

STATE OF MICHIGAN
CIRCUIT COURT FOR THE [REDACTED] JUDICIAL CIRCUIT
[REDACTED] COUNTY

AMY [REDACTED]

Claimant-Appellant

v

Case No. [REDACTED]

[REDACTED] MEDICAL CARE FACILITY,

HONORABLE [REDACTED]

Employer-Appellee,

and

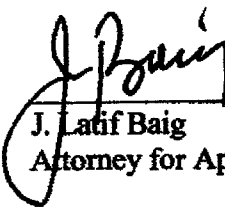
STATE OF MICHIGAN, DEPARTMENT
OF LICENSING & REGULATORY
AFFAIRS UNEMPLOYMENT
INSURANCE AGENCY,
Agency-Appellee.

ARGUMENT

Employer/Appellee [REDACTED] Medical Care Facility ([REDACTED] Medical"), through its attorney, J. Latif Baig, moves for entry of an Order affirming the Orders entered on October 30, [REDACTED] and February 21, [REDACTED] by the Compensation Appellate Commission ("MCAC") denying Claimant/Appellant her unemployment benefits; Appellant relies on the facts cited and arguments made in the attached Brief. Appellee requests Oral Argument.

Dated: October 2, [REDACTED]

Respectfully submitted,



J. Latif Baig
Attorney for Appellee

STATE OF MICHIGAN
CIRCUIT COURT FOR THE [REDACTED] JUDICIAL CIRCUIT
[REDACTED] COUNTY

AMY [REDACTED]

Claimant-Appellant

V

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STATE OF MICHIGAN, DEPARTMENT
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AFFAIRS UNEMPLOYMENT
INSURANCE AGENCY,
Agency-Appellee.

**BRIEF IN SUPPORT OF APPEAL REPLY
ORAL ARGUMENT REQUESTED**

QUESTION: Is the Claimant disqualified for unemployment benefits because he was terminated for statutory misconduct.

Claimant-Appellant Answers NO

Employer-Appellee Answers YES

Agency Answers YES

Employer/Appellee [REDACTED] Medical Care Facility ([REDACTED] Medical"), through its attorney, J.

Latif Baig, moves for entry of an Order affirming the Orders entered on October 30, [REDACTED] and

February 21, [REDACTED] by the Compensation Appellate Commission ("MCAC") denying Claimant/Appellant her unemployment benefits. The MCAC's Order reversed the Administrative Law Judge's ("ALJ") Order dated August 5, [REDACTED]. The ALJ's Order reversed an Agency determination dated April 30, [REDACTED].

STATEMENT OF FACTS

On December 17, [REDACTED] the claimant was discharged for violating the employer's drug administration standards. The employer had several policies that required that drugs to be administered and documented one patient at a time (see R 115-117 and R 118-119, i.e., exhibits 7 and 17 in the record). She acknowledged these policies (R 125, i.e., exhibit 48 in the record). The defendant used her own procedure, i.e., administer drugs to all the patients and then document the administration of the drugs, after the fact. As the employer witnesses testified, this posed significant risk to patients. In fact, the claimant's procedure violates the "five rights" (see ALJ Decision R 187); the claimant acknowledged that she knew what the "five rights" were. The claimant was given a warning about her violation of policy (R 111, i.e., exhibit 2 in the record) and nursing standard (R 74).

STANDARD OF REVIEW

The standard of review for decisions by the Compensation Appellate Commission is well settled. The Court may review questions of law or fact on appeal from the MCAC but cannot reverse a decision of the MCAC unless it is contrary to law or unsupported by competent, material and substantial evidence on the record as a whole. *MI Const 1963, art 6, § 28; MCL*

421.38. Also see *Chrysler Corp v Sellers*, 105 Mich App 715, 720; 307 NW2d 708 (1981).

Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. See *Becotte v Gwinn Schools*, 192 Mich App 682, 685; 481 NW2d 728 (1992).

ARGUMENT

Claimant was terminated from his employment for statutory misconduct. The MCAC's decision finding the Claimant disqualified should be affirmed because it is supported by competent, material and substantial evidence on the record as a whole.

Neither party disputes that claimant was terminated from her employment for misconduct.

MCL 421.29(1)(b) provides in part:

An individual shall be disqualified for benefits in the following cases in which the individual:

(b) Was suspended or discharged for misconduct connected with the individual's work ...

"Misconduct" is not defined in the statute but Courts have defined the term. In *Carter v Michigan Employment Security Commission*, 364 Mich 538 (1961), the Supreme Court adopted the definition of misconduct in *Boynton Cab Company v Neubeck*, 296 NW 636, 640 (Wis 1941) which, in part, states as follows:

The term 'misconduct'..., is limited to conduct evincing such willful or 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.

It is the employer's burden to demonstrate that misconduct was involved by a preponderance of evidence. *Fresta v Miller*, 7 Mich App 58, 63-64 (1967). In *Christophersen v City of Menominee*, 137 Mich App 776 (1984), the Court clarified the misconduct definition found in *Giddens v Employment Security Comm'n*, 4 Mich App 526, 534-35 (1966) and held that "misconduct" is established if the series of acts under scrutiny, considered together, evince a willful disregard of the employer's interest. *Id.* at 781.

The MCAC indicated in its decision that the employer provided competent and credible evidence of the claimant's misconduct. There was a clear, written policy that required documenting the dispensing of drugs to residents one at a time, when the drug is given to the resident (R 113-114, Exhibit 5 in the record). The employer cited a compelling reason for this policy, i.e., to ensure the safety of each resident (R 30-31; also see R 31 lines 1-3). The policy is there to protect residents from serious harm and even death; in fact, 1 out of 3 adverse drug events is due to errors in administering medication (R 42-42). Furthermore, Ms. [REDACTED] testified that this drug documentation procedure is part of a nurse's basic education (R 43). When confronted by Ms. [REDACTED] concerning the final incident (R 28-29), the claimant admitted to not following documented drug administration procedure (R 29, lines 3-5), that after she administered all the medications to all the residents, she then documented after the fact.

Based on the employer's evidence alone, the MCAC had substantial, material and competent evidence to rule in favor of the employer. Now let us examine what the claimant testified to.

The claimant denies every receiving a copy of the Employer's Drug Administration Standards. Even if it were true, she testified that she was put on notice by Mr. [REDACTED] that documenting after all the drugs have been administered is against nursing standard (R 74 lines 13-19); she said she would improve. Now note, Mr. [REDACTED] did not characterize the claimant's violation as a mere violation of some obscure employer policy – he told the claimant what she was doing was contrary to nursing standard! The claimant is a professional – she is a nurse. This corresponds to what Ms. [REDACTED] stated that this procedure is taught in a nurse's basic education (R 43). So Mr. [REDACTED] put the claimant on notice that her procedure for documenting drug administration was contrary to nursing professional standards.

Then a week later, she does it again – documenting after all the drugs have been administered. In her own words, she states: "I am doing the five rights, the right route, dose, kind, so on and so forth. The only thing I had done differently was chart at the very end." (emphasis provided – see R 81 lines 16-19). Her admission is consistent with the employer's testimony. She has admitted doing the exact same thing Mr. [REDACTED] told her was against nursing standard.

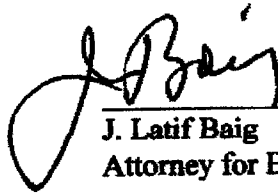
Even if we ignored the employer's testimony, the MCAC had substantial, material and competent evidence to rule in favor of the employer based on what the claimant even admitted.

CONCLUSION

For the reasons cited above, the MCAC's decision should be affirmed.

Dated: October 2, [REDACTED]

Respectfully submitted,



J. Latif Baig
Attorney for Employer/Appellee

Table of Authorities

Statutory and Administrative Authority:

MI Const 1963, art 6, § 28; MCL 421.38.
MCL 421.29(1)(b)

Caselaw:

Becotte v Gwinn Schools, 192 Mich App 682, 685; 481 NW2d 728 (1992)

Boynton Cab Company v Neubeck, 296 NW 636, 640 (Wis 1941)

Carter v Michigan Employment Security Commission, 364 Mich 538 (1961)

Chrysler Corp v Sellers, 105 Mich App 715, 720; 307 NW2d 708 (1981)

Christophersen v City of Menominee, 137 Mich App 776 (1984)

Fresta v Miller, 7 Mich App 58, 63-64 (1967)

Giddens v Employment Security Comm'n, 4 Mich App 526, 534-35 (1966)

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PROOF OF SERVICE

I certify that on October 2, [REDACTED], I sent a copy of Employer/Appellee Argument and Brief by email and first class mail (postage prepaid) to the attorneys of record at their addresses provided in their Appearances.

Dated: October 2 [REDACTED]



J. Latif Baig

asked if I did Accu-check at the same time, which accu-check is checking blood sugar, at the same time as passing the medications. I stated, "Yep." He then--I told him that we needed help because I'm spending a lot of the time running back and forth getting medications so I'm also ensuring the safety of the residents because at that time they do like to fall out of bed and we have had falls, and he said, "What should we do about it?" I said, "We've been asking for help for a long period of time. We need help." And he said, "What, aides or nurses?" I said, "Both would be wonderful, but I would take an aide so I can maintain what I have to do with my duties instead of constantly having to go to and helping the residents." He said, "Okay."

Q Okay. And so did he tell you from this day forward you have to document after every patient? Did he tell you that or did he tell you to improve your process?

A No, he just stated that it was against nursing standard to do it the way I was doing, and I told him I would improve from then on out, and I started documenting after five, six residents instead of the very end.

Q In your mind, did you believe that you were doing what he told you to do, work on your process and try to improve?

A Yes.

Q Okay. And were you ever argumentative or resistant with Mr. [REDACTED]

A No.

Q All right. And were you trying to work with your employer and

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issue?

A That was on December 14th, [redacted]

Q Okay. And were you suspended on that date?

A At--when at that point I had to finish out my shift, and then I went down to [redacted]'s office--the conference room and there they just-- and I brought [redacted] in with me, another nurse, and they told me that I was suspended until the board meeting. I asked when the board meeting was and they told me it was Monday the 17th, and I said, "Okay." And he said I have to make a motion to speak so I said, "Okay." And (inaudible) Monday and I was terminated on Monday.

Q Now there's been some testimony that you admitted that you were violating policy and procedure. Is that true?

A No.

Q Okay. Tell me about your discussion on December 14th regarding med pass.

A I told [redacted] and [redacted] at that time. I am being very cautious. I am--my safety is important to me. I am doing the five rights, the right route, dose, kind, so on and so forth. The only thing that I had done differently was chart at the very end. I do my (inaudible) and I thought in head at this point is any time a person picks up one pill, there's a potential for mistake or harm. I did not commit any errors, and I never received any paperwork on the 14th at all or on the 17th regarding my suspension or termination. I had got that in the mail on the 22nd of December, and I stated in the conversation that we had had, [redacted] and I on the 7th, and they