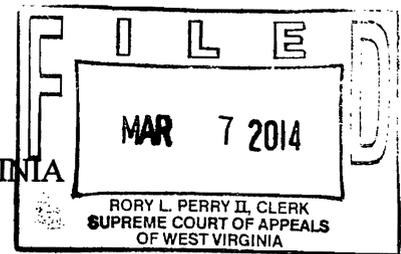


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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**DOCKET NO. 13-1242**

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**LIGHTNING ENERGY SERVICES, LLC,**

**Petitioner,**

**V.**

**Appeal from the final order of the  
Circuit Court of Kanawha County  
(13-AA-77)**

**BOARD OF REVIEW, WORKFORCE  
WEST VIRGINIA, RUSSELL L. FRY, as  
Commissioner and/or Acting Executive  
Director of Workforce West Virginia,  
JACK CANFIELD, as Chairman of the  
Board of Review, Workforce West Virginia,  
and AARON S. HORNE,**

**Respondents.**

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**BRIEF OF PETITIONER**

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**I. ASSIGMENTS OF ERROR**

A. The Board of Review erred in holding that Respondent Aaron S. Horne is not disqualified from receiving unemployment compensation benefits pursuant to West Virginia Code Section 21A-6-3.

1. The Board of Review erred as a matter of law in refusing to consider Petitioner Lightning Energy Services, LLC's alternative defenses.

2. The Board of Review erred as a matter of law in considering Lightning Energy's payment of wages to Mr. Horne within seventy-two hours of separation from employment as evidence of discharge.

3. The Board of Review erred as a matter of law in holding that Mr. Horne was discharged and, therefore, erred in placing the burden of proof on Lightning Energy.

4. Even assuming that Mr. Horne was discharged, the Board of Review erred in finding that Lightning Energy did not prove misconduct.

B. Lightning Energy should have been permitted to present additional evidence of Mr. Horne's embezzlement and other matters.

C. Neither the Board of Review nor the Circuit Court conducted an adequate review of the administrative record.

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

On January 20, 2013, Mr. Horne filed a claim for unemployment compensation benefits, naming Lightning Energy as his last employer. Workforce West Virginia sent Lightning Energy a request for separation information form, which Lightning Energy returned. On the form, a box was checked to indicate that Mr. Horne was discharged, but the handwritten explanation on the form stated as follows:

Person was Chief Operating Officer of company, reporting directly to Board of Directors, refused to communicate or answer phone calls of chairman over weekend of 1/11-13/2013, nor did he return urgent calls from Board members or chairman. Horne did not show up for work nor contact anyone regarding his absence. Horne abandoned his position on 1/14/2013. Horne did not take or make phone calls to chairman of the board. His desk was cleared & all personal effects were removed from office sometime between close of business 1/11/13 – and 7:30 am January 14 (1/14/13). It is our position Horne voluntarily left his position on 1/14/2013, official paperwork was completed 1/15/2013 stating he was discharged. Copies of his personnel file were removed from the premises between close of business 1/11/13 – 7:30 am January 14. This file contains written reprimands regarding Horne's performance.

A.R. at 51-52.

Workforce West Virginia issued its Deputy's decision on January 30, 2013. The Deputy's decision found as follows:

The claimant worked for the above employer as a Chief Operating Officer from November 21, 2011 to January 15, 2013. The claimant is determined to have quit when he failed to show up for work on January 14, 2013 and failed to contact the employer. The claimant's office had been cleaned and all personal effect [sic] were removed during the weekend.

A.R. at 55.

Through counsel Gregory H. Schillace, Mr. Horne filed a request for appeal. A.R. at 47. The Board of Review scheduled a telephonic hearing before Administrative Law Judge F. Malcolm Vaughan at 1:00 p.m. on March 15, 2013. The following issues were identified on the notice of hearing:

. . . Whether the claimant left work voluntarily without good cause involving fault on the part of the employer; *or* whether the claimant was discharged for misconduct, and if there was misconduct, was it simple or gross misconduct?

A.R. at 58 (emphasis added).

Mr. Horne appeared at the telephonic hearing with his attorney. Lightning Energy appeared by Michael Iuliucci its Chief Financial Officer. During the hearing, Mr. Horne testified that on January 15, 2013, he was told that he was fired and paid wages within seventy-two hours.

A.R. at 78. Mr. Horne testified further as follows on direct examination by Mr. Schillace:

Q Did you ever fail to return someone's telephone call?

A No, sir.

Q Now, in the statement of the Employer indicates [sic] that you cleaned out your office and cleaned out your desk during the weekend of January 13th through January 14th; is that accurate?

A Yes, that's accurate.

Q Why did you do that?

A Because I was told by several sources that Mr. Turner was going to come in and fire me on the beginning of the week.<sup>1</sup>

Q Did you intend to quit your job?

A No, I did not.

Q Did you intend to abandon your job?

A No, I did not.

Q Did you ever either abandon or quit your job?

A No, I did not.

. . .

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<sup>1</sup> Mr. Horne identified those "sources" as Tim Cassella, Ronda Michaels, Mr. Iuliucucci and "other various rumors" from Bill Smith, Vice-Chairman of the Board to Tracy Turner, Chairman of the Board. A.R. at 80. Mr. Horne admitted that none of his "sources" was superior to him. A.R. at 80.

Q Also, in the Employer's statement they talk about the personnel file. Did you have a personnel file?

A No, I did not.

Q Did you take any documents that didn't belong to you when you left?

A No, I did not.

Q Is the reason why you cleaned out your office and cleaned out your desk is you did not want to be embarrassed after they fired you?

A That is correct.

A.R. at 79.

Mr. Horne admitted under oath that he had been charged with embezzlement from Lightning Energy. A.R. at 81.

In response to questions from the ALJ, Mr. Iuliucci testified under oath in relevant part as follows:

Q Tell me just in a nutshell, this doesn't appear to be factual complex [sic], why is it that Aaron Horne no longer works for Lightning Energy?

A He abandoned his job.

Q On that one date?

A It was over the weekend, Your Honor. He did not return numerous phone calls from board members, mainly Mr. Tracy Turner. And on Monday we had incidences we were trying to deal with and Mr. Horne was nowhere to be found.

It's likely he spent most of the day at Greg Schillace's office.

Q Do you have any proof of that?

A When Mr. Horne came in at nine o'clock on Tuesday, the 15th, he was let known it was official he is no longer an employee of Lightning Energy because of his actions.

About two minutes after he walked out the door, we received a fax from Mr. Schillace was suing us [sic] and was representing Aaron Horne.

Q All right. Is there anything further you want to tell me?

A Mr. Horne is charged with embezzlement from the company to the tune of \$16,000. We have proof, checks signed by Mr. Horne from –

Q Don't tell me what proof you have unless you intend to present it to me today.

A I can fax it over to you –

Q Nope, nope. If you looked at your Notice of Hearing, all written evidence must have been submitted more than 24 hours before today's hearing –

A Okay.

Q – and provided – you're not going to do it now. What proof do you have other than an allegation you've made that he is guilty of any crime?

A I have plenty of proof, Your Honor. I have nothing I can – that you have in front of you.

Q Well, I don't have it; I don't consider it. Is there anything else you want to tell me?

A No sir.

...

JUDGE: Anything further on behalf of the company, Mr. Juliucci?<sup>2</sup>

MR. JULIUCCI: Yes. I neglected to say about the personnel file. I kept the personnel files. There was actually a personnel file that was missing when I came back right after this happened. His personnel file was gone.

JUDGE: That's not a proper subject for this forum. Anything further concerning the separation?

MR. JULIUCCI: No, sir. He voluntarily left his position.

JUDGE: I understand that. The Hour is 1:28 p.m. This hearing is concluded. I have a complete and thorough record in which to base a decision.

A.R. at 82-83.

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<sup>2</sup> Throughout the hearing transcript, Mr. Iuliucci is incorrectly referred to as Mr. Juliucci.

The ALJ issued his decision on March 22, 2013, which reversed the Deputy's decision.

The ALJ made the following relevant findings of fact:

3. The claimant learned from company sources that he was to be terminated. The person to whom the claimant reported, a Mr. Turner based both in the State of Texas and the State of North Dakota. In reliance of that information, which the claimant obviously found credible, he cleaned out his personal effects from his office, so he would not have to do so in front of his former co-workers, which he would have found embarrassing.

4. In fact, the claimant was terminated by Mr. Turner, ostensive because [sic] the claimant did not return a call to his superior. The claimant, given his job, is often out of the office and in the field, where he does not have adequate cell coverage. This is not the actual operant reason for the discharge.

5. At hearing it was learned that the claimant was discharged for alleged acts of embezzlement. The employer's representatives proffered that proof was available in the form of checks. These were not offered as proof at hearing. No evidence exists to establish that the claimant was guilty of any act of misconduct as a result of embezzlement.

6. The claimant was paid within 72 hours of his discharge, being further evidence of the nature of the separation being discharge.

7. The claimant did not quit his job. The claimant was discharged from his employment with the above employer, but not for misconduct.

A.R. at 59-60.

In addition, the ALJ made the following conclusion of law:

The employer discharged this claimant. Therefore, the employer has the burden of establishing by a preponderance of the evidence that the claimant was guilty of misconduct as defined above, in order that the claimant be disqualified from receiving unemployment compensation benefits. The employer has failed to meet its burden of proof. Allegations of misconduct are not proof of misconduct. The claimant cannot be disqualified on the evidence presented.

A.R. at 60.

On March 29, 2013, Lightning Energy filed an appeal from the decision of the ALJ. A.R. at 63. Lightning Energy argued that ALJ's findings of fact and conclusions of law are not supported by the evidence in the record or the law. Alternatively, Lightning Energy argued that

the matter should be remanded to the ALJ so that Lightning Energy could present evidence of Mr. Horne's embezzlement. A.R. at 70-71.

In addition, Lightning Energy separately filed a request for remand to the ALJ for the presentation of new evidence on the issue of embezzlement. The request for remand states in relevant part as follows:

Although Lightning Energy maintains that the claimant, who was Lightning Energy's Chief Operating Officer, voluntarily quit without fault on the part of the company, given ALJ Vaughan's determination that the claimant was discharged but not for misconduct, Lightning Energy should be given the opportunity to present evidence of the claimant's embezzlement. At the hearing before ALJ Vaughan, Lightning Energy attempted to offer such evidence, but was not afforded an adequate opportunity to do so.

At the hearing below, after the claimant acknowledged having been charged with embezzlement from Lightning Energy, the ALJ halted further questioning on the subject. The ALJ gave no consideration to the fact that the claimant has been charged with embezzlement from the company and, in fact, expressed an unwillingness to consider examination on the topic, stating that "[c]harges are not proof of misconduct." (*See* Tr. at 27, enclosed as "Exhibit A.")

The ALJ even expressed an unwillingness to hear testimony from Michael Iuliucci, Lightning Energy's Chief Financial Officer and its representative at the hearing below, regarding the claimant's embezzlement from the company . . . .

. . . At a minimum, Lightning Energy should have been given the opportunity to examine the claimant and offer testimony regarding the claimant's embezzlement from the company. Lightning Energy, however, was not given that opportunity.

A.R. at 108-09 (footnote omitted).

The request for remand further noted:

In addition to developing testimony regarding the claimant's embezzlement, if this matter is remanded, Lightning Energy will offer evidence of over \$16,000 worth of checks that support its position that the claimant embezzled from the company, demonstrating gross misconduct and warranting the claimant's disqualification from receiving unemployment compensation benefits. (*See* Iuliucci Aff., enclosed as "Exhibit B.") Upon information and belief, the checks reflect payments made by Rrhamco, Inc. to the claimant, rather than to Lightning Energy, for Lightning Energy materials sold by the claimant to Rrhamco, Inc. (*See* Iuliucci Aff., enclosed as Ex. B.)

A.R. at 109.

In his affidavit, which was attached to the request for remand, Mr. Iuliucci testified in relevant part as follows:

3. It is my understanding that Lightning Energy property in the form of materials such as steel was sold to Rrhamco, Inc. (“Rhamco”) [sic] by and/or at the direction of Aaron Horne in his former capacity as COO of Lightning Energy.

4. On several occasions during the course of Aaron Horne’s employment with Lightning Energy, in exchange for Lightning Energy’s sale of certain materials such as steel to Rrhamco, Rrhamco made checks payable directly to Aaron Horne. A copy of checks made payable by Rrhamco to Aaron Horne is attached hereto as “Exhibit 1.”

5. To my knowledge, Aaron Horne did not tender to Lightning Energy any or all of the amounts reflected in the checks attached hereto as Exhibit 1.

6. Lightning Energy did not give Aaron Horne permission to have Rrhamco make payments directly to him for the sale of Lightning Energy property, nor did Lightning Energy give Aaron Horne permission to keep for his own personal purposes money paid by Rrhamco for Lightning Energy property such as steel sold to Rrhamco.

A.R. at 114-15.

The Board of Review held a hearing on May 9, 2013, and issued its decision on May 21, 2013. The only finding states: “The Board of Review, having reviewed all documents in this matter,<sup>3</sup> finds the Administrative Law Judge has made a proper ruling and adopts the finding of the Judge, by reference in its entirety.” A.R. at 26. The decision states:

Therefore, the decision of the Administrative Law Judge is hereby affirmed. The claimant was discharged but not for misconduct. The claimant is not disqualified.

Employer’s remand request is denied, due to good cause not shown.

A.R. at 26.

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<sup>3</sup> The administrative file purportedly reviewed by the Board of Review contains a seventeen page facsimile transmission dated March 21, 2013, which is addressed to Administrative Law Judge Vaughan related to a claim styled *Stephens v. DIRECTV Customer Service, Inc.*, Case R – 2013-0871. The facsimile contains documents the employer intended to offer as exhibits during a hearing on March 22, 2013. A.R. at 90-106.

Lightning Energy filed a petition for appeal and a designation of the record with the Circuit Court of Kanawha County on June 21, 2013. Lightning Energy designated the entire administrative record. A.R. at 10-42, 43-45.

Under cover of a letter dated June 26, Jack Canfield, Chairman of the Board of Review, transmitted the administrative record to the Circuit Court. The letter specifies the documents transmitted to the Circuit Court, including the seventeen page facsimile related to the *Stephens* case noted above, which are listed as “Employer’s Exhibits A – D”. Although the Circuit Court Law Clerk received a copy of this administrative record, the parties did not receive copies. A.R. at 46.

The Circuit Court entered an order setting an administrative briefing schedule. The parties fully briefed the appeal. Lightning Energy argued that the Board of Review erred as follows: (1) in finding that Mr. Horne was discharged; (2) in finding that Lightning Energy’s decision to pay Mr. Horne within 72 hours is evidence of discharge; (3) in shifting the burden to Lightning Energy to establish that Mr. Horne was discharged for misconduct; (4) in finding that Lightning Energy did not prove Mr. Horne’s misconduct; (5) in finding that there was no evidence of Mr. Horne’s embezzlement from Lightning Energy; (6) in denying Lightning Energy’s request for remand to present additional evidence of embezzlement; (7) in failing to properly weigh Mr. Horne’s lack of responsiveness and abandonment of his job; (8) in finding that Mr. Horne justifiably relied on information that he was going to be discharged; and (9) in applying both the evidence and the law. Lightning Energy requested oral argument, but none was granted by the Circuit Court. A.R. at 12-13, 146-49, 158.

On November 6, 2013, the Circuit Court entered its order affirming the final decision of the Board of Review. Footnote 1 of the Circuit Court’s opinion states as follows:

At the outset the Court would note that both it and the tribunals below have been put in the awkward position of affirming the award of unemployment benefits to a person charged with embezzlement from his employer. But as the ALJ in this matter correctly noted, the lodging of criminal charges alone is not proof of guilt. *See Nobel v. Sheahan*, 132 F. Supp. 2d 626, 637 (N.D. Ill. 2001) (holding that “mere placement of criminal charges is not evidence of misconduct”). Indeed, Claimant may be entirely innocent of the charges against him.

However, even if he were ultimately convicted, Petitioner would have no one to blame but itself for the award of unemployment benefits to an embezzler. The relevant inquiry under West Virginia Code § 21A-6-3 is not whether an employee was guilty of misconduct, but whether he was discharged for misconduct. As discussed in detail below, throughout this process, Petitioner has steadfastly maintained that it did not discharge Claimant at all, let alone that it did so for embezzlement. Thus, Petitioner’s late-in-the-day prayer to offer evidence of embezzlement is without merit, as any such evidence would be irrelevant.

Having chosen not to discharge Claimant for suspected embezzlement Petitioner has tied the hands of the Agency and of this Court regarding any evidence Petitioner may have had regarding this claim.

A.R. at 172.

After setting forth the standard of review of a decision by an agency such as the Board of Review, the Circuit Court held:

After due and mature consideration of the briefs and the entire record made before the agency,<sup>4</sup> the Court is of the opinion that a hearing on this matter is not necessary to render its decision. The Court finds that the Board of Review, Workforce West Virginia’s application of law to the facts presented in this case, as indicated in its final decision, is not clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

A.R. at 178.

Lightning Energy timely filed a notice of appeal to this Court on December 6, 2013.

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<sup>4</sup> Again, although the Circuit Court purported to give due and mature consideration to the entire record made before the agency, it seemingly did not notice the seventeen page facsimile transmission pertaining to the unrelated *Stephens* case. In fact, neither the Board of Review nor the Circuit Court could have reviewed the administrative record as they claim without finding the obviously misfiled documents. The obvious lack of review of the administrative record by both the Board of Review and the Circuit Court provides a separate and independent basis for reversal in this action.

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

Mr. Horne is disqualified from receiving unemployment compensation benefits pursuant to West Virginia Code Section 21A-6-3. The Board of Review erred as a matter of law in refusing to consider Lightning Energy's alternative defenses of voluntary quit and discharge for misconduct, including but not limited to embezzlement.

In addition, the Board of Review erred as a matter of law in considering Lightning Energy's payment of wages to Mr. Horne within seventy-two hours of separation from employment as evidence of discharge. Payment of wages within seventy-two hours of separation from employment simply is not probative on the issue of whether an employee voluntarily quit or was discharged.

The Board of Review also erred as a matter of law in holding that Mr. Horne was discharged and, therefore, erred in placing the burden of proof on Lightning Energy under West Virginia Code of State Rules Section 84-1-6.7.

Even assuming that Mr. Horne was discharged, the Board of Review erred in finding that Lightning Energy did not prove misconduct as there is ample evidence of both simple and gross misconduct, including embezzlement in the administrative record.

In the event that the evidence currently in the administrative record is found to be insufficient, however, the Board of Review erred in not allowing Lightning Energy to present additional evidence of Mr. Horne's embezzlement and other matters including the missing personnel file, which the ALJ erroneously determined was not at issue.

Finally, neither the Board of Review nor the Circuit Court conducted an adequate review of the administrative record in this action, which contains seventeen pages of documents from an unrelated case. For all of these reasons, this Court should reverse the Board of Review.

#### IV. ARGUMENT

##### A. Standard of Review

Decisions of the Board of Review are reviewed in accordance with West Virginia Code Section 21A-7-21, which provides: “In a judicial proceeding to review a decision of the board, the findings of fact of the board shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure.” Accordingly, this Court held in *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395, Syl. Pt. 3 (1994), as follows:

The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

*See also Herbert J. Thomas Mem’l. Hosp. v. Bd. of Review*, 218 W. Va. 29, 620 S.E.2d 169, Syl. Pt. 1 (2005) (per curiam) (same); *James F. Humphreys & Assocs., L.C. v. Bd. of Review*, 216 W. Va. 520, 607 S.E.2d 849, Syl. Pt. (2004) (per curiam) (same); *Dailey v. Bd. of Review*, 214 W. Va. 419, 589 S.E.2d 797, Syl. Pt. 1 (2003) (same).

In a slightly different context, this Court further explained:

Similarly, in reviewing an ALJ’s decision that was affirmed by the circuit court, this Court accords deference to the findings of fact made below. This Court reviews decisions of the circuit under the same standard as that by which the circuit reviews the decision of the ALJ. We must uphold any of the ALJ’s factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts. Further, the ALJ’s credibility determinations are binding unless patently without basis in the record. Nonetheless, this Court must determine whether the ALJ’s findings were reasoned, *i.e.*, whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record. We review *de novo* the conclusions of law and application of law to the facts. Thus, the determination of the proper legal standard . . . is a question of law over which we have plenary review.

*Martin v. Randolph Cnty. Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399, 406 (1995).

**B. Mr. Horne should be Disqualified from Receiving Unemployment Compensation Benefits Pursuant to West Virginia Code Section 21A-6-3.**

Mr. Horne should be disqualified from receiving unemployment compensation benefits under West Virginia Code Section 21A-6-3. Section 21A-6-3 is controlling with regard to the ultimate decision of whether Mr. Horne is disqualified from receiving unemployment-compensation benefits. In pertinent part, the statute provides:

[A]n individual is disqualified for benefits:

(1) For the week in which he or she left his or her most recent work *voluntarily without good cause* involving fault on the part of the employer and until the individual returns to covered employment and has been employed in covered employment at least thirty working days.

\* \* \*

(2) For the week in which he or she was discharged from his or her most recent work for *misconduct* and the six weeks immediately following that week; or for the week in which he or she was discharged from his or her last thirty-day employing unit for misconduct and the six weeks immediately following that week. . . .

[Except that] [i]f 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 . . . theft, larceny, fraud or embezzlement* in connection with his or her work; or any other gross misconduct, he or she is disqualified for benefits until he or she has thereafter worked for at least thirty days in covered employment. . . .

W. Va. Code § 21A-6-3 (emphasis added).

In this action as discussed below, Mr. Horne left the employment of Lightning Energy voluntarily and without good cause. To the extent, however, that it is determined that Lightning Energy discharged Mr. Horne his discharge was for misconduct, including but not limited to embezzlement. In holding that Mr. Horne is eligible for unemployment compensation benefits, the Board of Review erred as a matter of law and its findings are clearly wrong.

**1. The Board of Review erred as a matter of law in refusing to consider Lightning Energy's alternative defenses.**

As a threshold matter, the Board of Review erred as a matter of law in refusing to consider Lightning Energy's alternative defenses of voluntary quit and discharge for misconduct, including but not limited to embezzlement. Pursuant to West Virginia Code Section 21A-7-13(4), the rules of the Board of Review need not conform to the common law or statutory rules of evidence or procedure and they may provide for the determination of questions of fact according to the predominance of the evidence. Accordingly, the Board of Review has promulgated general hearing procedures and policies in West Virginia Code of State Rules Section 84-1-6. Section 84-1-6.3 governs rules of evidence and procedure and provides in relevant part: "In the conduct of the hearings, neither the Board of Review nor its subordinate tribunals shall be bound by the usual common law or statutory rules of evidence or by the formal rules of procedure, except as provided for by these rules." In addition, Section 84-1-6.7 specifies which party bears the initial burden of going forward, in conjunction with the claims and/or defenses in West Virginia Code Sections 21A-6-1 and 21A-6-3, but further provides that once this initial burden has been met by the designated party, the burden may shift between the parties as directed by the presiding official.

The provision for shifting burdens in Section 84-1-6.7 is consistent with a procedure that would allow for alternative or hypothetical claims and defenses similar to West Virginia Rule of Civil Procedure 8(e)(2). Rule 8(e)(2) provides in relevant part as follows:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

Although the Board of Review is not bound by the formal West Virginia Rules of Civil Procedure except as provided in Section 84-1-6, not only is Rule 8(e)(2) consistent with Section 84-1-6 any construction of Section 84-1-6 that would not allow two or more statements of a claim or defense alternately or hypothetically would be *more formal* than the pleading requirements in Rule 8(e)(2). Such a construction would neither be consistent with Sections 21A-7-13(4) and 84-1-6.3, which were clearly intended to relax what the latter refers to as the “formal rules of procedure,” nor would it be consistent with the parties’ due process rights under the federal and state Constitutions. *See* U.S. Const., Amend. XIV; W. Va. Const. Art. III, § 10.

In this action, Workforce West Virginia sent Lightning Energy a request for separation information form, which Lightning Energy returned. On the form, a box was checked to indicate that Mr. Horne was discharged, but the handwritten explanation on the form stated as follows:

Person was Chief Operating Officer of company, reporting directly to Board of Directors, refused to communicate or answer phone calls of chairman over weekend of 1/11-13/2013, nor did he return urgent calls from Board members or chairman. Horne did not show up for work nor contact anyone regarding his absence. Horne abandoned his position on 1/14/2013. Horne did not take or make phone calls to chairman of the board. His desk was cleared & all personal effects were removed from office sometime between close of business 1/11/13 – and 7:30 am January 14 (1/14/13). It is our position Horne voluntarily left his position on 1/14/2013, official paperwork was completed 1/15/2013 stating he was discharged. Copies of his personnel file were removed from the premises between close of business 1/11/13 – 7:30 am January 14. This file contains written reprimands regarding Horne’s performance.

A.R. at 51-52.

Lightning Energy has consistently maintained that Mr. Horne voluntarily quit without good cause, but that if he was discharged as he claims to have been it was for misconduct. The ALJ understood this at least initially as he identified these issues in the notice of hearing. The Board of Review erred as a matter of law in refusing to consider these alternative defenses.

**2. The Board of Review erred as a matter of law in considering Lightning Energy's payment of wages to Mr. Horne within seventy-two hours of separation from employment as evidence of discharge.**

In addition, the Board of Review erred as a matter of law in determining that Lightning Energy's payment of Mr. Horne's wages within seventy-two hours of his separation from employment is evidence that Lightning Energy discharged Mr. Horne. West Virginia Code Section 21-5-4 provides in relevant part as follows:

(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.

(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee . . . .

. . .

(e) If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages. . . .

Thus, Section 21-5-4 distinguishes between wages paid to a discharged employee, which must be paid within seventy-two hours, and wages paid to an employee who quits, which must be paid no later than the next regular payday. Despite the distinctions between the two subsections, however, the timeframes for payment may overlap in whole or in part. Importantly, there is no *minimum* timeframe for the payment of wages upon an employee's separation from his or her employment for either discharge or voluntary quit. With the liquidated damages provision in mind, employers may reasonably pay an employee's wages using the most conservative date regardless of the circumstances leading to separation from employment. Accordingly, payment of an employee's wages within seventy-two hours of separation from employment is simply not probative of the question whether the employee was discharged.

Being paid wages within seventy-two hours of separation from employment could just as likely be consistent with an employee's decision to voluntarily quit.

In this action, the fact that Lightning Energy paid Mr. Horne's wages to him within seventy-two hours of his separation from employment has absolutely no bearing on whether he effectively quit his job as opposed to whether he was discharged. It is simply not probative evidence, and it bears absolutely no relevance to the question. Although Mr. Horne testified upon examination by his counsel that he was paid within seventy-two hours, this testimony is equally consistent with the circumstances of a voluntary quit. This is especially true since Mr. Horne did not testify regarding the date of his next regular payday. If the next regular payday was Friday, as is often the case, then a person such as Mr. Horne who was separated from employment on a Tuesday would likely receive a wage payment on Friday regardless of whether the circumstances were a voluntary quit or discharge. In any event, Lightning Energy may have acted conservatively in making a wage payment within the earliest possible timeframe in light of the liquidated damages provisions contained in Section 21-5-4.

Not only does an employer's payment of wages within seventy-two hours have no probative value on the question of whether an employee voluntarily quit or was discharged, ascribing relevance to any such payments would put employers in the untenable position of operating at the risk of being held liable for liquidated damages. Because by its terms Section 21-5-4 does not specify minimum timeframes for payment of wages upon separation from employment, employers cannot be placed between the rock of risking a legal determination that the separation was in fact a discharge and the hard place of being exposed to liquidated damages. The Board of Review's holding to the contrary was error as a matter of law.

**3. The Board of Review erred as a matter of law in holding that Mr. Horne was discharged and, therefore, erred in placing the burden of proof on Lightning Energy.**

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The Board of Review erred in a third respect by concluding as a matter of law that Mr. Horne was discharged and placing the burden of proof on Lightning Energy. A proper determination of whether Mr. Horne was discharged or voluntarily quit is important, as the burden of proof differs depending upon the applicable circumstance. For instance, in circumstances where a claimant has quit his job, the claimant has the burden of proving that he quit for good cause involving fault on the part of the employer. *See* W. Va. Code R. § 84-1-6.7.1-3. On the other hand, in circumstances where the claimant has been discharged, the employer carries the burden of going forward and proving that the discharge was for misconduct. *See* W. Va. Code R. § 84-1-6.7.4.

In this action, the ALJ made the following conclusion of law, which was adopted by the Board of Review:

The employer discharged this claimant. Therefore, the employer has the burden of establishing by a preponderance of the evidence that that the claimant was guilty of misconduct as defined above, in order that the claimant be disqualified from receiving unemployment compensation benefits. The employer has failed to meet its burden of proof. Allegations of misconduct are not proof of misconduct. The claimant cannot be disqualified on the evidence presented.

The Board of Review erred in concluding as a matter of law that Mr. Horne was discharged and, therefore, erred in placing the burden of proof on Lightning Energy. Despite the evidence presented on the record, the ALJ and, in turn, the Board of Review leaped to the conclusion that Mr. Horne was discharged. Even during the ALJ hearing below, the ALJ, whose findings were adopted by the Board of Review, presumed that this is a discharge matter, asking Mr. Iuliucci whether he had any questions “concerning [Mr. Horne’s] behavior for which you fired him[.]” A.R. at 81. In turn, Michael Iuliucci responded: “He abandoned his post, Your

Honor. He was not here on Monday the 14th. Numerous phone calls were made and he did not respond. . . .” A.R. at 81. As Mr. Iuliucci further explained: “[The Claimant] did not return numerous phone calls from board members, mainly Mr. Tracy Turner. And on Monday we had incidences we were trying to deal with and [the Claimant] was nowhere to be found.” A.R. at 82.

The evidence in the administrative record clearly demonstrates that Mr. Horne quit his job without good cause involving fault on the part of Lightning Energy. At the hearing before the ALJ, Mr. Horne testified that he cleaned out his office because he was told by “sources” within Lightning Energy that he was going to be discharged. A.R. at 79. Mr. Horne, however, did not call any such “sources” as witnesses. As noted above, Mr. Horne admitted that none of his sources was superior to him. A.R. at 80. Mr. Horne testified that he was the highest-ranking executive with regard to Lightning Energy’s day-to-day operations and that he reported to Tracy Turner, the Chairman of Lightning Energy’s Board. A.R. at 78. Although Mr. Horne contends that he heard “other various rumors” from Mr. Turner and from Mr. Smith, Mr. Horne did not testify that Mr. Turner, Mr. Smith, or any other decision-maker on Lightning Energy’s Board told him that he was going to be discharged. A.R. at 80. Mr. Horne offered nothing substantively more than his speculation in support of his contention that Lightning Energy, at the time when he cleaned out his office, already had plans to discharge him.

The ALJ and, by extension, the Board of Review appear to have found that Mr. Turner was the “company source” who told Mr. Horne, prior to when he cleaned out his office, that he was going to be discharged. A.R. at 60. Such a finding is wholly unsupported by the record. As noted above, Mr. Horne did not testify that, prior to cleaning out his office, Mr. Turner told him that he was going to be discharged; rather, Mr. Horne simply testified that Mr. Turner and

another member of Lightning Energy's Board had told Mr. Horne about "other various rumors." A.R. at 80. Mr. Horne simply has offered no credible evidence that he cleaned out his office because he reasonably believed that he was going to be discharged.

If Mr. Horne reasonably believed that he was going to be discharged at the beginning of the week of January 14, 2013, then surely he would have made an effort to return the telephone calls of Lightning Energy's Chairman of the Board and would have been at his office that Monday to meet with Mr. Turner. As the record clearly reflects, however, Mr. Horne did not return Mr. Turner's calls, and he was not present at the office on Monday, January 14. For that matter, Mr. Horne has not even offered any evidence to suggest that he made his fellow office workers aware of his whereabouts on Monday, January 14. A.R. at 81.

Through his actions, Mr. Horne effectively left his job. Moreover, to the extent that the ALJ and the Board of Review focused on the fact that Mr. Horne was not responsive to Lightning Energy's efforts to reach Mr. Horne, the ALJ and the Board of Review failed to give appropriate weight to the scope of Mr. Horne's non-responsiveness. A.R. at 60. As Mr. Iuliucci testified at the ALJ hearing, Mr. Horne did not simply fail to return one call; rather, he failed to return "numerous phone calls from board members," including the Chairman of Lightning Energy's Board, and was "nowhere to be found" on Monday, January 14 when Lightning Energy was trying to deal with certain matters. A.R. at 82.

This Court has recognized that employees have an "obligation" "to do whatever is reasonable and necessary to remain employed." *Childress v. Muzzle*, 222 W. Va. 129, 663 S.E.2d 583, Syl. Pt. 4 (2008). Such an obligation does not cease when an employee, particularly a company's Chief Operator Officer, develops concerns that he may be fired. Thus, Mr. Horne voluntarily quit his job without good cause involving fault on the part of Lightning Energy.

4. **Even assuming that Mr. Horne was discharged, the Board of Review erred in finding that Lightning Energy did not prove misconduct.**

Even assuming *arguendo* that Mr. Horne was discharged, there has been ample evidence of both simple and gross misconduct his part. There has been evidence of non-responsiveness and job abandonment by Mr. Horne, who was Lightning Energy's chief operating officer. To the extent that the ALJ and the Board of Review focused on the fact that Mr. Horne was not responsive to Lightning Energy's efforts to reach him, the ALJ and the Board of Review failed to give appropriate weight to the scope of the Claimant's non-responsiveness. A.R. at 60. As Mr. Iuliucci testified at the ALJ hearing, Mr. Horne, who was Lightning Energy's Chief Operating Officer, did not simply fail to return one call; rather, Mr. Horne failed to return "numerous phone calls from board members," including the Chairman of the Board, and was "nowhere to be found" on Monday, January 14 when Lightning Energy was trying to deal with certain matters. A.R. at 82. To the extent that this evidence is not determined to constitute a voluntary quit, it is certainly evidence of misconduct.

In addition, there is also evidence regarding Mr. Horne's missing personnel file. Mr. Iuliucci testified that he kept the personnel files and that Mr. Horne's personnel file was missing right after this happened. Although Lightning Energy stated on the request for separation information form that the file contains written reprimands regarding Horne's performance, the ALJ inexplicably stopped Mr. Iuliucci from testifying further regarding the personnel file, stating: "That's not a proper subject for this forum."

Moreover, as indicated above, there has also been evidence of Mr. Horne's embezzlement from Lightning Energy -- evidence which Lightning Energy should have been given a fair opportunity to develop more fully, yet still sufficient evidence of gross misconduct on Mr. Horne's part.

**C. Lightning Energy should have been Permitted to Present Additional Evidence of Mr. Horne's Embezzlement and other Matters.**

The Board of Review further erred in refusing to permit Lightning Energy to present additional evidence of Mr. Horne's embezzlement and other matters, including the missing personnel file, because the ALJ erred in refusing such evidence in the first place, denying Lightning Energy a fair hearing and reasonable opportunity to be heard. Section 21A-7-13, which is discussed in a previous section above, provides as follows:

The board shall establish, and may from time to time modify and amend, rules and regulations for:

- (1) The conduct and determination of benefit cases appealed to it, or to an appeal tribunal;
- (2) The form of all papers and records thereof;
- (3) The time, place, and manner of hearings;
- (4) Determining the rights of the parties; and the rules need not conform to the common-law or statutory rules of evidence and procedure and may provide for the determination of questions of fact according to the preponderance of the evidence.

Also as discussed in a previous section above, in accordance with Section 21A-7-13 the Board of Review has promulgated the general hearing procedures and policies in Section 84-1-6. In *Parks v. Board of Review*, 188 W. Va. 447, 425 S.E.2d 123, Syl. Pt. 4 (1992), this Court struck down the practice of the Board of Review requiring telephonic hearings in certain unemployment compensation cases. The Court based its holding at least in part on the fact that the Board of Review had not promulgated any regulations to govern telephonic appeal hearings as it was authorized to do under Section 21A-7-13. The Court observed as follows:

Despite its authority to establish procedural regulations, the Board has not seen fit to promulgate such regulations with regard to telephonic appeal hearings. Nor have rules for telephonic appeal hearings been issued under the Commissioner's rule-making authority contained in W. Va. Code, 21A-7-1 (1936).

*Parks v. Board of Review*, 188 W. Va. 447, 425 S.E.2d 123, 127 (1992) (footnote omitted).

Apparently in response to *Parks*, the Board of Review promulgated Section 84-1-6.2, which governs telephonic hearings and states in its entirety as follows:

The Board, in its discretion, may schedule appeal tribunal hearings telephonically. Any party has a right to an in-person hearing. In a case where a party is not a resident of the State of West Virginia and does not have an office or business location in the State of West Virginia, the Board may permit that party to appear telephonically.

More than twenty years after *Parks*, however, the Board of Review still has not promulgated regulations that set forth any procedures to be followed in the conduct of a telephonic hearing. Moreover, nowhere in Section 84-1-6 is it specified that written evidence generally must be submitted twenty-four hours prior to the hearing date. Thus, the ALJ's insistence that Lightning Energy provide written evidence more than twenty-four hours before the hearing has no basis in law and has deprived Lightning Energy of its due process rights under the federal and state Constitutions. *See* U.S. Const., Amend. XIV; W. Va. Const. Art. III, § 10.

In refusing to consider Lightning Energy's proffer of checks signed by Mr. Horne, the ALJ referred to the notice of hearing. The Notice of Hearing in the record, however, does not provide that written evidence must be provided more than twenty-four hours before a hearing. Moreover, although the notice of hearing refers generally to enclosed instructions, no such instructions are in the record. The ALJ's refusal to consider proffered evidence based on a purported rule not contained in the rules and regulations promulgated by the Board of Review with authority from the Legislature, but rather purportedly included in instructions enclosed with a hearing notice but not made part of the record is fundamentally unfair and perpetuates the violation of Lightning Energy's due process rights.

The Board of Review should have corrected the ALJ's legal error by granting Lightning Energy's motion to remand for additional evidence. West Virginia Code of State Rules Section 84-1-5.8 addresses motions for additional evidence and, in pertinent part, provides as follows:

Motions to present additional evidence will not be granted upon appeal to the Board except for good cause shown. To establish good cause, a party must demonstrate that the evidence was not available prior to the appeal tribunal hearing or that he or she did not know, nor reasonably could have known, of the evidence in question at that time. . . .

In this action, Lightning Energy has shown good cause to support its motion to remand for additional evidence. Although Lightning Energy maintains that Mr. Horne, who was Lightning Energy's Chief Operating Officer, voluntarily quit without fault on the part of the company, to the extent that the ALJ determined that Mr. Horne was discharged but not for misconduct, the Board of Review should have remanded the proceedings to give Lightning Energy the opportunity to present evidence of the Mr. Horne's embezzlement from Lightning Energy, as Lightning Energy clearly demonstrated good cause for presenting such evidence.

Mr. Horne has been charged with embezzlement. At the hearing before the Administrative Law Judge, Mr. Iuliucci proffered evidence of Mr. Horne's embezzlement, but was not afforded an adequate opportunity to do so. At the hearing below, after the Mr. Horne acknowledged having been charged with embezzlement from Lightning Energy, the ALJ abruptly halted further questioning on the subject. The ALJ gave no consideration to the fact that Mr. Horne has been charged with embezzlement from Lightning Energy and, in fact, expressed an unwillingness to consider examination on the topic, stating that "[c]harges are not proof of misconduct." A.R. at 81.

The ALJ even expressed an unwillingness to hear testimony from Mr. Iuliucci, regarding Mr. Horne's embezzlement from Lightning Energy. The ALJ questioned Mr. Iuliucci as follows:

Q All right. Is there anything further you want to tell me?

A Mr. Horne is charged with embezzlement from the company to the tune of \$16,000. We have proof, checks signed by Mr. Horne from –

Q Don't tell me what proof you have unless you intend to present it to me today.

A I can fax it over to you.

Q Nope, nope. If you looked at your Notice of Hearing, all written evidence must have been submitted more than 24 hours before today's hearing –

A Okay.

Q – and provided – you're not going to do it now. What proof do you have other than an allegation you've made that he is guilty of any crime?

A I have plenty of proof, Your Honor. I have nothing I can – that you have in front of you.

Q Well, I don't have it; I don't consider it. . . .

A.R. at 82.

At a minimum, Lightning Energy should have been given the opportunity to examine Mr. Horne and offer further testimony regarding his embezzlement. In addition to developing testimony regarding Mr. Horne's embezzlement, Lightning Energy should be given the opportunity to present evidence consistent with its proffered of over \$16,000 worth of checks that support its position that Mr. Horne embezzled from Lightning Energy, proving gross misconduct and warranting Mr. Horne's disqualification from receiving unemployment compensation benefits. Upon information and belief, the checks reflect payments made by Rrhamco, Inc. to Mr. Horne, rather than to Lightning Energy, for Lightning Energy's materials sold by Mr. Horne to Rrhamco, Inc. The ALJ had no basis in law to refuse this evidence in the first instance, and the Board of Review should have corrected this legal error for good cause shown.

**D. Neither the Board of Review nor the Circuit Court Conducted an Adequate Review of the Administrative Record.**

Finally, it is apparent from all that has occurred in this action, including but not limited to the astounding fact that both the Board of Review and the Circuit Court purportedly reviewed all documents in this matter, yet neither recognized that the administrative record contains a seventeen page facsimile transmission regarding an unrelated case. Indeed, in transmitting the administrative record to the Circuit Court, the Chairman of the Board of Review helpfully refers to these documents as “Employer’s Exhibits A – D”. Neither the Board of Review nor the Circuit Court conducted an adequate review of the administrative record to even determine that a substantial number of pages contained therein was actually part of the record in an unrelated action. Manifestly, they did not conduct an adequate review to affirm the ALJ’s decision in this action.

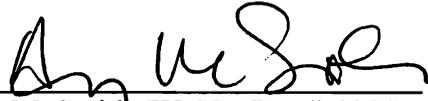
**V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This appeal is suitable for oral argument under West Virginia Rule of Appellate Procedure 20(a) because it involves issues of first impression on matters of fundamental importance including the due process rights of parties to unemployment compensation proceedings. Because this Court should reverse the circuit court’s judgment, a memorandum decision may not be appropriate.

**VI. CONCLUSION**

For all of the foregoing reasons, this Court should reverse the judgment of the Circuit Court and remand this action for the entry of an order holding that Aaron Horne is disqualified from receiving unemployment compensation benefits. In the alternative, the Court should direct the Circuit Court to remand this action to the Administrative Law Judge for an evidentiary hearing on the issue of Mr. Horne’s embezzlement from Lightning Energy Services, LLC.

Dated this 6th day of March, 2014.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of March, 2014, I caused true and accurate copies of the foregoing "Brief of Petitioner" as well as the "Appendix Record" to be deposited in the U.S.

Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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