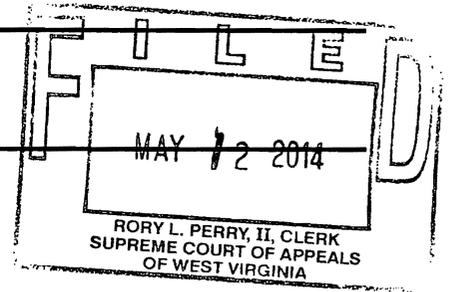


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1242



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.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

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, many of which should be conceded under West Virginia Rule of Appellate Procedure 10(d) because they are not addressed in Mr. Horne's brief and the Board of Review did not even respond, this Court should reverse the Board of Review.

II. ARGUMENT

A. 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. In *Childress v. Muzzle*, 222 W. Va. 129, 663 S.E.2d 583 (2008), this Court explained the purposes of the unemployment compensation statute as follows:

While we have held that “[u]nemployment compensation statutes, being remedial in nature should be liberally construed to achieve the benign purposes intended to the full extent thereof” (*See* Syllabus Point 6 of *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954)), we believe that it is also important for the Court to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Act. Also, we believe that the basic policy and purpose of the Act is advanced both when benefits are denied to those for whom the Act is not intended to benefit, as well as when benefits are awarded in proper cases. Additionally, we believe that the Act was clearly designed to serve not only the interest of qualifying unemployed persons, but also the general public.

The unemployment compensation program is an insurance program, and not an entitlement program, and is designed to provide “a measure of security to the families of unemployed persons” who become involuntarily unemployed through no fault of their own. “The [Act] is not intended, however, to apply to those who ‘willfully contributed to the cause of their own unemployment.’” *See Hill v. Board of Review*, 166 W. Va. 648, 651, 276 S.E.2d 805, 807 (1981) (quoting *Board of Review v. Hix*, 126 W. Va. 538, 541, 29 S.E.2d 618, 619 (1944)). From our reading of the Act, we believe the obligation of employees under the Act is to do whatever is reasonable and necessary to remain employed.

Id., 663 S.E.2d at 587 (footnotes omitted).

The Court continued in *Childress*:

This Court in *Gibson v. Rutledge*, 171 W. Va. 164, 166, 298 S.E.2d 137, 139 (1982), a case involving the application of W. Va. Code 21A-6-3, observed that most states have disqualifying provisions in their unemployment compensation law which are similar to W. Va. Code, 21A-6-3. In *Gibson*, in discussing the purpose of such disqualifying provisions, we stated that:

. . . one of the primary purposes of the West Virginia Unemployment Compensation Act, . . . is to compensate

individuals who are involuntarily unemployed. W. Va. Code, 21A-6-3(1) is included in the Act to disqualify those employees who are voluntarily unemployed and who therefore should not be entitled to the same benefits and treatment as involuntarily unemployed individuals.

Id. (citing *Gibson v. Rutledge*, 298 S.E.2d at 140 (citations omitted)).

The Court held in *Childress*:

3. The word voluntarily as used in W. Va. Code, 21A-6-3(1) means the free exercise of the will.

4. The term “good cause” as used in W. Va. Code, 21A-6-3(1) means cause involving fault on the part of the employer sufficient to justify an employee’s voluntarily leaving the ranks of the employed and joining the ranks of the unemployed.

Id. at Syl. Pts. 3-4.

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. As discussed in the Brief of Petitioner, any construction of West Virginia Code of State Rules Section 84-1-6 that would prohibit alternative defenses would be neither consistent with West Virginia Code Section 21A-7-13(4) and Section 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 *Childress*, this Court held:

“While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency’s interpretation is inapplicable.” Syllabus Point 5, *Hodge v. Ginsberg*, 172 W. Va. 17, 303 S.E.2d 245 (1983).

Id. at Syl. Pt. 7.

In this case, 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* [sic], 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 172.¹

¹ *Noble v. Sheahan*, 132 F. Supp. 2d 626 (N.D. Ill. 2001), which is cited by the Circuit Court and Mr. Horne, does not support their position. That case involved a civil rights claim under 42 U.S.C. § 2000e, *et seq.*, and the issue was whether similarly situated non-minority employees were treated more favorably. The court stated in full:

To the extent that the Circuit Court and Board of Review refused to consider the alternative defenses stated by Lightning Energy they erred as a matter of law. To the extent that they relied on a restrictive construction of Section 84-1-6, they are not entitled to deference.

Mr. Horne does not directly address the issue of whether alternative defenses are appropriate under Section 84-1-6, but instead argues that the circuit court appropriately found that Lightning Energy's only stated defense is voluntary quit. In numbered paragraph 16 on page 6, Mr. Horne refers approvingly to the following findings of fact of the circuit court:

18. Contrary to representations it had made on the Request for Separation Information form, Petitioner maintained at the ALJ hearing that it had not discharged Claimant; that instead he had abandoned his job, as indicated by his cleaning out his office, failing to report to his office, and failing to return phone calls.

19. This was the entire basis for Petitioner's position that Claimant was not entitled to unemployment benefits both before the Deputy, and before the ALJ.

A.R. at 175.

To the extent that the circuit court found that Lightning Energy did not state alternative defenses, the findings of fact are clearly erroneous. On the request for separation information 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

While we agree with Defendants that "the mere placement of criminal charges is not evidence of misconduct," (R. 43, Defs.' Reply at 13), we are troubled by the varying degrees of employee misconduct and divergent treatment afforded them by the Cook County Sheriff's Department. *That these non-minority peace officers, who are facing multiple criminal charges, continue to be employed and paid by Defendants, while Noble, who is accused of lesser misconduct in this Court's opinion, is suspended without pay, raises genuine issues of dissimilar treatment.*

Id. at 637 (emphasis added).

Thus, the language in *Noble* relied upon by the Circuit Court and Horne was actually quoted from a parties brief and not the court's holding. Moreover, the court in fact did consider the evidence of criminal charges in *Noble* although albeit in a different context.

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.

The ALJ understood Lightning Energy’s alternative defenses of voluntary quit, simple misconduct, and gross misconduct, at least initially as he identified them in the notice of hearing as follows:

. . . 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, and if there was misconduct, was it simple or gross misconduct?

A.R. at 58 (emphasis added).

The Board of Review erred as a matter of law and/or fact in refusing to consider these alternative defenses stated by Lightning Energy.

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. As discussed in the Brief of Petitioner, 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 because it could just as likely be consistent with an employee’s decision to voluntarily quit.

Compare W. Va. Code § 21-5-4(b) *with* W. Va. Code § 21-5-4(c). This is especially true where an employee such as Mr. Horne is separated from employment on a Tuesday and the regular payday is Friday.

Again, Mr. Horne does not address this issue, except that in numbered paragraph 13 on pages 5-6 of his brief he states that payment of wages within seventy-two hours of January 15, 2013, is consistent with termination from employment as found by the ALJ and the Circuit Court. Mr. Horne does not dispute, but rather ignores the fact that such evidence is equally consistent with a voluntary quit. Neither Mr. Horne, nor the ALJ or the Circuit Court provides any authority whatsoever for their position, and simply repeating the statement does not make it true. Pursuant to West Virginia Rule of Evidence 401, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The Fourth Circuit has aptly held:

Evidence that points equally in two directions points in neither, and therefore cannot satisfy the burden of proof. The defect cannot be cured by the alleged right of the trier of fact to draw inferences and make selections.

N.L.R.B. v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 809 (4th Cir. 1975).

Because payment of Mr. Horne’s wages within seventy-two hours of January 15, 2013, is equally consistent with his decision to voluntarily quit, the Board of Review’s holding that such payment is evidence of discharge 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.

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. As discussed in the

Brief of Petitioner, 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.

Although Mr. Horne asserts in numbered paragraph 10 on page 5 of his brief that he was advised by numerous sources that he was going to be terminated, he admitted that none of those sources held a superior position. 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.

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.

In *Hine v. Twin Falls County*, 114 Idaho 244, 755 P.2d 1282 (1988), the court held that a former deputy sheriff charged with embezzlement did not quit her job with good cause and was therefore disqualified from receiving unemployment compensation benefits under the following circumstances:

Hine stated that she “felt” that had she not resigned that she would have been forced to participate in an investigation to gather evidence against herself, or she might have been arrested in front of her fellow employees. Hine also noted . . . that Harold Jensen had testified in court . . . that had Hine not resigned she would have been terminated due to the filing of criminal charges against her.

Id., 755 P.2d at 1283.

Similar to the circumstances in *Hine*, 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 on his part. In *Herbert J. Thomas Memorial Hospital v. Board of Review*, 218 W. Va. 29, 620 S.E.2d 169 (2005) (per curiam), this Court held:

2. “For purposes of determining the level of disqualification for unemployment compensation benefits under West Virginia Code § 21A-6-3, simple misconduct is conduct evincing such willful and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer.” Syllabus point 7, *Dailey v. Board of Review, West Virginia Bureau of Employment Programs*, 214 W. Va. 419, 589 S.E.2d 797 (2003).

3. “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; (3) certain instances of use of alcohol or controlled substances as delineated in West Virginia Code § 21A-6-3; (4) arson, theft, larceny, fraud, or embezzlement in connection with employment; 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[.]” Syllabus point 4, in part, *Dailey v. Board of Review, West Virginia Bureau of Employment Programs*, 214 W. Va. 419, 589 S.E.2d 797 (2003).

Id. at Syl. Pts. 2-3.

In this action, as discussed in the brief of Petitioner and above 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 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. *See Ordinance Research, Inc. v. Sterling*, 475 So.2d 954 (1st Dist. Fla. 1985) (reversing holding that former hotel manager was entitled to unemployment compensation benefits and instructing the appeals referee on remand to go beyond question of whether embezzlement occurred as result of employee's conduct; fact that employer did not know prior to discharging employee the exact nature of employee's conduct which resulted in losses to the business did not preclude finding that he was discharged for work-related misconduct).

B. 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. As discussed in the brief of Petitioner, 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 under West Virginia Code of State Rules Section 84-1-5.8.

At a minimum, Lightning Energy should have been given the opportunity to further examine Mr. Horne and offer additional 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 proffer 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. *See Ordinance Research, Inc. v. Sterling*, 475 So.2d 954 (1st Dist. Fla. 1985) (reversing holding that former hotel manager was entitled to unemployment compensation benefits and instructing the appeals referee on remand to go beyond question of whether embezzlement occurred as result of employee's conduct; fact that employer did not know prior to

discharging employee the exact nature of employee's conduct which resulted in losses to the business did not preclude finding that he was discharged for work-related misconduct).

Mr. Horne could not possibly be prejudiced by the admission into evidence of the checks made payable to him from Rrhamco, Inc., which is a steel salvage company. Mr. Horne was of course well aware of the checks because they were made payable to him. Significantly, Mr. Horne does not dispute this proffered evidence of embezzlement but argues only that he has not been convicted yet.

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.

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

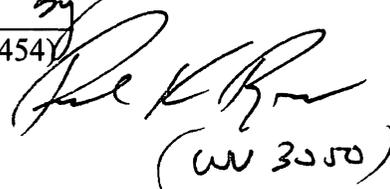
Finally, it is apparent from all that has occurred in this action, including but not limited to the astounding fact that both the Board of Review and the Circuit Court purportedly reviewed all documents in this matter, yet neither recognized that the administrative record contains a seventeen page facsimile transmission regarding an unrelated case. Manifestly, they did not conduct an adequate review to affirm the ALJ's decision in this action. The Board of Review did not even respond to the brief of Petitioner, so the Court should assume that the Board of Review agrees with Lightning Energy's view of the issue. *See* W. Va. R. App. P. 10(d).

III. CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the brief of Petitioner, 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 12th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2014, I caused true and accurate copies of the foregoing "Reply Brief of Petitioner" 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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