STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Wanda O. Williamson,
Respondent Below, Petitioner

vs.) **No. 12-0885** (Kanawha County 10-AA-13)

Independence Coal Company, Inc.,
Petitioner Below, Respondent

FILED
May 24, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Wanda O. Williamson, *pro se*, appeals the order of the Circuit Court of Kanawha County, entered March 28, 2012, that affirmed an order of the Board of Review of Workforce West Virginia, entered December 14, 2009. The Board of Review indefinitely disqualified Petitioner from receiving unemployment benefits based upon a finding that she was discharged for gross misconduct. Respondent Independence Coal Company, Inc., by counsel Thomas S. Kleeh and Daniel D. Fassio, filed a response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was employed by Respondent as a drill operator at one of Respondent's surface mines from February 5, 2009, to April 21, 2009. Petitioner was discharged for an incident occurring on April 14, 2009. As found by the Board of Review, the incident happened as follows:

> [Petitioner] clearly failed to follow the instructions of the other drill operator. He instructed [Petitioner] that he was going to tram [his drill] out in front of her. There was a small hill in front of the workers, and the co-worker told [Petitioner] to let him negotiate this hill. [Petitioner] disregarded this instruction and began operating her drill. She also violated safety policies by failing to comunicat[e] by her hand-held radio that she was moving the drill. [Subsequently,

> Petitioner's drill collided with the co-worker's drill.] The drilling mechanism which is approximately 28 feet in height could have turned over and crushed the cab of the other drill operator.

Petitioner was initially disqualified from receiving unemployment benefits for six weeks based upon the deputy commissioner's finding of simple misconduct. *See Herbert J. Thomas Mem'l Hosp. v. Bd. of Review of W. Va. Bureau of Emp't Programs*, 218 W.Va. 29, 33, 620 S.E.2d 169, 173 (2005)[1] ("Individuals are disqualified from obtaining unemployment benefits for six weeks if the termination of their employment was due to [simple] misconduct and are disqualified indefinitely if the termination was due to gross misconduct.") (citing W.Va. Code § 21A-6-3(2)). Petitioner appealed. Following a September 30, 2009 hearing at which both parties appeared, the Administrative Law Judge ("ALJ") ruled in Petitioner's favor in an order dated October 8, 2009, finding that "although [Petitioner] may have exhibited poor judgment or been negligent," there was no misconduct. Respondent appealed to the Board of Review.

Following a hearing on November 17, 2009,[2] the Board of Review reversed the ruling of the ALJ and found that Petitioner was discharged because of both "insubordination and failure to follow safety policies" and concluded that "[c]onsidering the serious safety concern of the incident, . . . [Petitioner] committed an act of gross misconduct."[3] The Board of Review's finding of gross misconduct indefinitely disqualified Petitioner from receiving unemployment benefits. *See Herbert J. Thomas Mem'l Hosp.*, 218 W.Va. at 33, 620 S.E.2d at 173.

Petitioner appealed the Board of Review's December 14, 2009 order to the circuit court. In an order entered March 28, 2012, the circuit court affirmed the decision of the Board of Review ruling, in pertinent part, as follows:

---

[1] Prior to 2007, Workforce West Virginia was known as the Bureau of Employment Programs. *See* W.Va. Code § 21A-1-4 (2007) (as amended by 2007 W.Va. Acts ch. 27).

[2] While Respondent appeared for the November 17, 2009 hearing, Petitioner did not. Petitioner asserts that the Board of Review improperly credited statements made by Respondent's representative at this hearing. However, it is not evident from the Board of Review's December 14, 2009 order that any new testimony was adduced at the November 17, 2009, hearing (as opposed to Respondent's representative stating its position). Petitioner's appendix does not include a transcript of the November 17, 2009 Board of Review hearing. The appendix does include a transcript of the September 30, 2009 hearing before the ALJ, at which testimony was heard from both Petitioner and Respondent. Because only the September 30, 2009 transcript is in the appendix, this Court has not considered any other testimony in deciding Petitioner's appeal.

[3] In addition to the serious safety concern, a damage report relating to the April 14, 2009, incident indicated that the collision caused damage to Petitioner's drill by "bending [the drill]'s deck back and up." The damage report reflects an estimated repair cost of $10,000. Petitioner disputes the dollar amount; however, Respondent's representative at the September 30, 2009 hearing before the ALJ also testified that the damage cost $10,000.

8. Petitioner's contention that the Court can simply credit her account that she did not disregard the other drill operator's director to keep the drill in place and that she did not fail to radio her intent to move the drill is misplaced. The evaluation of credibility on appeal is expressly forbidden by West Virginia law, under which Petitioner must demonstrate that [the] Board of Review's factual findings are clearly wrong and the Board of Review's decision is not "supported by evidence of a rational basis." Here, there is evidence of a rational basis for the factual underpinnings of the Board of Review's decision in the form of (1) [Respondent]'s multiple documentation (created well in advance of the hearing before the ALJ) stating that Petitioner failed to follow her co-worker's direction to keep the drill in place; (2) [Regional Human Resources Director] Brian Hicks's investigation into the incident and subsequent testimony that the fellow drill operator gave Petitioner the direction to keep the drill in place, Petitioner failed to heed this direction, and Petitioner likewise failed to communicate her intent to move the drill over the hill on her handheld radio; and (3) Petitioner's supervisor's statement that "this situation could have been avoided . . . [as] [p]roper communication from [Petitioner] to the [co-worker] would have prevented the accident." . . . Moreover, the events of April 14, 2009, are consistent with Petitioner's previously documented safety and insubordination issues.[4] In view of the foregoing, there is not only "sufficient evidence of rational basis"[, but] there is persuasive evidence to support [Respondent]'s account, and the Board of Review's underlying factual findings are adequately supported.

* * *

12. In sum, Petitioner's attempt at a *post hoc* re-characterization of the events leading up to her termination cannot be squared with the record evidence in this matter. Petitioner has failed to show that the factual findings of the Board of Review, are "clearly wrong." Inasmuch as there is adequate evidence to support the Board of Review's decision, it should not be disturbed.

[4] On her thirty-day evaluation form, dated March 31, 2009, Petitioner's supervisor gave her a rating of only "fair" in regard to safety stating that "[Petitioner] seems to respect safety to some degree but shows careless acts in her daily duties." The supervisor rated Petitioner "poor" in cooperating with supervisors and co-workers stating that "[Petitioner] has not shown a good attitude with supervisors and coworkers."

We recognize the following standard of review:

> "The findings of fact of the Board of Review of [Workforce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo.*" Syllabus point 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994).

Syl. Pt. 1, *Herbert J. Thomas Mem'l Hosp.*, 218 W.Va. at 30, 620 S.E.2d at 170.

On appeal, Petitioner asserts that the finding of the Board of Review was clearly wrong. Petitioner asserts that the decision of the ALJ, which was in her favor, was supported by substantial evidence on the record.

The ALJ found that Petitioner received no written warning prior to the April 14, 2009 incident, but that "[Petitioner] received oral counseling's [sic] from her supervisor concerning safety and work performance concerns." Respondent correctly argues that the lack of a written warning does not prevent Petitioner's conduct being classified as "any other gross misconduct" because "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[.]" Syl. Pt. 3, in part, *Herbert J. Thomas Mem'l Hosp.*, 218 W.Va. at 30, 620 S.E.2d at 170 (internal quotations and citations omitted) (emphasis added).[5]

Although the ALJ noted that Petitioner started moving her drill in spite of being advised to wait until the co-worker ahead of her could move his drill out of the way, the ALJ failed to discuss the fact that Petitioner did not communicate that she was moving her drill over her handheld radio. Safety policy required Petitioner to radio when she was going to move her drill. While the ALJ was the person who heard the parties' testimony, the ALJ's failure to discuss Petitioner's safety violation means that the ALJ's finding of no misconduct is entitled to less deference. *See* Syl. Pt. 1, *Brown v. Gobble*, 196 W.Va. 559, 474 S.E.2d 489 (1996) ("The deference accorded . . . [a] factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered . . . .").

The April 14, 2009 incident involved *two* instances where Petitioner did not follow the

[5] "Any other gross misconduct" is the catchall category on which Respondent is relying in this case. *See* Syl. Pt. 3, *Herbert J. Thomas Mem'l Hosp. v. Bd. of Review of W.Va. Bureau of Emp't Programs*, 218 W.Va. 29, 620 S.E.2d 169 (2005) (delineating the categories of "gross misconduct" for purposes of West Virginia Code § 21A-6-3(2)) (internal quotations and citations omitted). Respondent has the burden of furnishing evidence of gross misconduct. *See* Syl. Pt. 6, *Dailey v. Bd. of Review, W.Va. Bureau of Emp't Programs*, 214 W.Va. 419, 589 S.E.2d 797 (2003).

direction of a co-worker and/or violated safety policy. In light of Petitioner's documented history of safety issues and of not cooperating with co-workers/supervisors, the Board of Review did not clearly err in finding Petitioner was discharged for gross misconduct because of Petitioner's "insubordination and failure to follow safety policies" related to the incident. After careful consideration, this Court concludes that the circuit court did not err in affirming the Board of Review's December 14, 2009 order indefinitely disqualifying Petitioner from receiving unemployment benefits based upon a finding that she was discharged for gross misconduct.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 24, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II