STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

BARBARA BIXLER,
Claimant-Appellant,
-vs-
CONCENTRA HEALTH SERVICES, INC.,
and
STATE OF MICHIGAN, DEPARTMENT LICENSING & REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY,
Appellees.

No. 11-009212-AE
HON JOHN A. MURPHY

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Concentra Health Services, Inc.
Employer-Appellee
No Appearance Filed

OPINION AND ORDER REVERSING THE DECISION OF THE BOARD OF REVIEW

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan,

on JAN 24 2012

PRESENT: THE HONORABLE JOHN A. MURPHY

Background

Appellant, 67 year old Barbara Bixler, worked for Business Health beginning in June 2002, through when it was bought by Concentra in 2007, until she was terminated on November

13, 2009. (R. at 10-11, 19.) She was the front desk biller and receptionist.[1] (R. at 10.) Appellant stated that she was fired over the phone on November 13, 2009. (R. at 12.) Concentra, Appellant's former employer, chose to withdraw its appeal, and presented no evidence at the hearing or in this proceeding. (R. at 4.)

Appellant testified that she was told her termination was for a positive drug screen. (R. at 12.) She stated that she never came to work under the influence of narcotics or alcohol and her performance evaluations were all positive, without a write up for negative behavior. (R. at 12-13.) Appellant did not dispute the drug test and explained that it was positive:

> Because there was a long-time scheduled meeting get together with some old friends (inaudible) old friends, and I smoked marijuana with them a day and half before I was, unfortunately, pulled in for a random drug screen. I'm not a drug user. It – it's just a – it was an unfortunate set of circumstances. I hadn't smoked marijuana in 35 years. (R. at 14.)

Appellant offered to take periodic drug screenings but her employer refused. (R. at 15.) Appellant testified that she did not seek a confirmatory test because "it was indicated in so many words that I wouldn't get one" due to the zero tolerance policy. (R. at 17.) She did not ask what to do if she wanted to dispute the test. (R. at 18.)

The ALJ discussed a letter written by Appellant to the UIA on June 13, 2010. (R. at 14.) The June 13 2010 letter discussed redetermination considerations, and Appellant argued that the UIA determined that she did not intentionally deceive when she filed for unemployment benefits, the random test was unrelated to her performance record, she was not offered a recourse or retest, and that it was unreasonable that she be given 25 of 26 payments before a Notice of Restitution was delivered. (R. at 30.) The subject of restitution and whether or not Appellant should have been initially paid benefits was not discussed at the hearing. ALJ Gerring took this letter to

[1] Appellant's job duties consisted of billing, admitting patients, discharging patients, doctor's referrals, authorizations, and scheduling appointments. (R. at 10.)

imply that Appellant was drug tested and that it implied that the test was positive. (R. at 15.) ALJ Gerring stated, "[s]o you're indicating that the test was positive and you did not dispute it, and you were discharged as a result of it." (R. at 15.) Attorney/Advocate for Appellant objected at this point, stating "I don't think she's qualified to testify whether the test was positive or not. She knows what her Employer told her." (R. at 16.) ALJ Gerring then asked Appellant if she ever saw the test, and following objections stated:

> I'm just asking her what her recollection of what the test was. It's – I'm not gonna necessarily take it as Gospel, but I'd like to know what she recalled the test -- we don't have the test in front of us. She's already admitted to what she did, and she told me that Employer specifically said to her that she was being discharged for this positive test. If she looked at it and it said it was negative, I'd like to know that. (R. at 17.)

Appellant testified that she saw the test and that the test was positive. (R. at 17.)

At the hearing, ALJ Gerring indicated that the disqualification of benefits was under 29(1)(m) and that 29(1)(b), termination for misconduct, "might also apply." (R. at 5.) There was discussion at the onset of the hearing regarding burden of proof. Because Concentra chose not to participate, there was no opposing party to present evidence and carry the burden of proof that would be laid on the employer. ALJ Gerring acknowledged that Appellant did not have an obligation to establish a positive drug test. (R. at 8.) Advocate for Appellant explained the issue, stating "there shouldn't be any evidence of – a positive drug test admitting into the record if it hasn't been offered by the Employer. We certainly don't want to jeopardize her case by doing that and meeting the Employer's burden for them." (R. at 8-9.) The ALJ acknowledged that, directing Appellant to just tell her story, stating that "I do expect some type of an explanation as to why this is even coming up." (R. at 9.) However, when burden of proof came up during Appellant's closing argument, ALJ Gerring agreed with Appellant's concerns

regarding allocating burden of proof, but stated "I have a sort of quasi admission here that the Board would never let me get away without at least bringing it up." (R. at 20.)

Appellant's attorney/advocate argued burden of proof was not met because a positive drug test was not introduced, and also asserted that the employer failed to introduce evidence as to what "failing a drug test" actually means, who the test was administered by and if they are certified, there is no testimony about chain of custody, and that there was no impairment at work. (R. at 19-21.) Appellant's closing argument also argued that there was no misconduct because for there to be misconduct, the conduct has to be related to her employment and Appellant was never under the influence at work. (R. at 21.) Advocate for Appellant provided a written argument before the decision by ALJ Gerring was made. The argument provides much needed background information, explaining that Appellant was initially approved for unemployment benefits, only to be disqualified after receiving 25 payments. (R. at 32.) The UIA wanted restitution for $6,400 and $625. (R. at 32.) Appellant argued that without introducing the test, the employer failed to meet its burden of proof to use the drug test as a basis for the discharge. (R. at 33.) She asserts that "[w]ithout the drug test results Claimant is asked to defend allegations without the opportunity to confront the evidence that forms the basis for her discharge" and violates her due process rights to a fair hearing." (R. at 33.) Appellant argues that this hearsay evidence cannot be used to establish substantial evidence of misconduct. She argued that 29(1)(m) was inapplicable to her because as an excellent employee and a one-time user, who used off work premises, she is not the employee that it is directed at. Additionally, to interpret 29(1)(m) strictly regulates behavior outside of work "without any subsequent showing of harm to the employer or work-relatedness violates the Due Process and Equal Protection clauses of the US Constitution." (R. at 35.) The argument addressed restitution, explaining that

any benefits paid before the employer objected to unemployment benefits being paid to Appellant are not subject to restitution. (R. at 35.)

ALJ Gerring's Decision

In a decision issued September 27, 2010, ALJ Gerring fleshed out further background as to why Appellant was initially paid unemployment benefits. She indicated in her application for benefits that she was terminated for "lack of work" because she would have been eliminated due to downsizing. (R. at 41.) The agency paid 24 weeks of benefits even after being notified of the positive drug test, and then disqualified Appellant, seeking restitution. ALJ Gerring determined that "Claimant did not intentionally make a false statement or misrepresentation or conceal material information in order to obtain benefits to which not entitled." (R. at 42.) Appellant explained that the employer was downsizing at the time of the positive drug test and when faced with the positive drug test, chose to eliminate her position, which was why she listed her separation due to lack of work. (R. at 44.)

The decision by ALJ Gerring examined whether Appellant's benefits were terminated due to the illegal drug provision under section 29(1)(m). ALJ Gerring determined that although the employer offered no evidence to carry its burden to show a positive drug test, Appellant's initial protest to the Agency, and her testimony indicated that there was a positive drug test and that there was "a duty to uphold the public trust" which prevented ALJ Gerring from ignoring the prior statements of Appellant. (R. at 43.) The decision disagreed with Appellant's written argument, explaining that 29(1)(m) applies whether the drugs were taken at work or outside of the workplace, and that there is no distinction made between one time users and additcts. (R. at 44.) Appellant did not request a confirmatory test as permitted under the statute, she admitted to using marijuana the day before the test was given, and makes no argument that the test was

administered in a discriminatory fashion. (R. at 44.) The ALJ came to this conclusion without explaining how Appellant could make such an argument in the absence of the actual report. Indeed the employer did not attend the hearing and therefore was not subject to cross examination on whether the test was administered in a non-discriminatory fashion. ALJ Gerring explained that "[t]he statute is clear and precise; if you are fired for testing positive for drugs, benefits are denied." (R. at 44.) As to the issue of restitution, ALJ Gerring determined that it would be "against equity and good conscience" to require restitution because the agency knew as early as December 3, 2009 that Appellant was discharged for a positive drug test but continued to allow her to collect benefits into May 2010. (R. at 44.)

Appellant and the Agency both petitioned the Board of Review for review. Appellant argued she should not have been disqualified and the Agency argued that she should be required to pay restitution. The BOR denied oral argument and affirmed the determination of disqualification under 29(1)(m) but reversed the decision under Section 62(a) as to restitution. The decision stated:

> We disagree, however, with the Referee's Findings of Fact and Conclusions of Law regarding Section 62(a) of the Act. The Agency continued to pay the claimant after the employer informed the Agency that the claimant was discharged for failing a drug test because of the high volume of cases the Agency was required to process, not because of any administrative error. (R. at 47.)

The BOR also corrected language regarding "rework" to mean that Appellant must serve a 26-week requalification period. That issue is not argued here. (R. at 47.) Appellant was ordered to make restitution under Section 62(a).

Member Garry Goolsby filed a dissenting opinion. Mr. Goolsby took issue with ALJ Gerring's "duty to uphold the public trust" argument and the burden of proof issues. (R. at 48.)

He explained that "contrary to the conclusion of the Referee, this case has nothing to do with public trust; it has everything to do with evidence." (R. at 48.) Mr. Goolsby asserted that:

> The burden of proving [the evidence required under 29(1)(m)] is on the employer, not the claimant. The employer did not offer any evidence. Significantly, no drug test results were introduced. Moreover, there was no showing that the drug test was administered in a non-discriminatory manner. In my opinion, the Referee based his decision not on competent evidence but on information not in the record. At a minimum, the Referee should have introduced the claimant's prior statements upon which he relied to find the claimant disqualified. (R. at 48-49.)

Because the employer failed to carry its burden of proof, dissenter Mr. Goolsby found that Appellant should not be disqualified. (R. at 49.) None of the determinations addressed the constitutional issues raised in the written argument.

Standard of Review

The standard of review for an MES Board of Review decision is set by MCL 421.38(1). The circuit court must determine whether the decision by the Board of Review is supported by competent, material, and substantial evidence on the record and is not contrary to law. MCL 4.21.38(1). Substantial evidence is defined as "evidence which a reasoning mind would accept as sufficient to support a conclusion." *Russo v. Dep't of Licensing and Regulation*, 119 Mich App 624, 631; 326 NW2d 583, 587 (1982). "It is more than a mere scintilla but less than a preponderance of the evidence." *In Re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191, 194 (1994). Appellate review in this matter must be thorough and consider the whole record, but is not *de novo* and "must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Michigan Employment Relations Com. v. Detroit Symphony Orchestra, Inc.*, 393 Mich. 116, 124; 223 NW2d 283, 287-88 (1974). It is with this background that this court examines

Appellant's case. As long as the Board of Review decision was supported by competent, material, and substantial evidence on the record and was not contrary to law, this court should not hear the case anew.

Analysis

The determination of the Board of Review is reversed because it is not supported by material, competent, and substantial evidence on the record and the determination based on the drug test evidence was contrary to law.

Appellant was terminated because she failed a drug test, testing positive for marijuana. Under MCL 421.29(1)(m), a claimant is disqualified from receiving unemployment benefits if he:

> Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, *if the test was administered in a nondiscriminatory manner*. If the worker disputes the result of the testing, a generally accepted confirmatory test shall be administered and shall also indicate a positive result for the presence of a controlled substance before a disqualification of the worker under this subdivision. MCL 421.29(1)(m)(emphasis added).

The important language in this passage is "testing positive on a drug test if the test was administered in a nondiscriminatory manner." MCL 421.29(1)(m). If there is issue with the test, the claimant could dispute the test, seeking a confirmatory test. To properly apply the standard of review in this case, the Court must decide if the determination by the BOR is supported by material, competent, and substantial evidence and is not contrary to law.

The evidence before the Court is problematic. The employer did not participate in this matter. The drug test that the BOR used to disqualify Appellant from receiving benefits was not introduced. The problem here is the difference between what we know and what we can prove. Appellant knows she failed the drug test and she knows why: she admitted to smoking marijuana

a few days before the test. She saw the test and knows what she did. There is no disputing the results of the test and in light of Appellant's admission as to the drug use it is absurd to conclude anything but that the drug test was positive. However, the burden of proof here is on the employer. *Fresta v Miller*, 7 Mich App 58, 63; 151 NW2d 181, 184 (1967). The employer has the responsibility of proving to the Court that Appellant was terminated for a positive drug test and properly disqualified from benefits. Dissenting Board Member Goolsby highlighted in his dissent, stating that:

> The burden of proving [the evidence required under 29(1)(m)] is on the employer, not the claimant. The employer did not offer any evidence. Significantly, no drug test results were introduced. Moreover, there was no showing that the drug test was administered in a non-discriminatory manner. In my opinion, the Referee based his decision not on competent evidence but on information not in the record. At a minimum, the Referee should have introduced the claimant's prior statements upon which he relied to find the claimant disqualified. (R. at 48-49.)

This Court agrees with Mr. Goolsby. Additionally, ALJ Gerring discussed a letter that Appellant wrote on June 13, 2010, but this letter was not properly introduced into evidence during the hearing. It was just a subject of discussion.

Appellee argues that there are no evidentiary issues because the BOR and the ALJ have a duty to decide benefits regardless of the action or inaction of the employer. *Miller v FW Woolworth Co*, 359 Mich 342, 350-51; 102 NW2d 728, 733 (1960)(J. Black, concurring). Appellee explains that the ALJ has the duty to conduct the hearing to secure evidence necessary to reach a fair decision and is permitted to question witnesses. Mich. Admin.Code R. 421.1207(1) and (8). Appellant does not take issue with the ALJ questioning her as a witness, but with the questioning being used as a tool to circumvent the requirement that the employer carry the burden of proof. Appellee also argues that the testimony by Appellant that the test was positive, although hearsay, is perfectly admissible in the case of an administrative hearing

because evidence can be used if it is "commonly relied on by reasonably prudent persons in the conduct of their affairs." *Spratt v Dept of Soc Services*, 169 Mich App 693, 701; 426 NW2d 780, 784 (1988); MCL 24.275; *Michigan State Employees Ass'n v Michigan Civil Serv Com'n*, 126 Mich App 797, 804; 338 NW2d 220, 224 (1983); . *Perkey*, cited by Appellant, supports this principle, stating that "administrative agencies are given more discretion in admitting evidence than a trial court." *Perkey v Aetna Industries*, No. 96-7393-AE, Macomb Circuit Court (Aug. 21, 1997).

Under the logic of Appellee, the employer would never have to appear in drug test cases. The ALJ could simply inquire about the test, then decide that because it is an administrative hearing, the hearsay testimony as to what the unintroduced test contained is now admissible, effectively forcing claimants to prove the case against them, and improperly shifting the burden of proof. ALJ Gerring claimed that there was a duty to uphold the public trust, but the public, via the legislature, determined that in these cases the employer would be required to prove that the claimant is not entitled to benefits. That did not occur here. The ALJ questioned the Appellant into proving the case against her, effectively forcing her to carry the burden of proof against herself. This is contrary to law.

The logic of ALJ Gerring and the BOR is troublesome when it comes to ascertaining whether the test was administered in a discriminatory manner. Where the employer fails to appear, it cannot meet its burden of proof that the test was administered in a non-discriminatory manner. Appellant would have to introduce the test, describe how it was administered, and then refute the methods. After all this is complete, is there any real purpose for the employer to appear? ALJ Gerring ruled that Appellant did not argue that the test was discriminatorily

applied. How could she where the party administering the test failed to appear for the hearing? She could not cross examine an empty chair.

The determination of the BOR to deny Appellant unemployment benefits is not supported by material, competent, and substantial evidence on the record and is contrary to law. The employer failed to establish Appellant was disqualified under MCL 421.29(1)(m).[2] Therefore, the determination of the Board of Review is reversed.

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY _____ DEPUTY CLERK

John A. Murphy
Circuit Court Judge

[2] Although the issue of restitution was raised on appeal, the determination of this Court renders it moot.

STATE OF MICHIGAN
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-vs-
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and
STATE OF MICHIGAN, DEPARTMENT LICENSING & REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY,
Appellees.

No. 11-009212-AE
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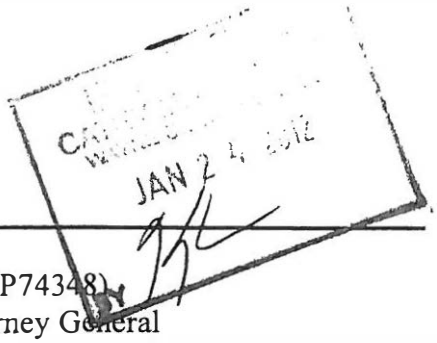

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Concentra Health Services, Inc.
Employer-Appellee
No Appearance Filed

ORDER REVERSING THE DECISION OF THE BOARD OF REVIEW

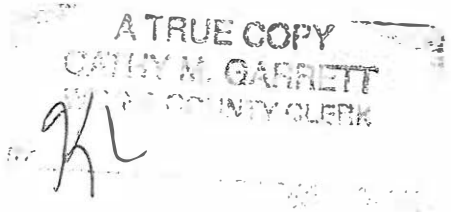
At a session of said Court, held in the City of
Detroit, County of Wayne, State of Michigan,

on JAN 24 2012

PRESENT: THE HONORABLE JOHN A. MURPHY

For the reasons stated, we grant Appellant's appeal and reverse the decision that Appellant is not entitled to unemployment benefits.

It is so ordered.



John A. Murphy
Circuit Court Judge