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ARKANSAS COURT OF APPEALS

DIVISION III
No. E-22-519

TMG, INC., D/B/A DAVID'S FIRE EQUIPMENT APPELLANT V. DIRECTOR, DIVISION OF WORKFORCE SERVICES, AND CHARLES SALTS APPELLEES	**Opinion Delivered** October 18, 2023 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2022-BR-00806] REVERSED

CINDY GRACE THYER, Judge

TMG, Inc., d/b/a David's Fire Equipment (TMG) appeals an adverse decision from the Arkansas Board of Review (Board) granting unemployment benefits to its former employee, Charles Salts. TMG contends on appeal that the Board erred in awarding benefits to Salts because there was insufficient evidence to support its finding that Salts had good cause for ending his employment with TMG over Salts's objection to TMG's vaccine mandate. Accordingly, TMG asks this court to reverse the award of benefits.[1] Because we agree that Salts failed in his burden of producing evidence sufficient to substantiate his medical and religious objections, we reverse the award of benefits.

[1]The Director, in its response, concedes error, claiming a factual error in the Board's analysis. As a result, he asserts that the matter should be remanded to the Board for reconsideration, rather than a simple reversal and termination of benefits. However, on review of the entire record, we find sufficient evidence in the record to support the Board's alleged erroneous finding.

I. *Facts and Procedural History*

TMG is a small business owned by Linda and David George in Cabot, Arkansas. It has four employees. One of those four employees was appellant Charles Salts, an hourly employee who worked at TMG as a welder.

In June 2021, David George (George) had heart surgery and was advised by his physician to avoid a COVID-19 infection. As a result, in August 2021, George informed his employees that he was going to require the COVID-19 vaccination of his employees. Salts informed George that he would get vaccinated when it was approved by the Food and Drug Administration (FDA).

Once FDA approval was granted,[2] George advised his employees they had thirty days in which to become vaccinated. Although he had previously expressed his willingness to become vaccinated upon FDA approval of the vaccine, Salts informed George he wanted to opt out of the vaccination requirement. He explained to George that he held medical and religious objections to the vaccine and believed that he had natural immunity due to a previous COVID-19 infection in November 2020. Salts asked if George would allow him to provide medical documentation of the presence of COVID-19 antibodies, to submit to weekly testing, to mask, and/or to practice social distancing in lieu of receiving the vaccine. George denied his requests. Then, despite claiming strong medical and religious objections to the vaccine, Salts indicated he was willing to abandon his concerns and get vaccinated if George would place him on salary. George denied that request as well, and Salts gave his two-week notice, which George accepted.

[2]The first COVID-19 vaccine received FDA approval on August 23, 2021.

In September 2021, Salts filed an unemployment claim alleging that he was discharged from TMG for refusing the vaccine. TMG responded to his claim, insisting that Salts had not been discharged but had quit after his request to move from hourly to salaried employment was denied. In support of its claim, TMG attached the statements of two employees, indicating that Salts voluntarily left TMG after securing employment elsewhere. As a result of the foregoing, the Division of Workforce Services (DWS) issued a notice of agency determination denying Salts's request for benefits. In doing so, the agency concluded that Salts had left work voluntarily and without good cause connected with the work. As such, he was disqualified from receiving benefits under Arkansas Code Annotated section 11-10-513(A)(1) (Supp. 2023).

Salts appealed the denial to the Appeal Tribunal (Tribunal). At the hearing, Salts again claimed that he had been discharged for refusing to take the vaccine. He informed the hearing officer that, because he had previously contracted COVID-19 and had antibodies, he did not feel the vaccine was necessary. He also claimed to have medical and religious reasons for not taking the vaccine. He testified that he is diabetic and has a family history of blood clots. He did not, however, provide any medical documentation from a physician to support his request for a medical exemption or explain how the COVID-19 vaccine violated his religious beliefs. He further admitted that he would not take the vaccine because he was an hourly, and not a salaried, employee. Salts's wife told the hearing officer she agreed that Salts has the right to medical and religious exemptions in certain cases and that he had not been offered any accommodations.

George informed the hearing officer that he had undergone heart surgery in June, had been advised by his physician to avoid COVID-19, and as a result, had asked his employees to get the vaccine. George stated that Salts had initially indicated his willingness to be vaccinated once there was FDA approval but had later reneged and agreed to be vaccinated only if he was placed on salary. Salts resigned after George refused his request to become a salaried employee.

Another TMG employee testified that Salts had told him that he was going to ask to be placed on salary as a compromise for getting the vaccine. When his request was refused, Salts gave his two weeks' notice. Salts left before completing the notice period because he had been hired by LabCorp.

Linda George testified that TMG did not have a COVID-19 vaccination policy. Instead, TMG had requested that the employees be vaccinated, and she claimed there was no penalty for an employee's failure to fulfill that request. She confirmed that Salts had submitted his resignation after his request for a salaried position was rejected. She also informed the hearing officer that she had been told independently by two employees that Salts had been looking for other employment, including a possible move to LabCorp. She stated that when he came to clean out his locker, Salts stated that he had a "grandma to take care of" and a new job to start on Monday.

After reviewing the record and the testimony at the hearing, the Tribunal denied Salts's claim for unemployment benefits, finding that he had left his employment as a welder upon being denied a salaried position. As such, the Tribunal found that he voluntarily left work without good cause connected to the work. Salts appealed.

In his petition for review, Salts asked that the decision be remanded to the Tribunal to consider additional evidence, including documentation that he had previously been infected with COVID-19 and that the legislature had recently passed a bill covering his situation.[3] He also sent a three-page letter explaining, among other things, that the vaccine "only protects the vaccinated person" and that it was not his responsibility to protect someone else's health; and that he believed his "God-given immune system" and the fact he had COVID-19 in November 2020 were reason enough to refuse a vaccine with no long-term data to prove it is safe and effective. He again generically asserted his own health and religious reasons for not wanting the vaccine.

The Board, without taking any additional evidence or remanding to the Tribunal for consideration of Salt's additional evidence, reversed the Tribunal's ruling. The Board found that Salts had been given thirty days to take the COVID-19 vaccine. When he asked his employer for other alternatives to taking the vaccine, TMG did not offer any alternatives. As a result, the Board concluded that Salts had taken appropriate steps to resolve his concerns prior to quitting, and thus, good cause existed. Accordingly, the Tribunal's decision that Salts had voluntarily left work without good cause connected with the work was reversed.

TMG timely appealed the award of benefits. On appeal, it asserts that the Board erred in its conclusion that Salts had good cause for quitting his job. More specifically, TMG argues that the Board based its decision to award benefits on Salts's requests for religious and medical exemptions but contends that the record contains no evidence substantiating Salts's

[3]Act 1115 of 2021 was codified at Arkansas Code Annotated section 11-5-118, had an effective date of January 14, 2022, and expired by its own terms on July 31, 2023. No argument was made that its provisions should be applied retroactively.

religious or medical exemptions. TMG highlights the fact that Salts presented no evidence indicating that the vaccine was medically contraindicated for him and offered no evidence regarding his religion or its tenets that would prevent him from taking the vaccine. We agree that under our caselaw, Salts was required to do more and failed in his burden of proof.

II. *Standard of Review*

Our standard of review in unemployment-insurance cases is well settled. We do not conduct de novo reviews in appeals from the Board. *Dillinger v. Dir.*, 2020 Ark. App. 138, 596 S.W.3d 62. Instead, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings of fact. *Rockin J Ranch, LLC v. Dir.*, 2015 Ark. App. 465, 469 S.W.3d 368. We accept the Board's findings of fact as conclusive if supported by substantial evidence, which is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* Even when there is evidence on which the Board might have reached a different decision, our scope of judicial review is limited to a determination of whether the Board could have reasonably reached the decision rendered on the basis of the evidence presented. *Coleman v. Dir.*, 2023 Ark. App. 290, 668 S.W.3d 540. We defer credibility determinations to the Board as the finder of fact as well as the weight to be accorded to testimony presented to the Board. *Id.* While our role in these cases is limited, however, we are not here to merely ratify the decision of the Board. *Boothe v. Dir.*, 59 Ark. App. 169, 954 S.W.2d 946 (1997). Instead, our role is to ensure that the standard of review has been met. *Id.*

III. *Analysis*

Pursuant to Arkansas Code Annotated section 11-10-513(a) (Supp. 2023), an individual shall be disqualified for unemployment benefits if he or she voluntarily and without good cause connected with the work left his or her last work. When a claimant has voluntarily quit work and is seeking unemployment-insurance benefits, the burden is on the claimant to show that he or she had good cause connected with the work for quitting. *Owens v. Dir.*, 55 Ark. App. 255, 256, 935 S.W.2d 285, 286 (1996). Good cause must be determined in the light of the facts in each case, *Keener v. Dir.*, 2021 Ark. App. 88, 618 S.W.3d 446, but it has generally been defined as "a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment." *Carpenter v. Dir.*, 55 Ark. App. 39, 41, 929 S.W.2d 177, 178 (1996). It depends not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of an average employee. *Keener*, *supra*.

Salts claims that he was forced to leave his employment because he refused a COVID-19 vaccination. He gave two reasons for his failure to do so: a medical objection and a religious objection. However, what is noticeably absent from our record is the proof required to substantiate those claims.

As for his medical-exemption claim, Salts testified that he is diabetic and that he has a family history of blood clots. He then asserted generically that he was personally concerned about the side effects of the vaccine. He provided no evidence, however, substantiating his concerns or otherwise detailing the side effects of the vaccine—no medical literature or research, no peer-reviewed studies, nor any documentation from his doctor counseling

against his receiving the vaccine. As for his alleged immunity based on a prior COVID-19 infection, he claimed in August 2021 that a November 2020 COVID-19 infection provided him with natural immunity, rendering vaccination unnecessary. Thus, it had been approximately nine months since his last infection. Simply put, the only evidence before the Board was Salts's personal belief that the vaccine should be avoided.

In *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993), this court upheld a denial of benefits, finding that the claimant's decision to quit was a personal, voluntary one unsupported by either medical advice or evidence. Perdrix-Wang was a chemist and had requested accommodations from her employer allowing her to avoid certain chemicals so as to protect the integrity of her breast milk for her infant child. Her employer denied her request but gave her the option of accepting a position as an FF assistant, which would allow her to avoid contact with chemicals. Perdrix-Wang resigned instead of remaining as a chemist without restrictions or accepting the demotion. She filed for unemployment benefits, and her claim was denied.

This court affirmed the Board's denial of benefits, finding that substantial evidence supported the Board's decision. We noted that the question before the Board was not whether appellant's purpose was legitimate; the issue was whether her reason for quitting constituted sufficiently good cause to justify an award of unemployment compensation. This court stated it was clear that the claimant's decision to breast feed her baby was not the result of instructions or recommendations by her physicians; rather, admittedly, it was her "personal" decision—based on her own judgment and her research of scientific literature, which she stated, without elaboration—that "breast-feeding best meets the nutritional needs

of infants." We noted that she tendered no evidence of the manner or extent, if any, that breast milk would benefit her child or whether the child would have been in any way endangered if the child were fed formula instead. Nor was there any evidence to indicate that the child suffered from allergies or immunity problems or that the child was in any way less than perfectly healthy. In affirming the Board's decision, we noted that, regardless of how worthy or even admirable her purpose in quitting may have been, her decision to breast feed was a personal, voluntary one unsupported by either medical advice or any evidence of the degree to which breast feeding might benefit the baby or protect her from harm.

Here, Salts had the burden of proving that he had good cause for quitting his employment with TMG. While he testified to his health conditions and his concerns, he presented no evidence to substantiate his claims or his concerns regarding taking an FDA-approved vaccine. While we are sympathetic to his concerns, more than our sympathies are required to support his claim, such as a medical opinion or other documentation that cautions him from taking the vaccine; or statistics or articles substantiating the side effects of the vaccine or advising when the vaccine is contraindicated—something more than his own personal views on the matter. It was his burden to present evidence sufficient to support his claims. Because he did not provide any such corroboration, the evidence is simply insufficient to support the Board's decision.

Finally, as for his religious claims, there is absolutely nothing in the record to support his claim that getting the vaccine would violate a cardinal principle of his religion. In fact, other than the generic "religious objection" stated, he provided no further evidence. He

did not testify to or produce any evidence as to what religion he practices; he did not assert that his refusal to be vaccinated was the result of a deeply held religious belief; nor did he describe what tenet of his religion getting the vaccine violates.

We recognized in *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983), that the Supreme Court of the United States has held that conditioning availability of benefits upon a person's willingness to violate "cardinal principles" of his or her religious faith effectively penalized the free exercise of constitutional liberties. *Haig*, 8 Ark. App. at 257, 650 S.W.2d at 595 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). In *Haig*, the evidence revealed that Haig was a devout Jehovah's Witness. When he converted to this faith, he began attending several religious conventions each year, which he claimed were an integral part of his faith. Although it created scheduling problems, his employer readily cooperated in allowing him to switch shifts or take accrued vacation time in order to attend these religious conventions. Eventually, when an insurmountable conflict arose, the employer informed Haig that he would be required to work, and if he attended the convention leaving no one to work his shift, then he would be fired. The claimant notified his employer that he intended to be present at the scheduled convention, and he resigned.

In *Haig*, we noted that Haig's desire to attend the religious convention was not a "cardinal principle of" or "conduct mandated by" his religion. Thus, he was not required to choose between his employment and the sacrifice of a constitutionally protected right. Because Haig's desire to attend the convention was personally motivated and his nonattendance was not violative of the foundation of his religion, we affirmed the Board's denial of unemployment-compensation benefits. *Compare Thomas v. Rev. Bd. of the Ind.*

Emp't Sec. Div., 450 U.S. 707 (1981) (fabricating metal for armaments violated Jehovah's Witness claimant's First Amendment rights because his religion forbade participation in the production of armaments) *with Guaranteed Auto Fin., Inc. v. Dir.*, 92 Ark. App. 295, 213 S.W.3d 39 (2005) (affirmed award of benefits because of claimant's deeply held belief that working on the Sabbath violated the tenets of his religion).

Here, Salts provided no evidence that getting a vaccination violated a cardinal principle of his religion—in fact, we do not even know what his religion is. Moreover, Salts was willing to violate this religious belief as long as TMG placed him on salary. Accordingly, the Board could not have concluded that Salts was required to choose between his employment and his constitutionally protected right.

In short, our case law requires more in the way of proof with respect to an employee's voluntary resignation from employment for personal or religious reasons in order for that employee to be eligible for unemployment benefits. Unemployment benefits are denied persons who quit their jobs without good cause connected with the work because it is deemed unreasonable to compensate people for leaving work for mere personal reasons. *See Owens v. Dir.*, 55 Ark. App. 255, 260 935 S.W.2d 285, 289 (1996) (Griffen, J., dissenting).

That is what happened here. The only evidence we have is that Salts, for personal reasons, did not want to submit to the vaccine. He claims that he was forced to quit because of his strongly held medical and religious beliefs. Yet we note that he provided no evidence to substantiate his claims, and he also was willing to compromise those beliefs as long as he was placed on salary. While it is possible that with additional evidence, an award might have

been sustainable, we believe that an award of benefits under these circumstances conflicts with policies behind unemployment insurance. Salts plainly failed in his burden of proof.

We recognize that the subject of COVID-19 vaccine requirements is polarizing in today's political climate and is one where passions run high. We take no side in that debate. Our role is simply to determine, as we must, whether there was substantial evidence presented to support the Board's decision. *Brown v. Dir.*, 2023 Ark. App. 389. It was Salts's burden as the claimant to prove that his reason for resignation was for something other than a personal, voluntary one or that he was being asked to violate a cardinal tenet of his religion.[4] Precedent dictates that he failed in that burden, and we are bound by that precedent.[5] If our supreme court decides to review this court's decision as the dissent suggests it should and holds that a Board's decision as to good cause can be upheld based on a claimant's medical concerns without any medical substantiation or a simple assertion that

[4]The dissent makes much of the fact that we have not required the employer to present any medical evidence to support his requirement that his employees be vaccinated. This would be an improper shifting of the burden of proof. As stated above, it is the claimant's burden of proving that there was good cause for his voluntary resignation. It is not the employer's burden to prove the reasonableness of his request; the burden rests on the claimant to prove that the employer's request was unreasonable.

[5]*See Perdrix-Wang*, *supra*, and *Haig*, *supra*. The dissent cites *Keener v. Director*, 2021 Ark. App. 88, 618 S.W.3d 446, for its claim that precedent exists to find substantial evidence in this case. *Keener* is distinguishable on its facts. In *Keener*, there was substantial evidence presented to the Board that the claimant was at specific risk of exposure to a *known* deadly virus and was presented a Hobson's Choice of giving up her employment or being exposed to that virus. Here, Salts voluntarily quit his employment, citing his own personal, speculative concerns regarding the potential risks surrounding a vaccine approved by the FDA. Thus, *Keener* involved a known and identifiable risk as opposed to the unspecified and unidentified risk from an FDA-approved vaccine as presented here.

claimant's religious beliefs are being violated, then we will, as we do now, abide by that precedent.

Finally, unlike the dissent, we will not let passion dictate the outcome of this decision but rely on precedent and our standard of review. To quote Aristotle, "Law is reason, free from passion."[6]

Reversed.

GRUBER, MURPHY, and BROWN, JJ., agree.

HARRISON, C.J., and ABRAMSON, J., dissent.

BRANDON J. HARRISON, Chief Judge, dissenting. This Division of Workforce Services case ends with the majority acting as Public Health Czar while it denies a former employee a public benefit the Division saw fit to award him. David's Fire Equipment (a small business co-owned by Linda George and David George and located in Cabot) and employee Charles Salts (a welder) separated over a disagreement on whether Charles had to get a COVID-19 vaccine to keep his job. After the Board of Review reversed the Appeal Tribunal's denial of benefits and ruled for Charles, the Georges lawyered up and appealed the adverse award to this court. Today, the majority mistakenly reverses the Board of Review's perfectly reasonable decision.

To summarize some material facts, co-owner David claimed that he had heart surgery and was told by his doctor he shouldn't get COVID-19; he therefore imposed a vaccine mandate on his employees. Charles balked, citing health conditions of his own: he testified under oath that he is diabetic, has a family history of blood clots, and was concerned about

[6]Aristotle, *Politics*, Book III, 1287a32.

the vaccine's emerging side effects. He also cited a religious belief and a natural immunity given a recent bout of the virus. Charles's wife, Tammy Salts, also testified during the hearing before the Appeal Tribunal. She reported that Charles was offered no accommodations—meaning no opportunity for a medical exemption, a religious exemption, "or even go pay to go to the doctor and take an antibody test for [owner] David George." (More on that later.) Nor, according to Tammy, was Charles offered a weekly testing option; and he worked "in a building by himself 90 percent of the time."[1] When the hearing officer asked if Charles was given the opportunity to "wear a mask all the time" or "social[ly] distance," Tammy answered that Charles was offered "none of that." With that orientation, let us count the ways in which the majority opinion stumbles.

First, it all but applies a new vaccine-mandate rule in the workplace: a private small-business owner can enact, against its private workforce, a COVID-19 vaccine mandate.[2] And the business owner can do so based on his own claimed personal-health concerns and the anxiety associated with it. Here, David said he recently had (relative to his vaccine mandate) heart surgery. It's worth stating up front that the heart issue David claims to have fueled the mandate is no more established by "medical evidence" than is Charles's claimed medical history and concerns with getting the vaccine, which the majority wholly discounts.

[1]In a detailed letter filed with the Division in March 2022, Charles wrote, "[W]e all worked in separate buildings and I worked alone 99% of the time."

[2]"Once FDA approval was granted, George advised his employees they had thirty days in which to become vaccinated[,]" the majority opinion acknowledges. (Internal footnote 2 omitted.)

Again, the majority gives the employer a pass on his presumed medical need for a COVID-19 vaccine mandate in the first instance, based solely on the employer's testimony; but the majority says Charles needs more than his own testimony to credibly support a preexisting health condition and family history that caused Charles's anxiety about the vaccine. And if an employee refuses a vaccine for some legitimate personal-health reason, then the private employer may still both fire the employee *and* thwart his unemployment-benefits claim. I cannot agree.[3]

Second, the majority supplants its judgment for the Board of Review's and therefore upends the standard of review. To appreciate the extent to which the majority does so, it's worth reading the core of the Board of Review's decision:

> In this case the claimant was given a 30-day timeframe to take a COVID-19 vaccine. Although the employer did not indicate what would happen if the claimant did not comply, the claimant was under the impression that he would be terminated if he did not get the vaccine. The claimant asked the employer for other alternatives instead of taking a COVID-19 vaccine, because he previously had COVID-19 and he had religious and medical reasons to not take the vaccine. However, the employer did not offer the claimant any alternatives. The Board finds that the claimant took appropriate steps to resolve his concerns prior to quitting. As such, the claimant has shown that he had good cause connected with the work for quitting. Therefore, the decision of the Appeal Tribunal in Appeal No. 2022-AT-00755 finding that the claimant voluntarily left last work without good cause connected with the work is reversed.

That decision, on this record, is an entirely reasonable application of the law to the facts. There is no legal justification for the majority to disregard our standard of review, which

[3]What effect, if any, the Arkansas General Assembly's Act 1115 of the 2021 General Session, and Acts 4 and 10 of the First Extraordinary Session of 2023, which prohibit public entities from enacting such mandates, might have on the Division of Workforce Services is unknown. These acts have not been applied to this case by any party.

simply asks whether the Board of Review could have reasonably reached the decision that it did. *See, e.g.*, *Anderson v. Dir.*, 2020 Ark. App. 427 (standard of review). The Board, having reviewed the hearing transcript generated by multiple witnesses while testifying under oath before the Appeal Tribunal, decided that Charles established "good cause" to separate from David's Fire Equipment. Why? Because in the Board's judgment, Charles, for purposes of receiving unemployment compensation, established "a cause which would reasonably impel the average able-bodied, qualified worker to give up his or her employment." *Teel v. Daniels*, 270 Ark. 766, 769, 606 S.W.2d 151, 152 (Ark. App. 1980). The good cause relates to a COVID-19 vaccine mandate in the workplace and the unchallenged fears Charles experienced because of it. The Board's decision expressly considered "whether [Charles] took appropriate steps to prevent the mistreatment from continuing." I have no doubt that he did so. He in fact tried steering to middle ground but was rebuffed.[4] Even if some doubt could be granted, the standard of review easily requires this court to affirm the Board's reasonable final decision.

Third, the majority, not content with upending our standard of review, fails to provide any statute or caselaw on which to properly rest its case. Does the majority rely on a COVID-19 vaccine-related Act by the General Assembly to support its decision? No. Does it cite a Division of Workforce Services Regulation on the COVID-19

[4]After David refused all other requested accommodations, Charles asked to become a salaried employee (he was hourly) with medical benefits to cover any adverse physical side effects he might experience if he agreed to get a COVID-19 vaccine. He was refused. This last resort was borne of his fear of experiencing a side effect of the vaccine if he complied with David's demand, which could, in turn, adversely affect Charles's ability to support his family.

vaccine/benefits intersection that puts claimants on notice of what is required to adequately support a benefits claim? No. Does it cite caselaw related to COVID-19 vaccine mandates in the private workplace of a small business? No. The majority relies heavily on a case from 1993, but it means very little here.

The majority pours Salts out by relying on a case where a chemist complained to her employer that her workplace environment might taint her breast milk and thereby adversely affect her child. The employer offered to move her, which is to say accommodate her concern, but the chemist refused, and the accommodating employer won at the agency level, and on appeal, when the chemist filed a claim and challenged the agency denials. These facts don't control this case for many reasons; an obvious one is that David didn't offer Charles any accommodation. *Perdrix-Wang v. Dir.*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Simply put, that one-off odd case doesn't decide this *uber*-unique one, thirty years apart.

Fourth, the majority finds some overarching principle from *Perdrix-Wang*—something about "personal choice." But the truth is that nothing in that case involving a rejected employer's offer to accommodate an employee's "environmental concern" remotely links to this vaccine-mandate-in-the-workplace case. The majority says: "The only evidence we have is that Salts, for personal reasons, did not want to submit to the vaccine." Again, Charles's decision to reject the vaccine was, of course, a personal choice. I'm here drawn to the response of Col. Nathan R. Jessup, played by Jack Nicholson, while on the stand under cross-examination by Lt. Daniel A. Kaffee, played by Tom Cruise, in *A Few Good Men* on the code red question:

COLONEL JESSUP: I felt [Private Santiago's] life might be in danger.

LIEUTENANT KAFFEE: Grave danger?

COLONEL JESSUP: Is there another kind?

A Few Good Men (Castle Rock Entertainment 1992). If every choice to take a vaccine or to refuse a vaccine is necessarily a personal one, what is the majority really saying about this "personal choice" angle?

Leaving Hollywood and returning to Cabot, David George's choice to implement the vaccine mandate at his workplace because he was worried about COVID-19 was also a personal choice. Why doesn't the majority scrutinize his anxiety as much as it minimizes Charles's? Two individuals making choices on a matter affecting their personal health will always be making personal choices. Conflicting views arise in these workplace cases all the time. What the majority really seems to mean, but can't directly say, is that it doesn't like Charles's decision. But the Board of Review had no issue with it. Nor do I, given the record and the standard of review of *reasonableness*.

The majority's analysis comes down to this:

> Here, [Charles] had the burden of proving that he had good cause for quitting his employment with TMG. While he testified to his health conditions and his concerns, he presented no evidence to substantiate his claims or his concerns regarding taking an FDA-approved vaccination. While we are sympathetic to his concerns, more than our sympathies are required to support his claim—a medical opinion or other documentation that cautions him from taking the vaccine; lab results showing he retained natural immunity; statistics or articles substantiating the side effects of the vaccine or advising when the vaccine is contraindicated—something more than his own personal views on the matter.

How does the majority know how Charles formed his views, meaning what sources of information he used to inform himself about the pros and cons of vaccination given his

family and personal history? Why doesn't the majority believe Charles was sincere and informed as he expressed his concerns? He straightforwardly testified that he has diabetes, has a family history of blood clots, and was concerned about emerging side effects. Where's the majority's citation to settled (or unsettled) medical opinion that Charles's assertions are medically unimportant when deciding whether to receive a COVID-19 vaccine? Maybe they are very important to the decision. More to the point, where has the majority gotten *its* view that diabetes and a family history of blood clots are not contraindications to a COVID-19 vaccination?

The Board of Review believed Charles well enough to rule for him. I don't know if Charles's concerns are correct as scientific or clinical fact; but he felt they were, and nothing in the record refutes him, as a matter of fact. What I do know is that the Appeal Tribunal held a hearing, received testimony under oath, and denied the claim. The Board of Review then reviewed the record at Charles's request and reversed the Appeal Tribunal, reasoning this way:

> The claimant asked the employer for other alternatives instead of taking a COVID-19 vaccine, because he previously had COVID-19 and he had religious and medical reasons to not take the vaccine. However, the employer did not offer the claimant any alternatives. The Board finds that the claimant took appropriate steps to resolve his concerns prior to quitting.

There is nothing unreasonable about the Board's decision.

Returning to a point I touched on at the beginning, why doesn't the majority require co-owner David's medical chart to be in the record before it believes he had a legitimate medical reason to impose the mandate on employees in the first place? David didn't produce a doctor's note. He just said he had recently undergone heart surgery and that his doctor

said he shouldn't get COVID. Again, Charles said he had diabetes and a family history of blood clots and was concerned about emerging side effects. Does the majority think Charles is a liar, or perhaps just uninformed to a fault? The Board of Review thought differently. That should've been the end of it.

> Even when there is evidence upon which the Board might have reached a different decision, our scope of judicial review is limited to a determination of whether the Board could have reasonably reached the decision rendered on the basis of the evidence presented. We defer credibility calls to the Board as the finder of fact as well as the weight to be accorded to testimony presented to the Board.

Keener v. Dir., 2021 Ark. App. 88, at 1–2, 618 S.W.3d 446, 448 (reversing the denial of benefits and awarding them in a COVID-19 workplace case) (internal citations omitted).

We now have a six-judge precedent that permits this court to make pivotal credibility calls on its own, which runs counter to thousands of cases this court has affirmed (without opinion) over decades of time.

By the way, which type of doctor or expert would satisfy the majority's appetite to know more than the Appeal Tribunal and Board of Review cared to know regarding the complicated social question of requiring COVID-19 vaccination in the workplace, and on what terms it can be mandated, if it can be mandated at all? The majority doesn't say.

Statistics? Medical journal articles? Claimants need "statistics or articles substantiating the side effects of the vaccine or advising when the vaccine is contraindicated" before showing "good cause"? Must a claimant have access to, and be able to decipher, statistical analysis of infectious-disease and epidemiological and biochemistry and immunological and pharmacological material before this court will find sufficient evidence

to permit an employee to leave a job because of an employer's mandate and still receive unemployment benefits?

What if *The Lancet* conflicts with the *Journal of the American Medical Association*? What if Johns Hopkins University conflicts with UAMS on COVID-19 vaccine recommendations? What if the CDC conflicts with (who knows how many) research scientists and clinical physicians? Does a claimant follow FOX News or CNN? Who's to be credited, one over the other? Will YouTube™ links be accepted in the Division of Workforce Services as proof of viable medical opinion? Must claimants recite on the record how they have received information during a global pandemic to satisfy the new precedent issued today? The majority erects an impractical legal hurdle against lay men and women seeking a public benefit that is meant to keep workers and their families from starving while between jobs due to circumstances beyond their control. That burden will be shared by the Division of Workforce Services too. Today's decision on what suffices as "sufficient proof" to justify paying claimants—who are themselves unrepresented 98 percent of the time and are not trained medical personnel 99.999 percent of the time—is simply wrong.

The majority holds Charles's vaccine refusal to a standard of correctness-in-hindsight, not reasonableness when he made it, though none of the evidence about the effects of contracting COVID-19, or being vaccinated against it, is more than four years old now—and Charles was terminated in September 2021. I suggest my colleagues have forgotten how much the scientific consensus (to the extent there even was one) changed in that time. (And it might change yet again.)

There are, of course, practical problems in the Division implementing the majority's new evidentiary standard in cases like this one. Must an employer, on the other hand, now hire an expert witness to dispute claims made against it? If not, how is an employer to rebut a claimant's medical proof? More to the point: for all the good it does, who believes the Division of Workforce Services has the resources, expertise, and time to review, assess, and question claimants about complex public-health material?

Fifth, the majority violates, as a matter of fact, the very "policy question" it seeks to exonerate. Justice Antonin Scalia has written, "This wolf comes as wolf."[5] So comes the majority's opinion: "While it is possible that with additional evidence, an award might have been sustainable, we believe that an award of benefits under these circumstances conflicts with policies behind unemployment insurance. Salts plainly failed in his burden of proof." The majority, not the Board of Review, usurps the policy behind unemployment insurance. Paying Charles's claim, on this record, would not offend the purpose of our unemployment-compensation statutes, which is "to protect the state unemployment compensation fund against claims of individuals who would prefer benefits to jobs." *Garrett v. Cline*, 257 Ark. 829, 832, 520 S.W.2d 281, 284 (1975). No evidence supports the majority's view that Charles sought benefits in lieu of his job. None. The opposite is true. Charles had worked for the Georges, and their *multiple businesses*, for seven or eight years. Seven to eight years the Georges relied on Charles. There was no issue until a vaccine mandate was thrust on Charles. This fact went unrebutted. Here again, the majority misses the mark.

[5] *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

A final, but no less important, point—Charles's assertion that the Georges didn't offer him a pass for religious reasons and the majority's related inquisition. Here's the majority's complaint: "[Charles] did not testify to or produce any evidence as to what religion he practices; he did not assert that his refusal to be vaccinated was the result of a deeply held religious belief; nor did he describe what tenet of his religion getting the vaccine violates."

True, Charles did not orate a pamphlet of faith for the hearing officer during the brief telephone hearing; but here again, the crucial point is missed. The hearing officer could have examined Charles on any aspect of that issue had the officer wanted to know more. Today's decision seems to require that hearing officers become arbiters of religious rights. Would the claimant's "right answer" prevail if he quoted one religious text but fail if he quoted an out of favor or obscure religion? What if there is no recognized text or scripture? Here again the majority supplants its judgment for the Board of Review's, as it calls for more checklists and more detail than the hearing officer thought necessary to know—this time about a man's religious beliefs instead of his personal and family medical history. A slippery slope indeed.

★ ★ ★

The Board of Review sided with Charles Salts's decision to separate over a vaccine-mandate dispute. That decision should easily stand because it was, without doubt, a reasonable one. The law requires nothing more.

Perhaps the Division of Workforce Services will do the right thing for itself, and claimants like Charles Salts, and seek review in the Arkansas Supreme Court so today's

decision can be set aright. *See Garrett v. Dir.*, 2014 Ark. 50 (vacating court of appeals opinion and deciding instead for the claimant on an employer's error).

As for me, and Judge Abramson who joins this dissent, we take Jimmy Buffet's advice to "Breathe in, Breathe out, Move on."[6]

We respectfully dissent.

ABRAMSON, J., joins.

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Cynthia L. Uhrynowycz, Associate General Counsel, for separate appellee Director, Division of Workforce Services.

[6]Jimmy Buffett, *Breathe in, Breathe Out, Move On*, on Take the Weather With You (Mailboat Records 2006).