IN THE CIRCUIT COURT OF MARYLAND FOR ANNE ARUNDEL COUNTY
Civil Division

PETITION OF NELDA ELAINE FINK PO BOX 64 Millersville, Maryland 21108	
FOR JUDICIAL REVIEW OF THE DECISION OF MARYLAND DEPARTMENT OF LABOR BOARD OF APPEALS DIVISION OF UNEMPLOYMENT INSURANCE 1100 North Eutaw Street, Room 515 Baltimore, Maryland 21201	**CIVIL ACTION NO.:** **C-02-CV-22-000867**
IN THE CASE OF Claimant: Nelda E. Fink PO Box 64 Millersville, MD 21108	
Employer: Pevco Systems International Inc. 1401 Tangier Dr. Middle River, MD 21220-2876	
DECISION NO.: 18977-BR-22 APPEAL NO.: 2123148 S.S. NO.:XXX-XX-4109	

MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Petitioner NELDA ELAINE FINK, by her counsel Jonathan E. Butler, Esquire, and the Law Offices of Jonathan E. Butler, LLC., appeals the decision by the Maryland Department of Labor Board of Appeals in the above-captioned matter, DECISION NO.:18977-BR-22; APPEAL NO.:2123148; S.S. NO: XXX-XX-4109

I. QUESTIONS PRESENTED

1. Whether the decision of the Board of Appeals - Maryland Department of Labor exceeded its statutory authority when it denied unemployment insurance benefits by improperly

and admittedly applying a provision of statute § 8-1001 to statute § 8-1002, when § 8-1002 is "silent" or lacks such a provision?

2. Whether the decision of Maryland Department of Labor - Board of Appeals exceeded its legislative authority when the Board, "found no meaningful distinction" between a separation from employment by discharge (i.e., Statute 8-1002) and separation from employment by voluntary quit (i.e., Statute 8-1001), thus substituting its own judgment rather than adhearing to the General Assembly's statutory intent?

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. The Petitioner, Nelda E. Fink, began working for employer, Pevco Systems International, Inc., on September 23, 2009. (Record Before the Maryland Department of Labor, Board of Appeals, pg. 80.)
2. Ms. Nelda E. Fink was discharged on May 12, 2021. (Id. at 81).
3. On September 08, 2021, Maryland Department of Labor- Division of Unemployment Insurance awarded benefits and determined "the circumstances surrounding the separation did not warrant a disqualification under § 8-1002 or § 8-1003". (Id. at 1)
4. Pevco Systems International appealed the award of benefits and on October 12, 2021, it was held that the employer discharged Ms. Fink for gross misconduct. (Id. at 15)
5. Ms. Fink did not receive timely notice of the hearing, and a *de novo* hearing was granted on November 10, 2021. (Id. at 24)

6. A *de novo* hearing occurred before the Maryland Depart of Labor, Licensing and Regulation Unemployment Appeals Board - Lower Appeals Division on February 14, 2022 (Id. at 38).
7. Ms. Fink informed Pevco Systems International, with a healthcare provider's note, that she possessed a medical condition (Id. at 46; Section Page 31,32)
8. Ms. Fink informed the hearing examiner that, "[I] wasn't intentionally disregarding Pevco's policy but did not want my healthcare condition to become any worse. I'm not a doctor… Dr. Lay (i.e., healthcare provider) told me not to do anything that would affect my breathing". (Id. at 47; Section Page 34).
9. Ms. Fink's performance appraisal did not say anything about misconduct. (Id. at 47; Section Page 35)
10. On February 22, 2022, the Lower Appeals Decision Hearing Examiner concluded that § 8-1001 was implicated and that Ms. Fink left work voluntarily (Id. at 61).
11. The Maryland Department of Labor – Board of Appeals, which reviews the Lower Appeals Decision's conclusions determined, **" The Board finds the hearing examiner's Findings of Fact are not entirely supported by substantial evidence in the record and they are incomplete…rejects the Hearing examiner's Findings of Facts in their entirety…"**(Id. at 80)
12. The Board of Appeals further determined**, "the record is replete with efforts by [Ms. Fink] to maintain her employment despite her medical concerns, and she took a number of steps in furtherance of continuing her employment."** (Id. at 84).

13. Importantly, the board concluded that **Ms. Fink was discharged and "this separation must be considered in light of the provisions of the *Md. Code Ann., Lab and Empl. Art., § 8-1002 and § 8- 1003*. (**Id.)

14. Moreover, the Board explicitly states, "***Md. Code Ann., Lab and Empl. Art., § 8-1002 and § 8- 1003 are silent"*** on this issue of medical opinions, physicians, medical evidence, or hospitals. (Id. at 84)**.**

15. However, the Board of Appeals states, "the decision in this case is prompted **ONLY** by the specific ruling of the Court and Board … connected with physicians and hospitals… under § 8-1001. (Id. at 84)

16. Furthermore, the Board of Appeals, which should have strictly applied *Md. Code Ann., Lab and Empl. Art., § 8-1002 and § 8- 1003*, stated " the Board finds the medical, evidentiary burden of proof in a discharge to be the same as that for a voluntary quit. (Id. at 84 and 85).

17. The Board ruled **"the medical documentation"** submitted by Ms. Fink and Dr. Lay (i.e., Chiropractor**) does not meet the burden of proof for *Md. Code Ann., Lab and Empl. Art., § 8-1002 and § 8- 1003,* which is totally silent on the issue of need for anything medically related**. (Id. at 85)

18. The Board of Appeals finally concluded, there was a discharge for gross misconduct under ***Md. Code Ann., Lab and Empl. Art., § 8-1002,*** because Ms. Fink did not provide sufficient medical documentation of a health problem from a physician or hospital. (Id. at 85).

19. Ms. Fink continues to be disqualified from unemployment insurance benefits.

III. STANDARD OF REVIEW

In ordinary circumstances, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Thanner Enters. LLC v. Baltimore Cnty., 995 A.2d 257, 414 Md. 265 (Md. 2010). However, when a statutory provision is entirely clear, with no ambiguity whatsoever, administrative constructions, no matter how well entrenched, are not given weight. Id. Despite the deference, it is always within the Court's prerogative to determine whether an agency's conclusions of law are correct. Id. A question of statutory interpretation is a question of law. Id. A reviewing court may reverse or modify the [administrative] decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision is affected by any other error of law. Maryland Transportation Authority v. King, 369 Md. 274, 799 A.2d 1246 (Md. 2002).

IV. ARGUMENT AND AUTHORITIES

A. Whether the decision of the Board of Appeals - Maryland Department of Labor exceeded its statutory authority when it denied unemployment insurance benefits by improperly and admittedly applying a provision of statute § 8-1001 to statute § 8-1002, when § 8-1002 is "silent" or lacks such a provision?

Because statute § 8-1002(a)(1)(i) does not state any criteria necessary, specifically any medical or healthcare related criteria necessary to exempt a Claimants from exclusion of benefits for gross misconduct, it was improper and erroneous for the Board to apply an explicit provision of § 8-1001. This impropriety resulted in denial of unemployment insurance benefits under §8-1002.

The starting point of any statutory analysis is the plain language of the statute. Kranz v. State, 459 Md. 456, 187 A.3d 66 (Md. App. 2018). We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with 'forced or subtle interpretations' that limit or extend its application. State v. Bey, 452 Md. 255, 156 A.3d 873 (Md. App. 2017). Consistent with this bedrock principle of statutory construction, [w] here the General Assembly includes particular language in one section of a statute but omits it in another ..., it is generally presumed that it acts intentionally and purposely in the disparate inclusion or exclusion. Gardner v. State , 420 Md. 1, 20 A.3d 801 (Md. 2011).

Here, the Department of Labor – Board of Appeals admits that § 8-1002[1], which is the statute used to deny unemployment insurance benefits to the Petitioner, is silent as to any medical criteria. Moreover, the Department of Labor – Board of Appeals is clear that its decision is based **ONLY** upon the application of the medical criteria required in § 8-1001 being applied to § 8-1002. (Record Before the Maryland Department of Labor, Board of Appeals, pg. 84.)

[1] MD. Labor and Employment Code Ann. § 8-1002 (2021)

When the General Assembly wrote § 8-1001[2], the assembly explicitly, intentionally and purposely provided the requirement "**For determination of the application of paragraph (1)(ii) of this subsection** to an individual who leaves employment because of the health of the individual or another for whom the individual must care, the individual shall submit a written statement or other documentary evidence of the health problem from a hospital or physician." MD Code LE 8-1001 Voluntarily leaving work (Maryland Code (2022 Edition).

There is no evidence to suggest that the General Assembly intended the criteria of documentary evidence of a health problem from a hospital or physician to be applied or imputed to any other statutory provision. Moreover, the plain language suggests that the General Assembly intended the provision to be restricted to only "paragraph (1)(ii)" of the subsection within Section 8-1001. The Department of Labor-Board of Appeals improperly and erroneously applied § 8-1001 provision to § 8-1002 which makes no mention of any medical or health related criteria that can be used to exclude a Claimant's justification or undermine the Claimant's intent.

When the Department of Labor – Board of Appeals admitted that they applied a provision that is entirely restricted to a subsection of 8-1001 (1)(ii) to § 8-1002, the Department of Labor – Board of Appeals committed legal error and biased Ms. Fink with prejudice conclusions of law. The Board of Appeals failed to adhere to the plain meaning interpretation of statute 8-1002, and replaced the General Assembly's intent with its own. No deference should be given to the Department of Labor- Board of Appeals interpretation of § 8-1002, because the **ONLY** basis for denial of Ms. Fink's unemployment benefits was improper.

[2] MD. Labor and Employment Code Ann. § 8-1001 (2021)

B. Whether the decision of Maryland Department of Labor - Board of Appeals exceeded its legislative authority when the Board, "found no meaningful distinction" between a separation from employment by discharge (i.e., Statute 8-1002) and separation from employment by voluntary quit (i.e., Statute 8-1001), thus substituting its own judgment rather than adhearing to the General Assembly's statutory intent?

The Maryland Department of Labor – Board of Appeals exceeded its legislative authority when it intentionally deviated from § 8-1002, the gross misconduct discharge statute, and relied upon a provision in § 8-1001, the voluntary quit statute, in order to diminish the claimant's justification for not adhering to a company's policy.

An agency's authority extends only as far as the General Assembly prescribes. Thanner Enters. LLC v. Baltimore Cnty., 995 A.2d 257, 414 Md. 265 (Md. 2010). An administrative agency, as a creature of statute, has **only the power its enabling statute delegates** to it. Id. The interpretation of an agency rule is governed by the same principles that govern the interpretation of a Statute. Id. The Court's primary objective is to ascertain and effectuate the intent of the Legislature. Id. The most reliable indicator of the Legislature's intent is the statute's plain language as ordinarily understood. Id.

"Gross misconduct" for the purposes of this article [Section 8-1002], shall include conduct of an employee which is (1) a deliberate and willful disregard of standards of behavior, which his employer has a right to expect, showing a gross indifference to the employer's interest, or (2) a series of repeated violations of employment rules proving that the employee has regularly and wantonly disregarded his obligations. Department of Economic and Employment

Development v. Jones, 558 A.2d 739, 79 Md.App. 531 (Md. App. 1988). Misconduct not falling within this definition shall not be considered **gross** misconduct (with emphasis added). Id. A claimant must possess a wanton, deliberate, willful state of mind, which is shown by "flagrantly" engaging in the substandard conduct. Id.

Here, there is no language within Statute 8-1002 that enables the Maryland Department of Labor – Board of Appeals to judge a Claimant's intent through the exclusion of certain Doctors' opinions or medical credential. Ms. Fink provided, from Dr. Mary Ann Ley, medical documentation of a condition. Moreover, Ms. Fink informed the hearing examiner that, "[I] wasn't intentionally disregarding Pevco's policy; I did not want my healthcare condition to become any worse. I'm not a doctor… Dr. Ley (i.e., healthcare provider) told me not to do anything that would affect my breathing". (Record Before the Maryland Department of Labor, Board of Appeals at 47; Section Page 34). Because the Board ignored Ms. Fink's intent, which was justified by Dr. Ley's opinion, the Board without explicit or implicit statutory authority improperly denied Ms. Fink's unemployment benefits. The most appropriate remedy is that unemployment benefits be restored.

V. CONCLUSION

When Maryland's General Assembly created §8-1002, the legislative body was clear in its intent, because it did not include a provision concerning a specific type of healthcare provider or healthcare setting. The Maryland Depart of Labor – Board of Appeals misappropriated the provision from §8-1001 and applied it to 8-§1002. This misappropriation is the **ONLY** reason Ms. Nelda Fink was denied benefits; although, Ms. Fink **also clearly** did not possess the

requisite intent necessary to commit gross conduct and be denied unemployment insurance benefits per § 8-1002. The Board of Appeals should simply apply § 8-1002 as proscribed by legislature, and acknowledge that Ms. Nelda Fink is a non-doctor that believed her Doctor of Chiropractic Medicine's medical advice that her medical condition would be made worse. The record is replete with facts that Ms. Fink did not voluntarily quit (§ 8-1001) or commit gross misconduct (§8-1002). With the facts and legal rationale above, rights and privileges to unemployment insurance benefits should be restored to Ms. Fink through a reversal of the Board of Appeals conclusion of law, which **ONLY** denied benefits due to misappropriating another statute's provision. Without the reversal, the Maryland Department of Labor is then given the authority to continue to arbitrarily and unfairly deny benefits, regardless of the statutes established by the Maryland General Assembly.

VI. TABLE OF AUTHORITIES

1. Thanner Enters. LLC v. Baltimore Cnty., 995 A.2d 257, 414 Md. 265 (Md. 2010)
2. Maryland Transportation Authority v. King, 369 Md. 274, 799 A.2d 1246 (Md. 2002)
3. Kranz v. State, 459 Md. 456, 187 A.3d 66 (Md. App. 2018)
4. State v. Bey, 452 Md. 255, 156 A.3d 873 (Md. App. 2017)
5. Gardner v. State , 420 Md. 1, 20 A.3d 801 (Md. 2011)
6. Department of Economic and Employment Development v. Jones, 558 A.2d 739, 79 Md.App. 531 (Md. App. 1988)\
7. MD. Labor and Employment Code Ann. § 8-1001 (2021)
8. MD. Labor and Employment Code Ann. § 8-1002 (2021)

WHEREFORE, the Petitioner respectfully requests this Honorable Court:

A. Reverse the Maryland Board of Appeals Denial of Unemployment Insurance Benefits;

B. Order reinstatement of Unemployment Insurance Benefits from time of discharge to present or in the alternative one year from time of discharge; and

C. For other and such further relief as the nature of Petitioner's cause may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing MEMORANDUM IN SUPPORT OF JUDICIAL was filed via MDEC with the Clerk of the Circuit Court of Anne Arundel County and a copy of the foregoing Petition for Judicial Review was this _23___ day of _____July_____ 2022 sent by USPS Regular First-Class Mail pre-paid to:

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