IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1080

ALCAN ROLLED PRODUCTS RAVENSWOOD, LLC,
Respondent Below, Petitioner

v.

TERRY W. McCARTHY,
Petitioner Below, Respondent

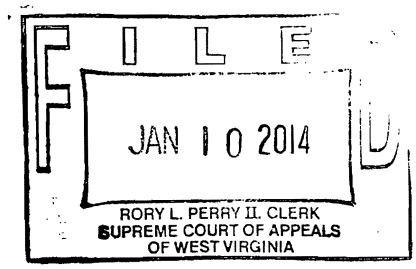

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 1

III. SUMMARY OF ARGUMENT 3

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 4

V. ARGUMENT

A. STANDARD OF REVIEW 5

B. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT COMPENSATION DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT SUBSTITUTED ITS FINDINGS OF FACT FOR THOSE OF THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW 7

C. CONTRARY TO W. VA. CODE § 21A-6-3 AND THIS COURT'S DECISIONS APPLYING THAT STATUTE, THE CIRCUIT COURT ERRED IN RULING THAT THROWING A JACK ROCK AT A SUPERVISOR'S VEHICLE AS IT IS ENTERING A PLANT DURING A STRIKE DID NOT CONSTITUTE "GROSS MISCONDUCT." 24

D. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR AN EMPLOYER'S BURDEN OF PROOF IN AN UNEMPLOYMENT COMPENSATION CASE, THE CIRCUIT COURT ERRONEOUSLY APPLIED A CLEAR AND CONVINCING BURDEN OF PROOF. 31

E. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT OF KANAWHA COUNTY ERRED BY HOLDING THAT EMPLOYEES HAVE A "PROPERTY RIGHT" IN EMPLOYMENT THAT GIVES EMPLOYEES "THE RIGHT TO STRIKE" AND TO ENGAGE IN VIOLENT CONDUCT IN THE CONTEXT OF A STRIKE "WITHOUT THE FEAR OF INFLICTION OF ECONOMIC CAPITAL PUNISHMENT" IN THE FORM OF DENIAL OF UNEMPLOYMENT BENEFITS WHEN AN EMPLOYEE IS DISCHARGED FOR ENGAGING IN VIOLENT CONDUCT DURING THE COURSE OF A STRIKE. 33

VI. CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Adkins v. Gatson,
192 W. Va. 561, 453 S.E.2d 395 (1994) 5

Alex Energy, Inc. v. Board of Review of Workforce W. Va.,
2013 WL 4726830 (W. Va.)(memorandum) 21

Baker v. General Motors Corp.,
478 U.S. 621 (1986) 36

Board of Educ. of County of Mercer v. Wirt,
192 W. Va. 568, 453 S.E.2d 402 (1994) 23

Brammer v. West Virginia Human Rights Commission,
183 W. Va. 108, 394 S.E.2d 340 (1990) 22

Brown v. Gobble,
196 W. Va. 559, 474 S.E.2d 489 (1996) 32-33

Carter v. Michigan Employment Security Commission,
364 Mich. 538, 111 N.W.2d 817 (1961) 28

Caruso v. Commonwealth Unemployment Compensation Board of Review,
122 Pa. Cmwlth. 351 (1988) 27

Dailey v. Board of Review, West Virginia Bureau of Employment Programs,
214 W. Va. 419, 589 S.E.2d 797 (2003) 28-30

Doughty v. Review Bd. of Dept. of Workforce Development,
784 N.E.2d 524 (Ind. Ct. App. 2003) 26

Duskey v. Central West Virginia Aging Services, Inc.,
2013 WL 5966963 (W. Va.)(memorandum) 21

Federoff v. Rutledge,
175 W. Va. 389, 332 S.E.2d 855 (1985) 33

Herbert J. Thomas Mem'l Hosp. v. Bd. of Review of W. Va. Bureau of Employment Programs, 218 W. Va. 29, 620 S.E.2d 169 (2005) 33

Horsehead Resource Development Co., Inc. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO, 321 NLRB No. 177 at *29 (N.L.R.B.), 321 NLRB 1404, 153 L.R.R.M. (BNA) 1200, 1996 WL 506087 (N.L.R.B.) 25

Jackson v. Doyal,
231 So.2d 462 (La. Ct. App. 1970) 26

James F. Humphreys & Associates, L.C. v. Board of Review,
216 W. Va. 520, 607 S.E.2d 849 (2004) 33

Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n,
183 W. Va. 15, 393 S.E.2d 653 (1990) 35

Kayser-Roth Corp. v. Textile Workers Union of America, AFL-CIO,
479 F.2d 524 (6th Cir. 1973) 36

Kessel v. Monongalia County General Hosp. Co.,
215 W. Va. 609, 328 600 S.E.2d 321, 328 (2004) 35

Lawrence v. Barlow,
77 W. Va. 289, 87 S.E. 380 (1915) 34-35

McGlone v. Superior Trucking Co., Inc.,
178 W. Va. 659, 363 S.E.2d 736 (1987) 19-21

MHC, Inc. v. International Union, United Mine Workers of America,
685 F. Supp. 1370 (E.D. Ky. 1988) 37

Miller v. Deepgreen West Virginia, Inc.,
2012 WL 3091094 (W. Va.)(memorandum) 22

Miner v. Administrator,
23 Conn. Supp. 206 (1961) 25-26

Montgomery v. Chesapeake & Potomac Telephone Co.,
121 W. Va. 163, 3 S.E.2d 58 (1939) 20

Neeley v. Johnson,
215 Va. 565, 211 S.E.2d 100 (1975) 20

N.L.R.B. v. Fansteel Metallurgical Corp.,
306 U.S. 240 (1939) 36

NSA v. United Steelworkers of America, AFL-CIO,
2000 WL 33665521 (N.L.R.B.) 24-25, 31

Sarrazine v. L. Karp & Sons,
1996 WL 355362 (N.D. Ill.) 36-37

State v. Goodwill,
33 W. Va. 179, 10 S.E. 285 (1889) 34

State ex rel. Tuck v. Cole,
182 W. Va. 178, 386 S.E.2d 835 (1989) 35

Stefanko v. West Virginia Bur. of Employment Programs,
2013 WL 3242777 (W. Va.)(memorandum) 21

Summers v. Gatson,
205 W. Va. 198, 517 S.E.2d 295 (1999) 33

UB Services, Inc. v. Gatson,
207 W. Va. 365, 532 S.E.2d 365 (2000) 28

Verizon Services Corp. v. Board of Review of Workforce West Virginia,
2013 WL 5967047 (W. Va.)(memorandum) 21, 31-32

Widner v. Jones,
2013 WL 3242839 (W. Va.)(memorandum) 21

Williamson v. Independence Coal Co., Inc.,
2013 WL 2495139 (W. Va.)(memorandum) 21-22, 29

Workman v. Clear Fork Lumber Co.,
111 W. Va. 496, 163 S.E. 14 (1932) 18-19

Yates v. Chair, Bd. of Review,
2013 WL 2157694 (W. Va.)(memorandum) 22, 30

STATUTES

W. Va. Code § 21A-6-3 ..... passim

W. Va. Code § 29A-5-4(5) 22

I. ASSIGNMENTS OF ERROR

1. Contrary to the standard adopted by this Court for appellate review of unemployment compensation decisions by the Board of Review, the Circuit Court of substituted its findings of fact for those of the Administrative Law Judge and Board of Review.

2. Contrary to W. Va. Code § 21A-6-3 and this Court's decisions applying that statute, the Circuit Court erred in ruling that throwing a jack rock at a supervisor's vehicle as it is entering a plant during a strike did not constitute "gross misconduct."

3. Contrary to the standard adopted by this Court for an employer's burden of proof in an unemployment compensation case, the Circuit Court erroneously applied a clear and convincing burden of proof.

4. Contrary to the standard adopted by this Court for appellate review of unemployment decisions by the Board of Review, the Circuit Court erred by holding that employees have a "property right" in employment that gives employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of economic capital punishment" in the form of denial of unemployment benefits when an employee is discharged for engaging in violent conduct during the course of a strike.

II. STATEMENT OF THE CASE

This is an unemployment compensation case filed by an employee of the Ravenswood Aluminum Plant, Claimant/Respondent, Terry W. McCarthy ["Claimant"],

who was terminated under the Employer's Rules of Conduct by Employer/Petitioner, Alcan Rolled Products Ravenswood, LLC ["Employer"], for gross misconduct as a result of picket line violence during an August-September 2012 strike against the Employer.

During the strike, Claimant tossed a "jack rock" weapon into the path of a car carrying Employer's management employees to the Ravenswood Aluminum Plant. At the administrative level, a WorkForce West Virginia deputy; an Administrative Law Judge; and the full Board of Review unanimously concluded that (1) Claimant engaged in violent conduct during the course of a strike; (2) Claimant was discharged for "gross misconduct;" and (3) Claimant was not entitled to unemployment compensation benefits.

Even though the Employer presented eyewitness testimony that Claimant attempted to damage vehicles occupied by management employees traveling to the Ravenswood Aluminum Plant during a strike that was work-related, and introduced clear support that his actions both violated the Employer's Rules of Conduct and constituted "gross misconduct," the Circuit Court applied the wrong burden of proof; failed to apply the correct standard of appellate review; misstated the law regarding the disqualifying nature off-premises, off-hours violent acts; misstated the law regarding an employee's "property interest" in employment including a "right to strike" and engage in violent conduct in conjunction with the exercise of that "right;" and substituted its findings of fact for those of the Administrative Law Judge and the Board of Review on conflicting evidence, reversing their decisions and ordering that Claimant receive unemployment compensation benefits.

It is from that order applying the wrong burden of proof; misapplying the correct standard of appellate review of a decision of the Board of Review; and misstating the law that Employer is pursuing its appeal.

III. SUMMARY OF ARGUMENT

There was substantial evidence that Claimant engaged in a violent act during a strike and threw a jack rock under the vehicle of one of Employer's supervisors as that supervisor approached a picket line at the entrance to the Ravenswood Aluminum Plant. Based upon that substantive evidence, a WorkForce West Virginia deputy; an Administrative Law Judge; and the Board of Review concluded that (1) Claimant engaged in violent conduct during the course of a strike; (2) Claimant was discharged for "gross misconduct;" and (3) Claimant was not entitled to unemployment compensation benefits.

On appeal, the Circuit Court erroneously applied a "clear and convincing evidence" burden of proof on Employer, rather than the correct "preponderance of the evidence" burden of proof; the Circuit Court misapplied the "clearly wrong" standard of appellate review of a decision of the Board of Review and reversed the factual findings of an Administrative Law Judge based on conflicting evidence involving issues of witness credibility; the Circuit Court erroneously concluded that this Court has held than off-premises, off-hours violent conduct by employees cannot constituted "gross misconduct" under the unemployment statute; and the Circuit Court erroneously held that employees have a "property right" in employment that gives employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of

economic capital punishment" in the form of denial of unemployment benefits when an employee is discharged for engaging in violent conduct during the course of a strike.

Accordingly, Employer respectfully requests that this Court set aside the Circuit Court's order and reinstate the decision of the Board of Review ruling that Claimant engaged in "gross misconduct" warranting the denial of unemployment benefits.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Circuit Court's decision to substitute its findings of fact for those of the Board of Review contrary to the "clearly wrong" standard of appellate review is probably insufficient to warrant oral argument, but the Circuit Court's application of an erroneous "clear and convincing evidence" burden of proof; its holding that this Court's precedents preclude a finding of "gross misconduct" if an employee's violent acts occur off-premises and off-hours; and its decision recognizing a "right to strike" that precludes the "infliction of economic capital punishment" in the form of the denial of workers' compensation benefits when an employee is discharged for engaging in violent conduct during the course of a strike is unprecedented as far as the Employer is aware and warrants oral argument pursuant to R. App. P. 20 which provides for "Rule 20" argument in "cases involving issues of first impression" and "cases involving issues of fundamental public importance."

Obviously, if employees enjoy some sort of "right to strike" that not only raises an employer's burden to "clear and convincing" evidence, but includes the right to engage in violent conduct during the course of a strike without the "fear" of losing their

unemployment benefits if they are discharged as a result of engaging in such violent conduct, then the health and safety of not only management employees, but co-employees, law enforcement, and the general public will be placed at greater risk in a manner the Legislature never intended in providing unemployment compensation benefits as a safety-net to employees who through no fault of their own become unemployed.

V. ARGUMENT

A. STANDARD OF REVIEW

In Syllabus Point 3 of *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994), this Court held, "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 is of judicial review is *de novo*."

Here, rather than giving "substantial deference" to the findings of fact by the Board of Review, the Circuit Court substituted its factual findings: "[T]he evidence of the employer at best is contradictory and confusing and does not rise even to the level of meeting the employer's burden of preponderance of the evidence test, and falls far short of clear and convincing evidence." App. 255. Under the proper standard of review, it was error for the Circuit Court to substitute its view of the evidence for that of the Administrative Law Judge and Board of Review, particularly where as the Circuit Court acknowledged, the evidence was conflicting.

With respect to any "purely" legal question, the Circuit Court improperly applied a "clear and convincing evidence" test to Employer's burden of proving Claimant's "gross misconduct;" misinterpreted this Court's precedents to hold that an employee's violent acts can never constituted "gross misconduct" if they occur off-premises and off-hours; and interjected some sort of First Amendment/Fourth Amendment test having no precedent in the law of unemployment compensation to the effect that employees have "property rights that a person has in his right to earn a living," giving those employees "the right to strike" and apparently engage in violent conduct in the course of exercising "the right to strike" that precludes the "infliction of economic capital punishment" in the form of the denial of workers' compensation benefits when an employee is discharged for engaging in violent conduct during the course of a strike. App. 255-256.

Of course, this Court has uniformly applied a "preponderance of the evidence" standard in unemployment cases involving the assertion of disqualifying "gross misconduct;" violent conduct by employees can constitute "gross misconduct" even if they occur off-premises and off-hours; and there is no "right" to engage in violent conduct during the course of a strike, and the Circuit Court's basing its decision to reverse the ruling of the Board of Review based upon a ruling that such "right to strike" exists "without the fear of infliction of economic capital punishment" in the form of denial of unemployment compensation benefits for employees who are discharged for engaging in violent conduct during the course of a strike was erroneous.

Accordingly, this Court should reverse the decision of Circuit Court of Kanawha County and reinstate the findings of fact and conclusions of law of the Board of Review denying unemployment benefits to an employee who engaged in violent conduct during a strike outside the Ravenswood Aluminum Plant.

B. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT COMPENSATION DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT SUBSTITUTED ITS FINDINGS OF FACT FOR THOSE OF THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW.

The Circuit Court's "Final Order" makes clear that the basis for its decision was that it simply viewed the evidence differently than the Board of Review: "The Court . . . is of the opinion that the Findings of Fact of the Board of Review and the Administrative Law Judge are clearly wrong in view of the evidence on the whole and are hereby reversed." App. 250.

The Court then proceeds for three pages making such findings as (1) "The alleged act was about one (1) mile from the employer's entrance, and did not take place on property owned or controlled by the employer," id., as if an employee who was discharged for committing a homicide off an employer's premises, for example, would still be eligible to receive unemployment compensation benefits if terminated as a result; (2) "There was no damage to any property of the employer," id., as if an employee who destroyed a police car, for example, would still be eligible to receive unemployment benefits if terminated as a result; (3) "No jack rocks . . . were produced at the hearing," App. 252, as if the failure to produce a violent instrumentality used by an employee who was discharged for engaging

in violent conduct, for example, would preclude the denial of unemployment benefits; (4) "No arrests were made as a result of the alleged acts of Mr. McCarthy," id., as if only criminal conduct that results in an employee's arrest may support the denial of unemployment benefits; (5) "If Mr. McCarthy was guilty of any act, it would be littering of a public road which is not an act of gross misconduct," App. 253, as if an employee who throws an explosive device that malfunctions and does not detonate but who is discharged as a result is still eligible for unemployment benefits because the employee would only be guilty of "littering of a public road; (6) "The alleged act did not take place during the course of Mr. McCarthy's work hours or on company property," id., as if an employee could violently assault a management employee or a police officer during a strike, but as long as the employee was not "on the clock" or "on company property," he or she would still be eligible for unemployment benefits once discharged as a result of that violent assault; and (7) Claimant was "an 18-year employee of the plant with no write-ups," App. 252, as if an employee can commit a violent act but still be eligible for unemployment benefits if discharged because the employee had never been the prior subject of discipline.

In addition to making findings of fact that were undisputed, but have no legal relevance, the Circuit Court supplanted itself for the Administrative Law Judge, who heard the testimony and observed the witnesses, and the Board of Review, which afforded proper deference to the Administrative Law Judge who was in a superior position to evaluation the respective credibility of the witnesses.

For example, the Circuit Court placed great emphasis on the fact that one of the witnesses, Rocky Elkins, testified that although he saw Claimant make "a motion like he was tossing something," that Mr. Elkins, who was operating a motor vehicle at the time, "didn't see anything come out of his hand," App. 250-251, as if observing a pedestrian appear as if he or she is throwing something is not evidence that the pedestrian actually threw something because the observant did not actually see a projectile come out of the pedestrian's hand. The physical act of throwing something at a moving vehicle cannot be mistaken for a sneeze or some other innocent gesture.

The Circuit Court also discussed, in a "grassy knoll/second gunman" sort of analysis, the proximity and position of the witness who testified that he Claimant throw a jack rock at the passing vehicles:

> The company did not call Jeffrey Wamsley, the driver of the car following Elkins,[1] but rather called David Johnson, a supervisor who was in the passenger seat of the Wamsley vehicle. (Tr. 58.) Johnson's testimony was that Wamsley's car was four to five feet from the Elkins car going through the intersection. (Tr. 59.) This puts the Elkins car blocking Johnson's view of where Mr. Elkins places Mr. McCarthy at the time of the alleged tossing motion. Johnson says he saw a

[1] The alleged failure to call Mr. Wamsley as a witness is a non-issue because Mr. Wamsley's statement was appended to an incident report admitted into evidence as a business record, Tr. at 81-82, and Claimant did not challenge Mr. Wamsley's statement at the hearing, App. 9-10 ("Q Okay. And you took it down verbatim the way that Mr. Wamsley was telling you? A. Yes."). That statement, admitted into evidence, states as follows:

> I was driving approximately from the rear of Rocky Elkins vehicle entering the north branch of the South Y (access) onto Century Road. I observed Terry McCarthy toss a jack rock at Rocky's back tire. I saw the jack rock bounce toward the back tire. There is no question that this was a jack rock.

App. 43.

> jack rock on the road between the Elkins car and the Wamsley vehicle (Tr. 60), and that the motion by Mr. McCarthy was after Elkins passed McCarthy (Tr. 65), and that the jack rock was thrown between the Elkins and Wamsley car. Johnson's testimony is totally inconsistent with Mr. Elkins' testimony, and is totally opposite from the statement Johnson signed stating "I witnessed Terry McCarthy toss a jack rock at Rocky's vehicle." (See Employer Exhibit 2, Page 8). Additionally, Johnson said he did not see McCarthy until the Elkins car had passed him (Tr. 50), and that's when he saw Mr. McCarthy make the motion. (Tr. 72.) The testimony of Johnson is in total conflict with that of Mr. Elkins who was in a much better position to observe Mr. McCarthy.

App. 251. This is precisely the type of reexamination of the evidence by the Circuit Court that this Court has prohibited in its adoption of a deferential standard of review.

A hearing was conducted before Administrative Law Judge, Truman L. Sayre, Jr., on December 21, 2012. App. 3.

The first witness who testified was Tom Slone, Manager of Environmental Health and Safety and Security at the Ravenswood Aluminum plant. App. 6. Mr. Slone authenticated an incident report dated August 7, 2012, which reported that as Mr. Elkins was driving into the plant Claimant was observed throwing a jack rock at Mr. Elkins' vehicle. App. 7. Mr. Slone testified that he obtained statements from Mr. Wamsley, Mr. Johnson, and Mr. Elkins regarding the incident. App. 8. Mr. Slone testified that, based upon his investigation, he concluded Mr. Wamsley and Mr. Johnson had observed Claimant throwing a jack rock at Mr. Elkins' vehicle. Id. Finally, Mr. Slone testified regarding the Employer's rules of conduct which, in Mr. Slone's judgment, warranted termination of Claimant's employment. App. 8-9.

The second witness who testified was Mr. Elkins, who worked as a production supervisor at the plant. App. 11. He was driving a lead vehicle into the plant because Mr. Wamsley and Mr. Johnson, who were following in their vehicle, had "never driven though a picket line before." Id. He testified that as he was approaching the picket line, Claimant "scooped down and make a bowl – like a bowling motion with his arm. I didn't see anything come out of his hand." App. 12. Mr. Elkins explained that after observing Claimant appear to have thrown something, he confirmed with others that Claimant had actually thrown a jack rock in the direction of Mr. Elkins' vehicle:

> And then later on, the people behind me - were about ten or fifteen minutes behind me and they said did you see Terry McCarthy? And I said yeah, I seen him. I said he was messing with me acted like he was throwing something at me.
>
> They said well, he did throw something, we seen it. And so I went back out for orientation. They made their statements. And like I said, I seen him make a motion but I didn't see anything come out of his hand.

App. 13.[2]

With respect to Claimant's position as Mr. Elkins observed him as he was approaching driving a Dodge Charger, Mr. Elkins testified that (1) he was driving in the

[2] See also App. 15 ("Q Mr. Elkins, did Mr. Wamsley and Mr. Johnson tell you that they saw Mr. McCarthy . . . toss an object when they came into the plant? MR. ELKINS. Yes. . . . JUDGE: Mr. Elkins, what were you told? . . . MR. ELKINS: I asked them why it took so long to get to where I was. They said didn't you see Sunshine, which is his nickname. JUDGE: Mr. McCarthy's nickname is Sunshine? MR. ELKINS: Yes, sir. I said yes, I seen him. I said he was messing with me. I think he acted like he was tossing something at me. They said he wasn't acting. They said they seen something, a jack rock is what they told me. And they'd stopped and told the guards at the entrance there."). Respectfully, it is absurd to suggest that Mr. Elkins was not credible when he was careful not to testify to anymore than he actually observed and only concluded that Claimant threw a jack rock when it was immediately confirmed by Mr. Wamsley and Mr. Johnson.

right-hand lane on his side of the yellow line; (2) Claimant was standing a foot to two feet off the edge of the left-hand lane all the way across the roadway; and (3) Claimant's appeared to throw something from across the roadway under Mr. Elkins' "left front quarter panel." App. 14. When asked if his vehicle could have blocked the vision of Mr. Wamsley and Mr. Johnson as Claimant appeared to throw something from across the roadway, Mr. Elkins testified, "I couldn't say, sir." App. 15.

The third witness who testified was Mr. Johnson, who was a supervisory employee. App. 16. Mr. Johnson confirmed the statement he provided to Mr. Slone regarding the incident. App. 17. Mr. Johnson testified that not only did he observe Claimant throw a jack rock at Mr. Elkins' vehicle, he even saw the jack rock bounce on the roadway. Id. Mr. Johnson testified:

> As we hit the intersection, since it's a swerve we have to slow down to probably five to six miles an hour, almost came to a stop. And I looked over and I seen someone go like this. And that's when I seen the jack rock in between Rocky's car and Jeff's car.
>
> JUDGE: And you were motioning with your right hand?
>
> MR. JOHNSON: Yes.
>
> JUDGE: With an underhand motion?
>
> MR. JOHNSON: Just like a toss.
>
> JUDGE: - about waist high?
>
> MR. JOHNSON: Yes.
>
> JUDGE: About two, two and a half foot swing in length?
>
> MR. JOHNSON: That's about right, yes.

JUDGE: Any other questions for him, ma'am?

BY MS. PRICE:

Q And you saw the jack rock?

A Yes.

Q And were you all able to successfully navigate around the jack rock?

A Yes. I remember the driver Jeff, he kind of swerved over. Like I said, it was a sharp turn, just a - just kind of maneuvered over top of it.

Q Were able to avoid it so you did not have damage to your vehicle?

A Exactly.

Q Now, you were the passenger in the vehicle, did you have any trouble seeing Mr. McCarthy?

A No.

App. 17-18.

As Mr. Johnson explained when cross-examined by Claimant's counsel, he was readily able to observe Claimant throwing the jack rock because Claimant was positioned across and off the oncoming lane of travel: "Q So I take it you being in the passenger side and you were four or five feet in front of - behind Mr. Elkins' car that you would've had a good view that Mr. McCarthy was on the right-hand side of the road? A Left-hand side. Q Left-hand side. Clear over on the left-hand side - A - yes." App. 18.

Moreover, Claimant was not only positioned completely across and off the oncoming lane of travel, he was standing at an intersection where Mr. Elkins' vehicle was negotiating a sharp turn, depicting in a photograph introduced and referenced at the

hearing before the Administrative Law Judge, App. __, and Claimant would have been in full view of Mr. Johnson when he observed him throwing the jack rock:

> MR. JOHNSON: We were directly behind him.
>
> MS. PRICE: You were behind him?
>
> MR. JOHNSON: Yes. But the intersection has a sharp curve.

App. 19.[3] Even a cursory examination of a the photograph of the site of the incident, App. 44, explains why Mr. Johnson was so adamant, despite the efforts of Claimant's counsel to reposition Claimant on the right hand side of the road contrary to the testimony of every witness, that Claimant was in plain view when he saw him throw the jack rock and why the Administrative Law Judge credited his testimony:

> Q His vehicle was between – the Elkins vehicle was between you and the other members who were on strike?
>
> A No. It wasn't in - it was (inaudible) - the Claimant was over here.
>
> Q When you say the Claimant was over here, where was he in –
>
> A Left-hand side. . . .
>
> Q The object that you say you saw him toss, where did it hit the road?

[3] See also App. 22 ("Q And just so that we're clear you had a lot of questions about where you were in relation to Mr. Elkins and Mr. Wamsley's view of Mr. McCarthy. Were you all in a curve? A Yes. Q When this occurred? A Yes. Q. So you weren't in a straight line? A Correct."). Just as Claimant is not permitted to reposition himself on the right side of the road if it suits his purposes, he should not be permitted to reposition the vehicles when both Mr. Wamsley and Mr. Johnson, as their vehicle was following Mr. Elkins' vehicle around a curve at an intersection, in order to claim, as the Circuit Court erroneously found, that Mr. Johnson's view of Claimant was somehow obstructed when Claimant was positioned well to the left of Mr. Elkins' vehicle as Mr. Elkins was turning away from Claimant at the time both Mr. Wamsley and Mr. Johnson observed him throwing a jack rock.

> A In the center of the road.
>
> Q You say the center, the center of the left lane? The center of the road or –
>
> A I can't - I don't know- I just seen it bounce. I seen it bounce in front of us.

App. 20.

The fourth witness at the hearing before the Administrative Law Judge was Claimant. App. 24. Although Claimant admitted that he heard jack rocks hitting the roadway, he denied throwing any. App. 25.

The fifth witness who testified was Ed Nunn, one of Claimant's co-workers. App. 27. But, his testimony placed himself with Claimant primarily when the two were sitting side-by-side in lawn chairs, App. 28, which would not have been when Claimant was observed by Mr. Elkins, Mr. Johnson, and Mr. Wamsley throwing a jack rock into the roadway, and which likely explains why his testimony is not referenced by the Circuit Court. Like Claimant, Mr. Nunn admitted seeing a jack rock in the roadway but again, like Claimant, Mr. Nunn did not testify to seeing anyone throw it. App. 29.

The final witness who testified was Luke Staskal, one of the Employer's human resources employees. App. 31. His testimony was limited to confirming that the Employer had made a video-recording of jack rocks being present in the roadway. Id.

Based upon his personal observations of the witnesses and the documentary evidence submitted at the hearing, the Administrative Law Judge found as fact the

following: (1) "On August 7, 2012, the claimant was manning the picket line at the South Y Entrance;"' (2) "The claimant threw a jack rock beneath and toward a vehicle entering the employer facility;" (3) "There were four vehicles in a convoy transporting supervisor personnel to work at the plant during the strike;" (4) "The claimant threw a jack rock into the roadway as the first vehicle drove pass [sic] the South Y Intersection;" (5) "The driver of the second vehicle swerved to avoid the jack rock in the roadway;" and (6) "The passenger in the second vehicle observed the claimant throw the jack rock into the roadway as the first car traveled past the claimant." App. 45-47.

These findings were based upon the testimony of Mr. Slone, who took statements from multiple witnesses who either saw Claimant make a throwing motion at Mr. Elkins vehicle, or who both saw Claimant make a throwing motion and saw the jack rock come out of Claimant's hand and bounce on the roadway, including Mr. Elkins, Mr. Johnson, and Mr. Wamsley. Even Claimant and Claimant's own witness, Mr. Nunn, admitted that a jack rock was in the roadway, and the only witness at the hearing who denied that it was Claimant who threw the jack rock was Claimant himself, as Mr. Nunn conceded that he was not always present with Claimant during the time the incident occurred.

In addition to supplanting its view of the evidence for that of the Administrative Law Judge who observed the witnesses testify, particularly with respect to the issue of whether Mr. Johnson could have seen Claimant when it was undisputed that Claimant was off the far left side of the road as the vehicle driven by Mr. Elkins was turning away to the right around a sharp turn, and referencing uncontested facts with no bearing on the

issue of whether Claimant engaged in gross misconduct, such as the fact that he had never been subjected to previous discipline, the Circuit Court erroneously faulted Employer for not producing evidence it was not required to produce.

First, the Circuit Court referenced the fact that the Employer did not introduce surveillance videotape, App. 252, but there was no evidence that there was any videotape surveillance at the time and in the area in which Claimant was observed by three witnesses either make a throwing motion and/or actually throw a jack rock at Mr. Elkins' vehicle. Moreover, as the Circuit Court noted in its order, there were twenty to twenty-five people present at the time with many people carrying signs, and it would have been difficult, if not impossible, to focus on a single person, such as the Claimant, quickly throwing a single jack rock under Mr. Elkins' vehicle.

Second, the Circuit Court referenced the fact that the Employer did not call Mr. Wamsley as a witness, and even erroneously applied "the legal principal [sic] that if called, the testimony of Wamsley would have been adverse to Constellium," id., which is not the law when Mr. Wamsley's statement was properly admitted as a business record, and the Employer introduced (1) the sworn testimony of Mr. Slone, who took Mr. Wamsley's statement and placed it into a business record; (2) the sworn testimony of Mr. Elkins, who clearly observed Claimant make a throwing motion at Mr. Elkins' vehicle; and (3) the sworn testimony of Mr. Johnson, who clearing observed not only Claimant making a throwing motion at Mr. Elkins' vehicle, but the jack rock coming from Claimant's hand and bouncing on the roadway near Mr. Elkins' vehicle.

The case relied upon by the Circuit Court to erroneously presume that Mr. Wamsley's testimony would have been adverse was *Workman v. Clear Fork Lumber Co.*, 111 W. Va. 496, 163 S.E. 14 (1932), in which the Court held in Syllabus Point 2 that, "Where the burden rests upon a party to prove a material fact at issue, and he fails to produce an important and necessary witness to such fact, a presumption is raised that the testimony of that witness, if introduced, would be adverse to the party having it in his power to produce him, unless, of course, there is some valid excuse for his nonproduction."

In *Workman*, however, the case involved a dispute between landowners and a timber company over the total amount of timber cut. The issue presented was not whether the failure of a party to call a witness created any presumption that such witness's testimony would have been unfavorable, but whether the failure of parties who are present at trial to testify on their own behalf justified an instruction to the jury regarding a negative presumption:

> A rejected instruction, tendered by defendant, would have told the jury, substantially, that the failure of plaintiffs to examine some of their witnesses present at the trial and in a position to testify on a material issue creates the presumption that such witnesses would have given evidence prejudicial to the plaintiffs with reference to said issue. ***This instruction was aimed at the plaintiffs James Workman and Emmett Scarbro, who were present at the trial and failed to testify in corroboration of Larkin Workman concerning the alleged conversation between the three and Jones.*** The instruction should have been given.

Id. at __, 163 S.E. at 15. (Emphasis supplied). Certainly, for example, if Claimant had not testified at the hearing despite being present, it would have been proper for the fact-finder to make a negative inference from his non-testimony, but Mr. Johnson was not

Employer's representative nor was he present at the hearing. Accordingly, the Circuit Court erred by applying Syllabus Point 2 of *Workman*.

More importantly, the leading case on a negative inference is not *Workman*, but *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987), where this Court held in Syllabus Point 3 that, "The unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the 'missing' witness would, if he or she had been called, have been adverse to the party failing to call such witness. To the extent that syllabus point 1 of *Vandervort v. Fouse*, 52 W. Va. 214, 43 S.E. 112 (1902), syllabus point 5 of *Garber v. Blatchley*, 51 W. Va. 147, 41 S.E. 222 (1902), and syllabus point 3 of *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S.E. 1025 (1895), are inconsistent with this opinion, they are hereby overruled."

In *McGlone*, this Court explained why prior cases, like *Workman*, adopted an overly broad application of the "missing witness" rule, including when, as in this case, "There is no presumption where there is already sufficient evidence so that that omitted would be merely corroborative." Id. at 664-665, 363 S.E.2d at 741-742. (Citation omitted). Here, of course, Mr. Elkins testified that he observed Claimant make a throwing motion; Mr. Johnson testified that he observed Claimant both make a throwing motion and observed the jack rock come out of Claimant's hand and bounce on the roadway; and Mr. Slone testified about taking Mr. Wamsley's statement, which was properly admitted as a business record. Accordingly, because Mr. Wamsley's sworn testimony would have been

cumulative, it was error for the Circuit Court to apply the "missing witness" rule. See, e.g., Syl. pt. 4, *Montgomery v. Chesapeake & Potomac Telephone Co.*, 121 W. Va. 163, 3 S.E.2d 58 (1939)("The evidence of an absent material witness is not presumed to be adverse to the side not procuring his [or her] attendance when the same material facts relating to the severity of the plaintiff's injury known to the absent witness have been testified to by other competent witnesses."); *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975)(missing-witness instruction should not have been given because the testimony of the absent doctors would have been cumulative).[4]

Indeed, the same concerns expressed by this Court in *McGlone* regarding the "missing witness" presumption demonstrate why it was misapplied by the Circuit Court in this case:

> Many of the leading commentators have criticized the reach of this concept and suggest caution in applying it. "This undoubted general principle has been frequently applied in numerous rulings, most of which throw no special light upon its doubtful features and are of little service as precedents." 2 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 285, at 199 (J. Chadbourn rev. 1979). "Despite the plenitude of cases supporting the inference, caution in allowing it is suggested with increasing frequency . . . . Possible conjecture or ambiguity of inference is often present . . . . [T]he availability of modern discovery procedures serves to diminish both the justification and the need for the inference." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 272, at 657 (E. Cleary gen. ed. 1972) (footnoted citations omitted).
>
> The courts, too, are mindful of the dangers inherent in the use of an instruction on the nonproduction of particular

[4] Analogously, it was error for the Circuit Court to make a negative inference from Employer's failure to introduce videotape evidence as both Claimant and his witness testified to observing a jack rock in the roadway.

> evidence at trial, for example, the danger that such an instruction permitting an adverse inference may add a fictitious weight to the case of the proponent of the instruction. *Cooper v. United States*, 415 A.2d 528, 533 (D.C. 1980).

Id. at 665, 363 S.E.2d at 742. Here, despite overwhelming evidence that Claimant threw a jack rock at Mr. Elkins' vehicle, the Circuit Court, ignoring the fact that Mr. Wamsley's statement was already in the evidence through the Employer's business records properly introduced, used the absence of his presence at trial to essentially trump all evidence to the contrary.

Unless the factual findings of an administrative law judge in an unemployment matter are "clearly wrong," whether those findings are in favor of claimant or employer, this Court has recently and consistently held that they must be affirmed.[5]

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[5] See, e.g., *Duskey v. Central West Virginia Aging Services, Inc.*, 2013 WL 5966963 at *2 (W. Va.)(memorandum)("[T]he findings of the administrative law judge are not clearly wrong."); *Verizon Services Corp. v. Board of Review of Workforce West Virginia*, 2013 WL 5967047 at *4 (W. Va.)(memorandum)("On the record before us, we simply cannot conclude that the Labor Dispute Tribunal and the Board of Review were clearly wrong . . . ."); *Alex Energy, Inc. v. Board of Review of Workforce W.Va.*, 2013 WL 4726830 at *2 (W. Va.)(memorandum)("While petitioner argues that the circuit court erred in affirming the Board of Review's order because it was based upon clearly wrong findings of fact and erroneous conclusions of law, the Court disagrees."); *Stefanko v. West Virginia Bur. of Employment Programs*, 2013 WL 3242777 at *2 (W. Va.)(memorandum)("Upon our review, the Court concludes that the circuit court did not improperly review the Board's decision nor did it err in affirming it."); *Widner v. Jones*, 2013 WL 3242839 at *2 (W. Va.)(memorandum)("Upon our review, the Court concludes that the circuit court did not improperly review the Board's decision nor did it err in affirming it."); *Williamson v. Independence Coal Co., Inc.*, 2013 WL 2495139 at *3 (W. Va.)(memorandum)("After careful consideration, this Court concludes that the circuit court did not err in affirming the Board of Review's December 14, 2009 order indefinitely disqualifying Petitioner from receiving unemployment benefits based upon a finding that she was discharged for gross misconduct."); *Yates v. Chair, Bd. of Review*, 2013 WL 2157694 at *2 (W. Va.)(memorandum)("Petitioner had a number of absences after receiving the written warning for which she provided no doctor's excuse. Therefore, we find that the circuit court did not err by finding that petitioner's continued absenteeism constituted 'gross misconduct.'"); *Miller v. Deepgreen West Virginia, Inc.*, 2012 WL 3091094 at *1 (W. Va.)(memorandum)("[T]he Court finds no error in the circuit court's conclusions that there was

This standard is derived from the Administrative Procedures Act which states, "The court . . . 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 . . . Clearly wrong in view of the reliable, probative and substantial evidence of the whole record." W. Va. Code § 29A-5-4(5).

Where there is conflicting evidence, or conflicting inferences which may be drawn from the evidence, deference must be given to the resolution arrived at by the Administrative Law Judge. *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 111, 394 S.E.2d 340, 343 (1990)("The record contains conflicting evidence on the employer's motivation for discharging the complainant. These conflicts were resolved by the fact finder in favor of the complainant."). Obviously, the Circuit Court's analysis in this case fails this test as the Circuit Court acknowledged that the evidence regarding whether Claimant threw the jack rock was conflicting. When the evidentiary record contained conflicting evidence, the Circuit Court was supposed to defer to the Administrate Law Judge's resolution of that conflicting evidence and the failure to defer constitutes reversible error.

Likewise, the clearly erroneous standard "'does not entitle a reviewing court to reverse the finder of fact simply because it may have decided the case differently.' *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528

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adequate evidence to support the Board's decision and that Mr. Miller failed to show that the Chief ALJ's findings, as adopted by the Board, were 'clearly wrong.'").

(1985)." *Board of Educ. of County of Mercer v. Wirt*, 192 W. Va. 568, 578–79, 453 S.E.2d 402, 412–13 (1994). Indeed, this Court has observed:

> "'In applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" 470 U.S. at 573, 105 S. Ct. at 1511, 84 L. Ed. 2d at 528, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L.Ed.2d 129, 148 (1969). Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. 470 U.S. at 573-74, 105 S. Ct. at 1511, 84 L. Ed.2d at 528. Moreover, we must afford the lower tribunal's findings great weight in this case because the factual determinations largely are based on witness credibility.

Wirt, supra at 578, 453 S.E.2d at 412. Here, of course, because three witnesses saw Claimant either make a throwing motion at Mr. Elkins' vehicle and/or saw Claimant both make a throwing motion and saw a jack rock come out of his hand and bounce on the roadway near Mr. Elkins' vehicle and only Claimant denied throwing the jack rock, with his co-worker testifying that he saw the jack rock, but did not see Claimant throw it, the credibility of the witnesses was crucial and, as this Court has held, it was improper for the Circuit Court to supplant its view of the credibility of the witnesses for that of the Administrative Law Judge, who was able to view their demeanor and make his own credibility determinations based upon his personal observations of the witnesses.

Accordingly, the Circuit Court erred by reversing the factual findings of the Administrative Law Judge and Board of Review where there was conflicting evidence, warranting reversal of the Circuit Court's decision and reinstatement of the decision of the Board of Review.

C. CONTRARY TO W. VA. CODE § 21A-6-3 AND THIS COURT'S DECISIONS APPLYING THAT STATUTE, THE CIRCUIT COURT ERRED IN RULING THAT THROWING A JACK ROCK AT A SUPERVISOR'S VEHICLE AS IT IS ENTERING A PLANT DURING A STRIKE DID NOT CONSTITUTE "GROSS MISCONDUCT."

It has been held that throwing jack rocks during the course of a strike justifies termination of employment. See, e.g., *NSA v. United Steelworkers of America, AFL-CIO*, 2000 WL 33665521 (N.L.R.B.)("Newman was discharged for his conduct on June 23, 1998, three days after the commencement of the strike in following a bus carrying replacement employees from the plant to lodging in Owensboro, Kentucky and throwing 'jackrocks' under the side of the bus as he passed it on the road. 'Jackrocks' are a three pronged bent nail device which are fashioned so that one of the points of the nails faces upward in order to puncture tires of vehicles. They apparently serve no other purpose. These items were regularly strewn by picketers on the drive to the plant in order to flatten the tires of individuals working or making delivery or transporting product from the plant. . . . I do not credit Newman's testimony which I found to be unconvincing. I find that Herrin had an honest belief that Newman had thrown the jackrocks under the moving bus carrying replacement employees. This was a violent act which could have resulted in the death or injury of the occupants of the bus and the other vehicles and the discharge of an employee engaged in similar conduct would normally be the penalty for such conduct. . . . I find Respondent did not violate the Act by its discharge of Newman."); *Horsehead Resource Development Co., Inc. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO*, 321 NLRB No. 177 at *29 (N.L.R.B.), 321 NLRB 1404, 153 L.R.R.M. (BNA) 1200, 1996 WL 506087 (N.L.R.B.)("Crabtree was also discharged due to tossing jackrocks 'onto

roadway at entrance to plant causing damage to the tire of a vehicle entering plant.' . . . Flanagan testified that the person who threw the jackrock was Thomas Crabtree. He testified that a foreman, who he believes 'might have been Sub Boles, I'm not really sure on that' identified Crabtree, based upon Flanagan's description of the clothing worn. Flanagan did not recognize Crabtree. . . . I do not credit Crabtree's denial of this conduct and find that Flanagan's identification of Crabtree is sufficient. . . . I credit Flanagan's testimony here and find that Crabtree's conduct here and damage to the property it caused warranted his discharge.").

Likewise, courts have held that those who engage in violent acts may be disqualified from the receipt of unemployment benefits even if those violent acts occur outside the scope of employment and off the employer's premises but are related to strike activities.

In *Miner v. Administrator*, 23 Conn. Supp. 206 (1961), for example, an employee standing in a picket line threw a rock through the windshield of an automobile as it was entering the employer's grounds. Under those circumstances, the court held it appropriate to deny unemployment benefits:

> The purpose of the Connecticut Unemployment Compensation Act, chapter 567 of the General Statutes, is to provide benefits to employees willing and able to work and who have been discharged through no fault of their own. See §§ 31-235, 31-236. The corrected finding establishes that this employee hurled a rock through the windshield of a car entering his employer's premises and that he had joined the picket line that morning at the end of his shift. The act itself was clearly wilful misconduct; *Bigelow Co. v. Waselik*, 133 Conn. 304, 308, 50 A.2d 769; and he was still, at that moment,

> an active employee. See *Ekco Products Co.*, 117 N.L.R.B. 137, 39 L.R.R.M. 1184, 1190; *Leiter Mfg. Co.*, 112 N.L.R.B. 843, 36 L.R.R.M. 1123, 1124-5. In picketing while the plant was in operation, he obviously was trying to influence the outcome of the strike, which concerned itself with hours, wages and working conditions. His act, therefore, was directly connected with his employment and was committed at the entrance of his employer's plant while it was in operation. The picketing itself was not an act of misconduct, since picketing an employer's premises is a right given employees as a part of the employment relationship, and since claimant had not even left the vicinity of the plant after completing his day's work, it is difficult to separate his acts from his employment.
>
> To sustain the commissioner's ruling upon the highly technical ground that this claimant had decided to leave his job and join the strikers as of the moment he walked out the gates of the plant and that therefore his act of violence, committed at those very gates, was not misconduct in the course of his employment would appear to distort the purposes of the act and offend public policy by rewarding a violent picketer rather than condemning his act of unlawful violence.

Id. at 474; see also *Doughty v. Review Bd. of Dept. of Workforce Development*, 784 N.E.2d 524 (Ind. Ct. App. 2003)(unemployment benefits denied for striking worker who assaulted replacement worker after she had left employer's facility); *Jackson v. Doyal*, 231 So.2d 462 (La. Ct. App. 1970)(unemployment benefits denied where striking employee followed supervisory personnel after they departed place of employment and bumped the employee's vehicle into the rear of the supervisory personnel's vehicle); see also *Caruso v. Commonwealth Unemployment Compensation Board of Review*, 122 Pa. Cmwlth. 351 (1988)(unemployment benefits denied where worker appeared at supervisor's residence and harassed and terrorized supervisor's wife and small child accusing supervisor of being a "company man" instead of a "union man").

As noted in the Circuit Court's ruling, W. Va. Code § 21A-6-3(2) provides:

> Upon the determination of the facts by the commissioner, an individual is disqualified for benefits . . . 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 thirty 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 . . . . or any other gross misconduct, he or she is disqualified for benefits until he or she has thereafter worked for at least thirty days in covered employment . . . .

Final Order at 4. After hearing the evidence, the Administrative Law Judge, in a ruling confirmed by the Board of Review, properly concluded as follows:

> The claimant was discharged. The claimant contends that the incident occurred off premises – not on employer property. It is considered the claimant's attempt to damage property was work related, the claimant was attempting to discourage supervisors from traveling to work during the strike. David Johnson, Supervisor, was a passenger in the second vehicle. Mr. Johnson observed the claimant throw a jack rock in to the roadway as the first vehicle traveled past the claimant. The driver of the second vehicle swerved to avoid the jack rock which the claimant had thrown into the roadway. The claimant's attempt to damage property, in violation of the employer policy, is a deliberate disregard of the employer's interest and constitutes gross misconduct. Accordingly, it is held the claimant was discharged for an act of gross misconduct. The claimant is disqualified.

App. 46. As previously discussed, this holding is consistent with decisions in other jurisdictions which have disqualified claimants from unemployment benefits who were discharged in conjunction with violent conduct occurring off-premises, off-hours in conjunction with a strike.

Just as it applied the wrong burden of proof; misapplied the "clearly wrong" standard of review; and misstated the holdings of cases relied on, the Circuit Court inaccurately applied this Court's case of *Dailey v. Board of Review, West Virginia Bureau of Employment Programs*, 214 W. Va. 419, 589 S.E.2d 797 (2003).[6]

In *Dailey*, the case did not involve, as the Circuit Court's order implies, Final Order at 4-5, an act of violence or destruction of property, but it merely involved an employee's failure to advise his employer that his driver's license had been suspended. Id. at 422, 589 S.E.2d at 800. Moreover, contrary to the Circuit Court's order, Final Order at 5, this Court did not state that its previous decision in *UB Services, Inc. v. Gatson*, 207 W. Va. 365, 532 S.E.2d 365 (2000), where it correctly determined that an incident in which an employee savagely beat a co-worker during a domestic dispute at the employee's residence constituted "gross misconduct" under W. Va. Code § 21A-6-3(2), was wrongly decided.

Rather, it noted that the definition of "gross misconduct" used by the Court in *UB Services*, had been taken from a Michigan case, *Carter v. Michigan Employment Security Commission*, 364 Mich. 538, 111 N.W.2d 817 (1961), and that a broader examination of an appropriate definition of "gross misconduct" was appropriate as many states distinguish "gross misconduct" from simple "misconduct" for unemployment purposes. Id. at 424-426, 589 S.E.2d at 802-804.

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[6] The *Dailey* opinion was rendered in a 3-2 opinion authored by the late Justice Albright, in which then Chief Justice Starcher and then Justice McGraw joined, and then Justices Davis and Maynard dissented.

Ultimately after conducting a broader examination of cases distinguishing "gross misconduct" from simple "misconduct" for unemployment purposes, this Court held in Syllabus Point 4, in part, of *Dailey* that, "For purposes of determining the level of disqualification for unemployment compensation benefits under West Virginia Code § 21A-6-3, an act of misconduct shall be considered gross misconduct where the underlying misconduct consists of (1) willful destruction of the employer's property; (2) assault upon the employer or another employee in certain circumstances . . . or (5) any other gross misconduct which shall include but not be limited to instances where the employee has received prior written notice that his continued acts of misconduct may result in termination of employment." To conclude that the employee's vicious assault on a co-worker in *UB Services* does not satisfy this definition is preposterous as it would have constituted (1) an "assault" upon "another employee" and (2) "other gross misconduct . . . not limited to instances where the employee has received prior written notice" is preposterous.[7]

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[7] For example, in *Williamson*, supra at *3, this Court recently affirmed the denial of unemployment benefits for an employee who had not received a prior written warning, but had been counseled about safety issues, and who had "started moving her drill in spite of being advised to wait until the co-worker ahead of her could move his drill out of the way," concluding that "because of Petitioner's 'insubordination and failure to follow safety policies' related to the incident . . . this Court concludes that the circuit court did not err in affirming the Board of Review's December 14, 2009 order indefinitely disqualifying Petitioner from receiving unemployment benefits based upon a finding that she was discharged for gross misconduct." Similarly, in *Yates*, supra at *2, this Court affirmed the denial of unemployment benefits to an employee for "gross misconduct" based merely upon her excessive absenteeism. If moving a drill before a co-worker could move his drill out of the way, without any prior written warning or excessive absenteeism, with a prior written warning, can constitute "gross misconduct" disqualifying the terminated employee from the receipt of unemployment benefits, how can Claimant credibly argue that he did not engage in "gross misconduct" when he threw a jack rock at a supervisor's vehicle as it was entering the plant?

Not only does Syllabus Point 4 of *Dailey* support the Administrative Law Judge's and Board of Review's decision to deny Claimant unemployment benefits for "gross misconduct," this Court's holdings in Syllabus Points 5 and 6 also support those decisions:

> 5. Except where an employee has received a prior written warning, the phrase, "other gross misconduct," in West Virginia Code § 21A-6-3(2) evidences the legislature's intent to provide some element of discretion in the Board and reviewing courts, based upon the peculiar facts of each case.
>
> 6. Where the catch-all provision of "other gross misconduct" in West Virginia Code § 21A-6-3(2) is utilized as a basis for denial of all unemployment compensation benefits in the absence of a qualifying prior written warning, the employer is required to furnish evidence that the act in question rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items, and a resolution of matters brought under this subdivision must be analyzed on a case-by-case basis.

W. Va. Code § 21A-6-3 begins by stating, "***Upon the determination of the facts by the commissioner***, an individual is disqualified for benefits . . . ." [Emphasis supplied]. It is for this reason that this Court has adopted a "clearly wrong" standard when reviewing factual determinations by the Board of Review. Here, the Board of Review took a look at the evidence presented to the Administrative Law Judge and appropriately found it constituted "gross misconduct," which should have been afforded substantial deference by the Circuit Court, but it was not.

Moreover, as other courts have held, throwing a jack rock at a supervisor's vehicle as it is entering a plant during a strike "rises to a level of seriousness equal to or exceeding that" of "willful destruction of the employer's property;" "assault upon the employer or another employee in certain circumstances;" or "any other gross misconduct which shall

include but not be limited to instances where the employee has received prior written notice that his continued acts of misconduct may result in termination of employment," all of which included in the statutory definition of "gross misconduct." As the NLRB stated, the act of throwing jack rocks at vehicles is "a violent act which could have resulted in the death or injury of the occupants . . . and the discharge of an employee engaged in similar conduct would normally be the penalty for such conduct." *NSA*, supra.

Accordingly, the Circuit Court erred in failing to correctly apply the "clearly wrong" standard for Board of Review decisions and misapplying this Court's ruling in *Dailey* and its order should be set aside and the order of the Board of Review should be reinstated.

D. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR AN EMPLOYER'S BURDEN OF PROOF IN AN UNEMPLOYMENT COMPENSATION CASE, THE CIRCUIT COURT ERRONEOUSLY APPLIED A CLEAR AND CONVINCING BURDEN OF PROOF.

Not only did the Circuit Court fail to correctly apply the "clearly wrong" standard and misapply this Court's ruling in *Dailey*, it applied the wrong burden of proof on the Employer to establish Claimant's "gross misconduct."

As recently as in *Verizon*, supra at *3, this Court reiterated, '"'T]he burden of persuasion is upon the former employer to demonstrate by the preponderance of the evidence that the claimant's conduct falls within a disqualifying provision of the unemployment compensation statute." *Peery [v. Rutledge]*, 177 W. Va. [548] at 552, 355 S.E.2d [41] at 45 (internal citations omitted).' *Herbert J. Thomas Mem'l Hosp. v. Bd. of*

Review of W. Va. Bureau of Employment Programs, 218 W. Va. 29, 32, 620 S.E.2d 169, 172 (2005)."

In this case, however, the Circuit Court did not apply a "preponderance of the evidence" standard to Employer's asserting that Claimant's conduct was disqualifying, but applied a "clear and convincing evidence" standard:

> Additionally, the evidence of the employer at best is contradictory and confusing . . . and falls short of clear and convincing evidence.
>
> Justice Frank Cleckley, writing for a unanimous court in *Brown v. Gobble*, 195 W. Va. 559, 564 (1996) [sic],[8] opined:
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>> . . . While the preponderance standard applies across the board in civil cases, a higher standard is needed where fairness and equity require more pervasive proof. . . . [T]his Court stated that 'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established. It should be the highest possible standard of civil proof. . . . The interest at stake ***in an adverse possession claim is not the mere loss of money*** . . . Rather, it ***often involves the loss of a homestead, a family farm or other property associated with traditional family and societal values***. To this extent, most courts have used the clear and convincing standard to protect these important property interests.

App. 255. (Emphasis supplied and citations omitted).

[8] The actual citation is *Brown v. Gobble*, 196 W. Va. 559, 474 S.E.2d 489 (1996).

Brown was an adverse possession case and the cases cited in *Brown* are adverse possession cases, but this is not an adverse possession case. Consequently, as this Court has uniformly applied a "preponderance of the evidence" standard in unemployment cases where employers have asserted "gross misconduct" as disqualifying a former employee for benefits,[9] the Circuit Court in this case erred in applying a "clear and convincing" evidence standard and its ruling should be set aside and the decisions of the

E. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT FOR APPELLATE REVIEW OF UNEMPLOYMENT DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT OF KANAWHA COUNTY ERRED BY HOLDING THAT EMPLOYEES HAVE A "PROPERTY RIGHT" IN EMPLOYMENT THAT GIVES EMPLOYEES "THE RIGHT TO STRIKE" AND TO ENGAGE IN VIOLENT CONDUCT IN THE CONTEXT OF A STRIKE "WITHOUT THE FEAR OF INFLICTION OF ECONOMIC CAPITAL PUNISHMENT" IN THE FORM OF DENIAL OF UNEMPLOYMENT BENEFITS WHEN AN EMPLOYEE IS DISCHARGED FOR ENGAGING IN VIOLENT CONDUCT DURING THE COURSE OF A STRIKE.

In an apparent effort to justify its application of an erroneous "clear and convincing evidence" standard, the Circuit Court held that employees have a "property right" in employment that gives those employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of economic capital punishment" in the form of denial of unemployment benefits:

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[9] See *Herbert J. Thomas Mem'l Hosp. v. Bd. of Review of W. Va. Bureau of Employment Programs*, 218 W. Va. 29, 32, 620 S.E.2d 169, 172 (2005)(applying preponderance of evidence standard in gross misconduct unemployment compensation case); *James F. Humphreys & Associates, L.C. v. Board of Review*, 216 W. Va. 520, 607 S.E.2d 849 (2004)(applying preponderance of evidence standard in gross misconduct unemployment compensation case); *Summers v. Gatson*, 205 W. Va. 198, 517 S.E.2d 295 (1999)(applying preponderance of evidence standard in gross misconduct unemployment compensation case); *Federoff v. Rutledge*, 175 W. Va. 389, 332 S.E.2d 855 (1985)(applying preponderance of evidence standard in gross misconduct unemployment compensation case).

West Virginia has long recognized the property rights that a person has in his right to earn a living. In *State v. Goodwill*, 33 W. Va. 179,[10] our Supreme Court held:

"The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property." Cited with approval in Lawrence v. Barlow, 77 W. Va. 289, 292 (1915).[11] [Emphasis added.]

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[10] The year of that case is not referenced in the Circuit Court's decision, but Goodwill was decided in 1889: *State v. Goodwill*, 33 W. Va. 179, 10 S.E. 285 (1889). The case had nothing to do with unemployment compensation or even the right to strike, but the constitutionality of a statute that criminalized the failure of mining or manufacturing companies to pay their employees in anything other than "lawful money of the United States." Id. at ___, 10 S.E. at 286. It is ironic that Circuit Court would cite *Goodwill* in support of Claimant's efforts to secure unemployment benefits in the course of a strike as this Court held in Syllabus Point 2 of *Goodwill* that, "The third section of chapter 63, Acts 1887, (Code 1887, p. 983) which prohibits persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as is specified in the said act, is unconstitutional and void." Of course, these pre-New Deal decisions of courts are a remnant of the past, but Employer can find no court which has held that employees have a "property right" in employment that gives those employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of economic capital punishment" in the form of denial of unemployment benefits.

[11] The Circuit Court was correct that *Goodwill* was cited in *Lawrence v. Barlow*, 77 W. Va. 289, 87 S.E. 380 (1915), but it was not cited with approval for the subject matter referenced in the Circuit Court's order. Rather, in *Lawrence*, which involved whether habeas corpus was an available remedy for those "confined in one of the hospitals for the insane," the Court cited *Goodwill* for a completely different proposition:

> If the petitioner has been restored to sanity, is he unlawfully deprived of his liberty? We think he is.
>
> > "The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to

> Here, the important property right is that of working at a job without fear of infliction of economic capital punishment where the worker has a right to strike, yet is discharged on weak, inconsistent and uncorroborated testimony.

Final Order at 7. Of course, none of this is correct.

First, there is no "property right" to continued employment in the private sector. See, e.g., *Kessel v. Monongalia County General Hosp. Co.*, 215 W. Va. 609, 328 600 S.E.2d 321, 328 (2004)("[P]laintiffs' alleged property right cannot derive from a private contract."); Syl., in part, *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989)("A state college administrator . . . has no property right in continued employment with the college beyond his current contract . . . .").

Second, there is no constitutional or common law "right to strike." Syl. pt. 1, *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 393 S.E.2d 653 (1990)("In the absence of legislation, the common law rule recognized in both federal and state courts is that public employees do not have the right to strike.").

Third, there is no "right" to unemployment compensation benefits to the extent that disqualifying a claimant for "gross misconduct" is somehow an unconstitutional

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> earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *People v. Gillson*, 109 N. Y. 398, 17 N. E. 343, 4 Am. St. Rep. 465.
>
> The above is quoted approvingly in *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863.

Id. at ___, 87 S.E. at 381. Unless the Circuit Court somehow believes that the "right to strike" is not only a "property right," but also is a "liberty right," its reference to *Lawrence* is confusing.

infringement on the claimant's "right to strike." See *Baker v. General Motors Corp.*, 478 U.S. 621 (1986)(Michigan statute denying unemployment benefits for any employee who provided financing for strike that caused the employee's unemployment by means other than payment of regular dues was valid); see also W. Va. Code § 21A-6-3(4)("Upon the determination of facts by the commissioner, an individual is disqualified for benefits . . . For a week in which his or her . . . unemployment is due to a stoppage of work which exists because of a labor dispute . . . .").

Third, even where a "right to strike" may exist, such as under the National Labor Relations Act, there is no right to engage in "violent" conduct in conjunction with such strike. See, e.g., *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939)("The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant."); *Kayser-Roth Corp. v. Textile Workers Union of America, AFL-CIO*, 479 F.2d 524, 528 (6th Cir. 1973)("The union's argument is in essence a contention that the results of picket line violence should be treated as additional penalties to be imposed upon a company whose unfair labor practices have caused a strike. This argument fails to consider that special appropriate remedial sanctions are available for unfair labor practices by a company, as have been invoked in this case. Furthermore, the Supreme Court has rejected the argument that violence by strikers should not be reimbursable if the strike was caused by the unfair labor practices of the company.")(citing *Fansteel*); *Sarrazine v. L. Karp & Sons*, 1996 WL 355362 at *11 (N.D. Ill.)("Violence on the picket line is not protected by federal labor law, and so Huffmaster's alleged breach of its duty to prevent that violence is also not preempted by federal labor

law."); *MHC, Inc. v. International Union, United Mine Workers of America*, 685 F. Supp. 1370, 1377 (E.D. Ky. 1988)("The NLRA provides the right to strike but this privilege does not include a license to commit acts of violence.").

Finally, Claimant's "discharge," which was not the issue before the Circuit Court in any event, was not based "on weak, inconsistent and uncorroborated testimony." Rather, Claimant and his witness admitted he was physically present when the incident occurred; Claimant and his witness admitted a jack rock was physically present; and Mr. Elkins' testimony was not inconsistent or uncorroborated as Mr. Elkins testified to Claimant making a throwing motion, Mr. Johnson testified to Claimant making a throwing motion and observing the jack rock come out of Claimant's hand and bounce on the roadway, and Mr. Slone testified that the reasons for the decision to discharge Claimant were set forth in his investigative report, which included the statement of Mr. Wamsley who, like Mr. Elkins and Mr. Johnson, observed Claimant making a throwing motion, and like Mr. Johnson, actually saw the jack rock fly from Claimant's hand and bounce on the roadway in the vicinity of Mr. Elkins' vehicle.

Accordingly, as employees do not have a "property right" in employment that gives those employees "the right to strike" and to engage in violent conduct in the context of a strike "without the fear of infliction of economic capital punishment" in the form of denial of unemployment benefits, the judgment of the Circuit Court of Kanawha County should be set aside, and the decision of the Board of Review should be reinstated.

VI. CONCLUSION

The Employer/Petitioner, Alcan Rolled Products Ravenswood, LLC, respectfully requests that this Court reverse the judgment of the Circuit Court of Kanawha County, and reinstate the decisions of a WorkForce West Virginia deputy; an Administrative Law Judge; and the full Board of Review concluded that Claimant/Respondent, Terry W. McCarthy, was discharged for gross misconduct and was not entitled to unemployment compensation benefits.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2014, a true and accurate copy of the foregoing **BRIEF OF THE PETITIONER** was mailed to counsel for all other parties to this appeal as follows:

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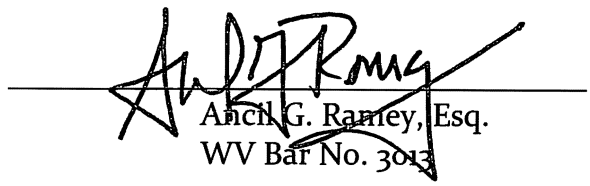

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