice of Appeal on January 26, 2024. The untimely filing is a jurisdictional bar under West Virginia Code § 21A-7-17.

If this Court considers the merits of Baldwin's appeal, the Board of Review's decision should be affirmed. The BOR's decision is entitled to substantial deference and should only be overturned if it was clearly erroneous, arbitrary, capricious, or an abuse of discretion. The BOR determined that an overpayment occurred, a conclusion Baldwin does not challenge. Based upon the administrative record, the BOR also determined that the overpayment was not the result of an error; rather, it was the result of nondisclosure or misrepresentation. Baldwin misrepresented her employment status, reporting that she did not work at all for the weeks ending April 11, 2020, and April 18, 2020. Baldwin also failed to disclose that she earned wages for those weeks. Baldwin's statements that she did not work were misrepresentations. Baldwin's failure to disclose wages is just that, nondisclosure. Therefore, the BOR correctly determined that Baldwin's overpayment was caused by misrepresentation and nondisclosure, and the BOR correctly determined that recoupment of an overpayment caused by misrepresentation and nondisclosure is governed by the five-year statute of limitations in West Virginia Code § 21A-10-8. The BOR's decision should be affirmed.

Baldwin argues that the BOR has "no jurisdiction or authority" to determine the cause of an overpayment or the statute applicable to such cause. Baldwin's argument is flawed for several reasons. First, the BOR is the highest level of review within the legislatively created unemployment claim procedure. The intent of the Legislature in creating the unemployment compensation claim procedure is clear: unemployment compensation benefits determinations and determinations of the parties' rights related to the unemployment compensation program are to be made through the administrative process. The BOR, here, has done just that. It determined that overpayments occurred and that the overpayments were the result of Baldwin's misrepresentations and nondisclosure. The statute of limitations for collection of overpayments made by reason of misrepresentation or nondisclosure is governed by West Virginia Code § 21A-10-8.

Second, throughout her brief, Baldwin conflates the claim procedure for determination of overpayments with the collection of overpayments. The claim procedure, adjudicated by the BOR, determines the parties' rights related to the unemployment compensation program. The collection process does not involve the BOR at all. The BOR determines whether an overpayment occurred and the cause of the overpayment. The Commissioner is statutorily tasked with recoupment. Pursuant to West Virginia Code § 21A-2D-5, the Commissioner of WorkForce West Virginia is required to adopt and implement internal administrative policy to "[r]ecover improper overpayments of unemployment benefits, without exception, to the fullest extent possible by state and federal law." W. Va. Code § 21A-2D-5(c).

Baldwin appears to argue that the determination of "nondisclosure or misrepresentation" must be made through a civil action because West Virginia Code § 21A-10-8 includes "the institution of civil action" as a collection method. This is a tortured reading of the statute. The statute states that a person who receives a benefit by reason of nondisclosure or misrepresentation

"shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received." W. Va. Code § 21A-10-8. This statute does not exclude from the claim procedure the determination of the cause of an overpayment. It simply states that, if an overpayment was caused by nondisclosure or misrepresentation, then the person who received the overpayment must either have the amount of the overpayment deducted from a future benefit or repay the Commissioner the amount of the overpayment. If the overpayment recipient does not have a future benefit from which to deduct or if the overpayment recipient does not repay the Commissioner, then the statute provides authority for the Commissioner to collect the overpayment using the procedures set forth in West Virginia Code § 21A-5-16, which permits the Commissioner, *inter alia*, to initiate a civil action, W. Va. Code § 21A-5-16(a), to use the procedures applicable to judgment liens, W. Va. Code § 21A-5-16(b), and/or to distrain personal property, W. Va. Code § 21A-5-16(c). The use of the term "civil action" does not alter the meaning of the plain language of the statute or the fundamental processes of the unemployment compensation system.

Baldwin also argues that the BOR could not consider the applicability of West Virginia Code § 21A-10-8 because she believes it was not properly raised by WorkForce at the ALJ hearing level and was, therefore, waived. The ALJ specifically discussed the five-year statute of limitations that could be applicable to Baldwin's overpayments. Regardless, the ALJ hearing is for evidentiary purposes, and the BOR review is to determine the legal validity of the ALJ's determination. WorkForce timely submitted written arguments to the BOR challenging the ALJ's determination that Baldwin's overpayments were the result of "error" and, thus, collection was subject to a two-year statute of limitations. Therefore, the issue was properly before the BOR, and Baldwin's argument is unavailing.

Finally, Baldwin's appeal is not interlocutory. Baldwin appeals the BOR's decision, which resolved all factual and legal issues and reversed, in part, and affirmed, in part, the ALJ's determination on the merits. The only purpose of the BOR's remand was to effectuate a corrected overpayment amount limited to the weeks ending April 11, 2020, and April 18, 2020. The amounts of overpaid benefits for those weeks were not in dispute at any stage of the proceedings; therefore, the BOR's decision is a final order, and Baldwin's appeal is not interlocutory.

STATEMENT REGARDING ORAL ARGUMENT

Respondents do not believe that oral argument is appropriate under either Rule 19 or Rule 20 of the West Virginia Rules of Appellate Procedure because Petitioner's appeal is a routine appeal of an administrative decision and because Petitioner's assignments of error are grounded in misapplication of statutory interpretation.

ARGUMENT

I. Standard

This appeal is governed by the following standard of review:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Bryan W. v. W. Va. Dep't of Health & Human Res., No. 23-ICA-16, 2023 W. Va. App. LEXIS 284 *5, 2023 WL 7202957 (W. Va. Ct. App. Nov. 1, 2023) (quoting W. Va. Code § 29A-5-4(g)). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which

presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Id.* at *6 (quoting Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996) (internal quotation marks omitted); *see also*, Syl. Pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996) (on appeal, a court may not overturn a finding simply because it would have decided case differently).

"Further, an appellate court is required to give deference to an administrative decision unless it is clearly wrong." *Id.* (citing Syl. Pt. 1, in part, *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996) ("findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.")); Syl. Pt. 1, *Francis O. Day Co., Inc. v. Dir. Of Env't Prot.*, 191 W. Va. 134, 135, 443 S.E.2d 602, 603 (1994) ("[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong."); Syl Pt. 1, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 ("[a]n adjudicative decision of [an administrative agency] should not be overturned by an appellate court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Review under this standard is narrow and the reviewing court looks to the [administrative agency]'s action to determine whether the record reveals that a substantial and rational basis exists for its decision."). "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, in part, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

II. Discussion

A. Baldwin's untimely appeal deprives this Court of subject matter jurisdiction.

The Board of Review's decision was mailed to Petitioner on December 26, 2023, and she filed her appeal on January 26, 2024, outside the statutory thirty-day appeal deadline. West Virginia Code § 21A-7-17 states,

> The decision of the board shall be final and benefits shall be paid or denied in accordance therewith, unless a claimant, last employer, or other interested party appeals to the Circuit Court of Kanawha county **within thirty days after mailing of notification of the board's decision**: Provided, That, in cases relating to a disqualification under subdivision (4) of section three [§ 21A-6-3] of article six the decision of the board shall be final and benefits shall be paid or denied in accordance therewith, unless a claimant, last employer, or other interested party appeals to the Circuit Court of Kanawha county within twenty days after mailing of notification of the board's decision.
> Parties to the proceedings before the board shall be made defendants in any such appeal; and the commissioner shall be a necessary party to such judicial review.

W. Va. Code § 21A-7-17 (emphasis added). Effective June 30, 2021, the West Virginia Appellate Reorganization Act created the Intermediate Court of Appeals of West Virginia. *See* W. Va. Code §§ 51-11-1, *et seq.* By statute, the Legislature endowed the Intermediate Court of Appeals with appellate jurisdiction over, *inter alia*, "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. Va. Code § 51-11-4(b)(4). West Virginia Code § 29A-5-4 states, in relevant part, "Notwithstanding any provision of this code to the contrary, proceedings for judicial review of any final order or decision issued after June 30, 2022, must be instituted by filing an appeal to the Intermediate Court of Appeals as provided in §51-11-1 et seq. of this code." W. Va. Code § 29A-5-4(b).

Thus, in the instant case, Baldwin was required by statute to file an appeal to the Intermediate Court of Appeals of West Virginia within thirty days of the mailing of the Board of Review's decision. Because the Board of Review's decision was mailed on December 26, 2023, Petitioner was required to file her Notice of Appeal by January 25, 2024. Baldwin acknowledged

this in her Motion for Leave for Filing, requesting leave to file her Notice of Appeal "filed on January 26, 2024 out of time." Pet'r's Mot. for Leave, p. 1.

Baldwin's untimely appeal has deprived this Court of subject matter jurisdiction. As this Court has recently held in other administrative contexts, the thirty-day deadline is jurisdictional. *Jenkins v. W. Va. Bd. of Soc. Work*, No. 23-ICA-70, 2023 W. Va. App. LEXIS 265 *10, 2023 WL 7202960 (W. Va. Ct. App. Nov. 1, 2023) (citing *State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 433, 533 S.E.2d 362, 365 (2000) (noting all judicial reviews sought under West Virginia Code § 29A-5-4 must be initiated within thirty days)) (also citing *W. Va. Div. of Motor Vehicles v. Swope*, 230 W. Va. 750, 755-756, 742 S.E.2d 438, 443-444 (2013) (finding the plain language of West Virginia Code § 29A-5-4 is controlling and requires appeals to be filed within thirty days)); *see also Statoil USA Onshore Props., Inc. v. Irby*, 895 S.E.2d 827, 835 (W. Va. Ct. App. 2023) (finding appeal deadline to Office of Tax Appeals is jurisdictional). Additionally, the Supreme Court of Appeals of West Virginia has held that, "[t]o allow an untimely filing would render the 'limitation period established by the Legislature . . . utterly meaningless.'" *Dingess v. Miller*, No. 11-0557, 2011 W. Va. LEXIS 537 *5 (W. Va. Oct. 21, 2011) (quoting *McCourt v. Oneida Coal Co., Inc.*, 188 W. Va. 647, 654, 425 S.E.2d 602, 609 (1992)). Our Supreme Court has "long held that 'filing requirements established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering.'" *Cate v. Steager*, No. 16-0599, 2017 W. Va. LEXIS 517 *7, 2017 WL 2608434 (W. Va. June 16, 2017) (quoting *Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006)) (additional citations omitted). Because the appeal deadline is jurisdictional, Baldwin's failure to timely file has deprived this Court of subject matter jurisdiction.

Baldwin does not argue that the thirty-day appeal deadline is not jurisdictional. Rather, Baldwin argues that "no jurisdictional bar is articulated" in the statute and that the thirty-day appeal

deadline is not jurisdictional *as applied to her*. While she previously conceded that her appeal was untimely, Pet'r's Mot. for Leave, p. 1, Baldwin now argues that it "was timely filed, in light of the Board of Review's failure to properly serve its December 26, 2023 order." Pet'r's Supp. Br., p. 1. When seeking leave to file her appeal out of time, Baldwin's only stated reason for non-compliance with the statutory appeal period was that "a calendaring error caused the filing to be made one day late, which was not discovered until after her filing." Pet'r's Mot. for Leave, p. 1. Now, however, Baldwin argues that the jurisdictional thirty-day deadline does not apply because the BOR mailed its decision to Baldwin rather than to her counsel. Pet'r's Supp. Br., pp. 1-3. Baldwin further argues that the BOR failed to timely render a decision and failed to timely mail its decision pursuant to statute and legislative rule. Pet'r's Supp. Br., p. 2. Both arguments fail as a matter of law.

First, the BOR complied with all statutory and regulatory deadlines. "Upon consideration of all evidence, the Board shall issue a decision within ten (10) days of the conclusion of the hearing and mail a copy to all parties." W. Va. Code St. R. § 84-1-6.14. The BOR considered the evidence on December 7, 2023. D.R. 56. The BOR issued its decision on December 12, 2023, only five days later. D.R. 58. "The board shall, within fifteen days after the conclusion of the hearing, notify the claimant, last employer, and the commissioner of its findings and decision on an appeal." W. Va. Code § 21A-7-15. The BOR concluded its hearing on December 12, 2023, when it timely issued a decision. D.R. 58. As Baldwin states, the BOR mailed its decision on December 26, 2023, only fourteen days later. Pet'r's Supp. Br. 1. Even if the time for notification ran from December 7, 2023, the BOR's mailing was still timely. The fifteenth day following December 7, 2023, was December 22, 2023, which was proclaimed a full-day state holiday for public employees.[2] Thus,

[2] *See* "Gov. Justice issues proclamation declaring extended full-day holiday for Christmas for public employees," Office of the Governor, Dec. 20, 2023, available at https://governor.wv.gov/News/press-releases/2023/Pages/Gov.-Justice-issues-proclamation-declaring-extended-full-day-holiday-for-Christmas-for-public-employees.aspx.

the fifteenth day following December 7, 2023, was December 26, 2023, the date of mailing. Regardless, Baldwin cites to no law invalidating the jurisdictional appeal deadline in the event that an agency fails to meet a deadline.

Likewise, Baldwin cites to no law invalidating the jurisdictional appeal deadline in the event that an agency mails a decision to a claimant rather than the claimant's attorney. Baldwin does not dispute that she received the BOR decision. Rather, she claims that her receipt of the BOR decision directly from the BOR violates the West Virginia Rules of Professional Conduct and the West Virginia Code of Judicial Conduct. Pet'r's Supp. Br., p. 3. Both arguments are meritless.

Baldwin first cites to Rule 4.2 of the Rules of Professional Conduct, which states, "**In representing a client**, ***a lawyer*** shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." W. Va. R. Prof. Cond. 4.2 (emphasis added). The BOR is not a lawyer, is not comprised of lawyers, and does not represent a client. Instead, the BOR is tasked with, *inter alia*, "[h]ear[ing] and determin[ing] all disputed claims presented to it in accordance with the provisions of article seven [§§ 21A-7-1 to 21A-7-30]." W. Va. Code § 21A-4-9. Thus, Rule 4.2 is inapplicable and does not alter the jurisdictional nature of the thirty-day appeal deadline in West Virginia Code § 21A-7-17.

Baldwin next cites to Rule 2.9 of the Code of Judicial Conduct, which states, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows …." W. Va. Code Jud. Cond. 2.9(A). Baldwin relies specifically upon Comment 2, which states, "Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or

to whom notice is to be given." W. Va. Code Jud. Cond. 2.9, cmt. 2. The Code of Judicial Conduct does not apply to the BOR, however. Comment 2 to the Application Section states, "The Code does not apply to an administrative law judge, hearing examiner, or similar officer within the executive branch of government, or to municipal judges." W. Va. Code Jud. Cond. Application § I, cmt. 2. Thus, because the BOR is comprised of hearing examiners or similar officers within the executive branch of government, the Code of Judicial Conduct is inapplicable. Regardless, the Code of Judicial Conduct does not alter the jurisdictional nature of the thirty-day appeal deadline in West Virginia Code § 21A-7-17.

Baldwin's efforts to malign the BOR's notice are an attempt to establish excusable neglect. But our Supreme Court has held that similar filing deadlines are not susceptible to equitable modification. *Cate*, 2017 W. Va. LEXIS 517 *7, 2017 WL 2608434 (quoting *Helton*, 219 W. Va. at 561, 638 S.E.2d at 164). In *Dingess v. Miller*, No. 11-0557, 2011 W. Va. LEXIS 537 *5 (W. Va. Oct. 21, 2011), the petitioner's counsel argued that the petitioner's untimely appeal should be excused on the grounds that, "because his fiancée was killed by a drunk driver [and his client was challenging a license revocation due to driving under the influence], he had repeatedly 'wrestled' with whether he should continue to represent petitioner[,]" which resulted in the untimely appeal. *Id.* at *5. The Supreme Court stated, "[a]fter examining the circumstances in this appeal, the Court cannot conclude that the petitioner's counsel's failure to timely file petitioner's appeal should be excused." *Id.* The Supreme Court noted that the Circuit Court ruled that "any excusable negligence could not overcome the jurisdictional bar" imposed by the statutory thirty-day appeal period. *Id.* at *2 (cleaned up). Thus, the Supreme Court found "no error in the circuit court's rejection of petitioner's counsel's excusable neglect argument." *Id.* at *5. The result should be no different here.

Simply put, the BOR was required to provide notice of its decision to "the claimant." W. Va. Code § 21A-7-15. The BOR provided that notice by mailing its decision to the claimant, Baldwin, on December 26, 2023. Baldwin had thirty days to appeal the BOR's decision, W. Va. Code § 21A-7-17, but failed to file her appeal until January 26, 2024. The appeal deadline is jurisdictional and not readily susceptible to equitable modification or tempering. Thus, even if Baldwin's calendaring error, which was somehow allegedly caused by the BOR's mailing of the decision to Baldwin rather than her attorneys, constitutes excusable neglect, it cannot overcome the jurisdictional bar imposed by the statutory thirty-day appeal period. Therefore, this Court lacks subject matter jurisdiction.

B. The Board of Review has authority to determine whether a claimant received an overpayment and the cause of the overpayment.

The legislatively created unemployment compensation claim procedure grants WorkForce West Virginia, the deputies who initially render decisions on claims, the administrative law judges who hear appeals from the deputies' decisions, and the Board of Review the authority to determine whether a claimant received an overpayment and the cause of the overpayment. West Virginia Code § 21A-6-1 provides the eligibility qualification criteria for claimants, and specifically provides that "[a]n unemployed individual shall be eligible to receive benefits only if the commissioner finds" the claimant has met the qualifications. W. Va. Code § 21A-6-1. West Virginia Code § 21A-6-11 provides for payment of benefits for partial unemployment "upon a claim therefor filed within such time and in such manner as the commissioner may by regulation prescribe[.]" W. Va. Code § 21A-6-11. To make benefits eligibility determinations, the Legislature provided the Commissioner with the power to "appoint deputies to investigate all claims, and to hear and initially determine all claims for benefits …." W. Va. Code § 21A-7-3. The deputy is required to "determine whether or not such claim is valid, and, if valid, shall determine: (1) The

week with respect to which benefits will commence; (2) The amount of benefit; (3) The maximum duration of benefits." W. Va. Code § 21A-7-4(d). The Commissioner has prescribed regulations governing the appeals process for unemployment benefits. Those "procedural rules shall govern the conduct of hearings in contested unemployment compensation claims before the Board of Review and its subordinate tribunals." W. Va. Code St. R. § 84-1-1.1. The rules provide,

> The purpose of the hearing process shall be to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of the Deputy's decisions and determinations with regard to the granting or denial of any award, or the entry of any Order, or the granting or denial of any modification or change with respect to former findings.

W. Va. Code St. R. § 84-1-2.2. "If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him or her pursuant to a prior decision, the amount of benefits paid are considered overpaid." W. Va. Code § 21A-7-11(c).

Thus, the administrative process is in place to determine whether claimants meet the eligibility criteria, whether a claim is valid, when benefits will commence, how much the benefits are, and the duration of benefits. The administrative process is also in place to determine the rights of the parties and to modify or change benefits determinations if necessary. The administrative process determines whether an overpayment has occurred and the reason for the overpayment. That is the process Baldwin is challenging.

C. Baldwin's overpayments were the result of misrepresentation and/or nondisclosure and, therefore, are subject to the five-year statute of limitations within West Virginia Code § 21A-10-8.

Baldwin's overpayments are subject to the five-year statute of limitations in West Virginia Code § 21A-10-8. Baldwin asserts that West Virginia Code § 21A-10-21 applies to her overpayments; however, that section only applies to overpayments made as a result of "error":

> A person who, **by reason of error**, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past due payment: Provided, That such collection or deduction of benefits shall be barred after the expiration of two years.

W. Va. Code § 21A-10-21 (emphasis added). West Virginia Code § 21A-10-8, on the other hand, applies to overpayments made as a result of "nondisclosure or misrepresentation":

> A person who, **by reason of nondisclosure or misrepresentation, either by himself or another (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent)**, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past-due payments against employers as set forth in section sixteen [§ 21A-5-16] of article five of this chapter, which specifically includes the institution of civil action and collection procedures thereon enumerated in said section: Provided, That such collection or deduction of benefits shall be barred after the expiration of five years, except for known or fraudulent nondisclosure or misrepresentation which shall be barred after the expiration of ten years, from the date of the filing of the claim in connection with which such nondisclosure or misrepresentation occurred.

W. Va. Code § 21A-10-8 (emphasis added). Baldwin's case is one of nondisclosure and misrepresentation.

For each claim, Baldwin completed a claim certification. D.R. 16-21. For the week ending April 11, 2020, Baldwin was asked the question, "Did you work during the week, including self employment?" D.R. 17. Baldwin responded, "No." D.R. 17. Baldwin was asked the same question for the week ending April 18, 2020, and she also responded, "No." D.R. 19. Based upon her claim certifications, she was paid unemployment compensation benefits. D.R. 19. WorkForce determined that Baldwin was overpaid, stating in a notice, "[a]n overpayment determination has been made on your unemployment compensation claim that you have received benefits payments to which you were not entitled due to the reason checked below: … Earnings, pensions, social security benefits, or other incomes were not deducted." D.R. 46. Baldwin's earnings were not

deducted because she answered "no" when asked if she had worked during the weeks ending April 11, 2020, and April 18, 2020. Baldwin's "no" answers are nondisclosures, at best, and misrepresentations, at worst. Regardless of intent, West Virginia Code § 21A-10-8 specifically provides a five-year period for recoupment of payment under these circumstances.

Baldwin's argument that she "did everything [she] could to establish a low earnings claim and ha[s] consistently represented that [she] was employed, reduced to a part-time basis, and reported wages for the periods required," Pet'r's Br., p. 12, is inconsistent with the claims certifications, D.R. 16-21, claims audit form, D.R. 15, benefits rights acknowledgement, D.R. 22-23, and Baldwin's sworn testimony before the ALJ. D.R. 38-42. It is true that, when initially filing for benefits on April 5, 2020, Baldwin stated that she was "wanting to file for low earnings but the employer has not provided any forms or reports." D.R. 28 (emphasis removed). This statement does not absolve Baldwin from subsequent misrepresentations of her employment status in which she twice denied working and twice failed to disclose wages. D.R. 17, 19. In her benefits rights acknowledgement, Baldwin averred that she understood that she "must report all work and gross earnings for **each week** [she] file[s], regardless of the amount." D.R. 22 (emphasis added). Despite her representations that she did not work or earn wages, Baldwin's employer later provided evidence that she had, in fact, worked the weeks ending April 11, 2020, and April 18, 2020, D.R. 15, and Baldwin testified that she "got wages for those weeks." D.R. 40, p. 10.

The BOR acknowledged that the undisputed facts before the ALJ showed that Baldwin worked and received wages the weeks ending April 11, 2020, and April 18, 2020, and Baldwin failed to disclose that information on her weekly claim certifications. D.R. 57. "In that the claimant had earnings for benefit week ending April 11, 2020, and April 18, 2020, it was the claimant's duty to report those earnings on her weekly certifications; she failed to disclose that information and,

as a result, received benefits to which she was not entitled." D.R. 57. Therefore, the BOR correctly ruled that the applicable statute of limitations for recoupment of overpayments for the weeks ending April 11, 2020, and April 18, 2020, is five years and "that WorkForce West Virginia is not prohibited from pursuing an overpayment for those weeks." D.R. 57.

Baldwin conflates the administrative determination process with the collection process, arguing that a "nondisclosure or misrepresentation" determination under West Virginia Code § 21A-10-8 must occur through a civil action. Collection or recoupment occurs only *after* the overpayment determination is made and based upon the reason for the overpayment. In the event of a final decision determining that an overpayment has occurred, "[t]he commissioner shall recover such amount by civil action **or** in any manner provided in this code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit the amount against the overpayment until it is repaid in full." W. Va. Code § 21A-7-11(c)(1). If the overpayment is determined by a final decision to be the result of an error, the commissioner's recovery of the overpayment is governed by West Virginia Code § 21A-10-21 and is subject to that provision's two-year statute of limitations. W. Va. Code § 21A-10-21. If the overpayment is determined by a final decision to be the result of nondisclosure or misrepresentation, the Commissioner's recovery of the overpayment is governed by West Virginia Code § 21A-10-8 and is subject to that provision's five-year statute of limitations. W. Va. Code § 21A-10-8.

Collection is mandatory, but the commissioner's filing of a civil action is always discretionary. *See* W. Va. Code § 21A-7-11(c)(1) ("The commissioner **shall recover** such amount by civil action ***or*** in any manner provided in this code for the collection of past-due payment ….") (emphasis added); *see also* W. Va. Code § 21A-10-8 ("Collection **shall be made** in the same

manner as collection of past-due payments against employers as set forth in section sixteen [§ 21A-5-16] of article five of this chapter, which specifically includes the institution of civil action ***and collection procedures thereon enumerated in said section***[.]") (emphasis added); W. Va. Code § 21A-5-16(a) (stating "[t]he commissioner in the name of the State ***may*** commence a civil action…" and providing six other collection methods, including all available remedies under West Virginia Code § 38-1-1, *et seq.*) (emphasis added). Importantly, none of these statutes states that the Commissioner is required to file a civil action to determine whether an overpayment occurred or by what reason an overpayment occurred. A civil action is simply one of the methods statutorily afforded to the Commissioner to *collect* an overpayment *after* a final decision. Baldwin's conflation of overpayment determinations with collections of overpayments is unpersuasive.

D. The Board of Review properly considered whether the ALJ correctly determined the applicable statute of limitations.

Baldwin argues that the BOR erred in deciding her overpayments were subject to the five-year statute of limitations in West Virginia Code § 21A-10-8 because that argument "was raised for the first time only at appeal stage." Pet'r.'s Br., pp. 16-17. Baldwin claims that West Virginia Code § 21A-10-8 was not "voiced during the hearing before the administrative law judge"; however, this is factually incorrect. To the contrary, the ALJ discussed "another statute that says five years" at length with Baldwin and WorkForce's representative when discussing Baldwin's assertion that the two-year statute of limitations applies. D.R. 41, p. 13. At the beginning of the hearing, the ALJ specifically mentioned "a little bit of debate amongst the judges in terms of" the statute of limitations but stated that, "as or right now, that's what my understanding is, that there will be a two-year statute of limitations." D.R. 39, p. 7. The ALJ acknowledged the need for the BOR's input on the statute of limitations issue: "I'm hoping the Board of Review is going to sort this out sooner or later." D.R. 39, p. 7.

Regardless, legal arguments need not be raised before the ALJ to be preserved for appeal to the Board of Review, and the BOR applies the appropriate law to administrative proceedings regardless of the arguments, or lack thereof, of the parties.[3] As Baldwin was notified prior to the ALJ hearing, its purpose is for the gathering of evidence. D.R. 32. The BOR hearing's purpose is to "decide if the Administrative Law Judge has made a proper decision." D.R. 36. This is all part of the administrative process. The law cited by Baldwin regarding waiver applies to appeals *from* the administrative process, not to appeals *within* the administrative process.

Baldwin cites *Noble v. W. Virginia Dep't of Motor Vehicles*, 223 W. Va. 818, 679 S.E.2d 650 (2009) (per curiam), for the proposition that WorkForce was required to argue the legal applicability of West Virginia Code § 21A-10-8 to the ALJ in order to argue that point to the BOR. *Noble* addressed, however, arguments raised for the first time before the Circuit Court, in whose stead this Court now sits by operation of West Virginia Code §§ 51-11-4(b)(4) and 29A-5-4(b). The *Noble* Court acknowledged that the review before the Circuit Court was to "'be conducted by the court without a jury and shall be ***upon the record made before the agency***, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.'" *Noble*, 223 W. Va. at 822, 679 S.E.2d at 653 (quoting W. Va. Code § 29A-5-4(f)) (emphasis added). The Supreme Court succinctly stated why the plaintiff could not raise a new argument before the Circuit Court: "In the present case, it is undisputed that Ms. Noble's … argument was not raised during the administrative hearing. Ms. Noble's argument, while novel, was raised for the first time

[3] As a matter of policy, it would be unfair for the Board of Review to require parties, and, particularly claimants, who are most often unrepresented, to make legal arguments at the ALJ level or forever waive those legal arguments regardless of their correctness. Indeed, this would invite error as administrative decisions should be reversed if they are in violation of constitutional or statutory provisions. W. Va. Code § 29A-5-4(g)(1).

before the circuit court. In other words, Ms. Noble asked the circuit court to consider a non-jurisdictional question, outside the record made before the Commissioner, that was made for the first time on appeal." *Id.*

Here, not only was the applicability of the five-year statute of limitations discussed during the ALJ hearing, but WorkForce also raised the issue before the Board of Review in its written argument, stating that, on the facts established at the evidentiary hearing before the ALJ, "WorkForce West Virginia has five years to collect the overpayment pursuant to W. Va. Code §21A-10-8." D.R. 72-76. Still within the administrative process, the BOR correctly determined that the applicable statute of limitations for recoupment of overpayments for the weeks ending April 11, 2020, and April 18, 2020, is five years and "that WorkForce West Virginia is not prohibited from pursuing an overpayment for those weeks." D.R. 57. Thus, the applicability of West Virginia Code § 21A-10-8 was preserved throughout the administrative process and is properly before this Court on appeal pursuant to West Virginia Code § 29A-5-4(f).

Despite making an assertion that WorkForce waived an argument that clearly appears in the administrative record, Baldwin, for the first time on appeal, makes the argument that she was not provided due process. Pet'r's Br., p. 17. Baldwin argues that WorkForce mailed its written argument to her on December 5, 2023, "two days prior to an appeal review," Pet'r's Br., p. 17, which she claims constitutes a lack of notice. This is, however, precisely the deadline imposed by the BOR. *See* D.R. 55 ("Your comments should be received **no later than 2 days before** the stated date above [December 7, 2023] on which the BOARD will consider this case.") (emphasis in original). This is also the same date on which Baldwin provided the BOR with her written argument. D.R. 78-80. Thus, both parties before the BOR submitted written arguments on the same day. The administrative record is devoid of any due process argument, and, therefore, it cannot be

considered on appeal before this Court. Regardless, Baldwin's submission to the BOR is evidence of receipt of notice and of an opportunity to be heard. *See* D.R. 79 ("The *Notice of Appeal Review* provides that the parties' arguments or comments are to be provided to the BOR in writing, and on the subject of whether the claimant disagrees or agrees with the Administrative Law Judge's decision. Claimant Deborah Beheler Baldwin agrees with the Administrative Law Judge's decision issued on or about October 11, 2023.") (emphasis in original). Baldwin's written arguments were her opportunity to be heard. Baldwin's *post hoc* disagreement with the BOR's decision does not nullify the administrative process that provided her notice and an opportunity to be heard on three different occasions, even if Baldwin now believes she should have been given an opportunity to be heard orally rather than in writing.

E. The Board of Review's remand for the sole purpose of determining the amount of overpayment for benefit weeks ending April 11, 2020, and April 18, 2020, does not render Baldwin's appeal interlocutory.

Adkins agrees with Baldwin that the BOR's remand "for the sole purpose of determining the amount of overpayment for benefit week ending April 11, 2020, and for benefit week ending April 18, 2020[,]" D.R. 58, does not render Baldwin's appeal interlocutory. The BOR's remand relates specifically to WorkForce's overpayment determination in the amount of $2,054.00, which was calculated based upon Baldwin being overpaid for the weeks ending April 11, 2020, April 18, 2020, and May 9, 2020. D.R. 3. Because the BOR determined that the two-year statute of limitations in West Virginia Code § 21A-10-21 applied to the overpayment for the week ending May 9, 2020, a remand was necessary in order to subtract that week's overpaid benefits amount from the initial determination of $2,054.00. As a result, the general rule announced in *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990), is inapplicable.

In *Paxton*, our Supreme Court stated, "'Ordinarily a judgment of reversal rendered by an intermediate appellate court which remands the cause for further proceedings in conformity with the opinion of the appellate court is not final and, therefore, not appealable to the higher appellate court, so long as judicial action in the lower court is required.'" *Id.* at 242, 400 S.E.2d at 250 (quoting 4 Am. Jur. 2d Appeal & Error § 59 at 580 (1962)). "This rule, however, is limited to those situations where the intermediate appellate court finds that there are ***disputed issues of fact or law that have not been resolved by the trial court***. … This general rule does not apply to situations where the trial court has ***reversed or affirmed the agency decision on the merits***." *Id.* (emphasis added).

Here, the BOR's decision resolved all issues of fact and law and reversed, in part, and affirmed, in part, the ALJ's decision on the merits. The only purpose of the order remanding the matter was to recalculate the overpayment without the amount included for the week ending May 9, 2020, so that a correct overpayment determination, consistent with the BOR's decision, could be issued. Neither Baldwin nor WorkForce challenged the accuracy of the overpayment amounts for the weeks ending April 11, 2020, and April 18, 2020. Rather, Baldwin challenged whether she received an overpayment at all and whether WorkForce was time barred from collecting based upon her belief that West Virginia Code § 21A-10-21 applied because she believed her overpayment was received in "error." D.R. 7-8, 38-42, 78-80. Those issues of fact and law have been resolved and decided on their merits, and the BOR notified Baldwin that its "decision is final unless a party appeals to" this Court. D.R. 58. Therefore, the BOR's remand does not render Baldwin's appeal interlocutory.

CONCLUSION

Respondents Scott A. Adkins, in his official capacity as Acting Commissioner of WorkForce West Virginia, and WorkForce West Virginia Board of Review respectfully request that this Court dismiss Petitioner's Appeal for lack of subject matter jurisdiction. Alternatively, Respondents respectfully request that this Court affirm the Board of Review's decision.

/s/ Roberta F. Green
Roberta F. Green (W. Va. Bar No. 6598)
Caleb B. David (W. Va. Bar No. 12732)
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Ste 200
Charleston, WV 25301
(304) 345-1400; (304) 343-1826 (fax)
rgreen@shumanlaw.com
cdavid@shumanlaw.com
Counsel for Respondents

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 24-ICA-39

DEBORAH BEHELER BALDWIN,

Claimant Below/Petitioner,

v.

SCOTT A. ADKINS, in his official capacity as Acting Commissioner of WORKFORCE WEST VIRGINIA, and WORKFORCE WEST VIRGINIA BOARD OF REVIEW,

Respondents.

Appeal from WorkForce Board of Review
Case No. R-2023-1780 (R-2-J)

CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondents, hereby certifies that a true and correct copy of the foregoing ***Respondents' Brief*** has been served upon the parties and counsel of record via File & ServeXpress, this 8th day of June, 2024.

L. Dante diTrapano (W. Va. Bar No. 6778)
David H. Carriger (W. Va. Bar No. 7140)
D. Christopher Hedges (W. Va. Bar No. 7894)
CALWELL LUCE DITRAPANO PLLC
Law and Arts Center West 500 Randolph Street
Charleston, WV 25302
(304) 343-4323
(304) 344-3684 (fax)
chedges@cldlaw.com
and

Ben Salango (W. Va. Bar No. 7790)
SALANGO LAW, PLLC
206 Capitol Street
Charleston, WV 25301
(304) 342-0512
(304) 342-0513 (fax)
ben@salangolaw.com

and

Patrick Salango (W. Va. Bar No. 11873)
SALANGO LEGAL FIRM, PLLC
110 Capitol Street
Charleston, WV 25301
(304) 932-0394
(304) 932-0390 (fax)
patrick@salangolegalfirm.com

/s/ Roberta F. Green
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
Shuman McCuskey Slicer PLLC