IN THE COURT OF APPEALS OF THE STATE OF NEVADA

COAST HOTEL AND CASINOS; AND STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION,
Appellants,
vs.
TRISTRAM JOHNS,
Respondent.

No. 75765-COA

ORDER OF REVERSAL AND REMAND

Coast Hotel and Casinos and the Nevada Employment Security Division appeal from a district court order granting a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Coast Hotel and Casinos (Coast) terminated Tristram Johns, a bartender, in connection with multiple alleged failures to follow company policy in a single shift, including failing to charge and undercharging customers for alcoholic beverages.[1] Johns sought unemployment benefits, which the Employment Security Division (ESD) granted. Coast appealed the decision, alleging that Johns engaged in disqualifying misconduct under NRS 612.385. An appeals referee agreed, and the Board of Review (Board) adopted and affirmed the referee's denial of benefits. ESD then ordered Johns to repay the amount of benefits he had already received, and Johns

[1]We do not recount the facts except as necessary to our disposition.

appealed that decision. The appeals officer affirmed, and the Board denied further review.

Johns filed petitions for judicial review challenging both the denial of benefits and the overpayment decision. The district court consolidated and granted the petitions, concluding that substantial evidence did not show that Johns engaged in disqualifying misconduct and that the overpayment issue was therefore moot. The district court also concluded that the Board failed to make its own findings of fact and conclusions of law with respect to the denial of benefits as required under NRS 233B.125.

On appeal, Coast argues that the district court erred in concluding that the Board abdicated its duties under NRS 233B.125 by merely adopting the referee's decision and not stating its own findings of fact and conclusions of law. It further argues that substantial evidence supported the Board's decision to deny benefits. Finally, it argues that this court should affirm the referee's decision to order repayment of the benefits paid to Johns. We agree.

First, we consider whether the Board was required to state its own findings of fact and conclusions of law rather than merely adopt the referee's decision. Coast argues that the Board's decision complied with the specific provisions of NRS Chapter 612, which prevail over the general provisions of NRS Chapter 233B. Johns counters that NRS 233B.125 applies and that the Board's decision was deficient on its face.

This court reviews questions of statutory interpretation de novo. *Pawlik v. Deng*, 134 Nev. ___, ___, 412 P.3d 68, 70 (2018). When the language of a statute is clear and unambiguous, "this court will not go

beyond the statute's plain language." *Id.* at ___, 412 P.3d at 71. NRS 233B.125, in relevant part, states as follows:

> A decision or order adverse to a party in a contested case must be in writing or stated in the record. . . . [A] final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

However, "[t]he special provisions of . . . Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the Employment Security Division . . . prevail over the general provisions of [NRS Chapter 233B]." NRS 233B.039(3)(a). NRS 612.515(3) provides that "[t]he Board [of Review] may affirm, modify or reverse the findings or conclusions of the [appeals referee] . . . ." Moreover, NRS 612.500(4) provides that "[ESD] shall adopt regulations governing the manner of filing appeals and the conduct of hearings and appeals consistent with the provisions of this chapter." One such regulation states that, "[i]n addition to the requirements imposed by NRS 233B.125, the decision [of the appeals referee] must inform each party of the right of appeal to the Board of Review." NAC 612.235(1).

Here, Johns does not dispute that the referee's decision denying benefits complied with NRS 233B.125 as required under NAC 612.235(1). Moreover, the Board affirmed the referee's findings and conclusions as allowed under NRS 612.515(3) and adopted them in whole. No Nevada case has suggested that this constitutes error. *See, e.g., State, Emp't Sec. Div. v. Murphy*, 132 Nev. 202, 204, 371 P.3d 991, 992 (2016) (noting that the appeals referee made a finding and that "the Board of Review adopted that

finding"); *Nev. Emp't Sec. Dep't v. Holmes*, 112 Nev. 275, 280, 914 P.2d 611, 614 (1996) ("These findings of fact were subsequently adopted in whole by the Board of Review in affirming the appeals referee's decision."). Johns argues that the Board deprived him of a meaningful appeal by failing to conduct an independent review of the record, but the Board's decision clearly states that it "reviewed the complete record" before issuing its findings, and the record before the Board included an audio recording of the referee hearing.[2] *See* NAC 612.235 (stating that appeals referees may base a final decision in part upon "listen[ing] to the tape . . . of the hearing"); *see also* NRS 612.515(3) (noting that the Board may make its decision "solely on the basis of evidence previously submitted"). Because there is no authority suggesting that a final decision from the Board must independently satisfy NRS 233B.125 even when it expressly adopts a previous decision that satisfied that statute, we conclude that the Board's decision complied with the relevant provisions of NRS Chapters 233B and 612.

Next, we consider whether the referee's findings of disqualifying misconduct were supported by substantial evidence. Coast argues that the district court incorrectly narrowed the definition of

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[2]Johns additionally argues that the Board was required to review a transcript of the referee hearing—which was not prepared until after he filed a petition for judicial review—but he fails to cite any relevant authority in support. However, we note that Johns may be correct. *See* NRS 612.500(5) ("A record of all testimony and proceedings on appeal must be kept for 6 months after the date on which a decision of an Appeal Tribunal is mailed, but *testimony need not be transcribed unless further review is initiated*." (emphasis added)). Nevertheless, in light of our disposition, any error here was harmless, and we need not decide this issue.

"misconduct" when it concluded that substantial evidence did not support the referee's decision. Johns counters that the district court applied the appropriate standard and that the referee's decision was arbitrary and capricious.

We review an administrative unemployment compensation decision under the same standard employed by the district court, which is "to ascertain whether the Board acted arbitrarily or capriciously, thereby abusing its discretion." *Murphy*, 132 Nev. at 205, 371 P.3d at 993 (quoting *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1444, 148 P.3d 750, 754 (2006)). The Board's factual findings in such matters "are conclusive when supported by substantial evidence," which is evidence that "a reasonable mind could find adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). Similarly, the Board's "fact-based conclusions of law . . . are entitled to deference." *Id.* (internal quotation marks and citation omitted). However, we review purely legal questions like issues of statutory interpretation de novo. *Id.*

Under NRS 612.385, a person discharged "for misconduct connected with the person's work" is ineligible for unemployment compensation. The Nevada Supreme Court has defined "[m]isconduct" as "unlawful, dishonest, or improper behavior." *Murphy*, 132 Nev. at 207, 371 P.3d at 994 (quoting *Misconduct*, *Black's Law Dictionary* (10th ed. 2014)). It has further stated as follows:

> Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards [his or] her employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to [the] employer.

> As we have previously suggested, because disqualifying misconduct must involve an element of wrongfulness, an employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law.

Bundley, 122 Nev. at 1445-46, 148 P.3d at 754-55 (internal quotation marks and citations omitted). Whether an employee's actions constituted disqualifying misconduct "is a fact-based question of law . . . entitled to deference." *Id.* at 1446, 148 P.3d at 755. The employer bears the burden of proving by a preponderance of the evidence that an employee engaged in disqualifying misconduct. *Goodwin v. Jones*, 132 Nev. 138, 145, 368 P.3d 763, 768 (Ct. App. 2016). If the employer meets its burden, the burden shifts to the employee to prove that his or her conduct did not constitute disqualifying misconduct, for example, by "showing that it was reasonable and justified under the circumstances." *Id.*

Substantial evidence in the record below supported the referee's decision denying benefits on grounds of disqualifying misconduct. Coast's witness at the hearing—a manager who had reviewed the surveillance tape and records from Coast's sales system at the time of Johns' shift—testified that Johns served two drinks of Hennessy that he never rang into the system and that he did not measure out with a jigger as required when no pour spout is equipped. She further testified that Johns poured a total of five shots for a customer (which she could discern because the bottle was equipped with a pour spout that dispenses one shot per inversion) in exchange for only two shots' worth of drink tickets. Moreover, Johns admitted that he did not use a jigger when pouring the Hennessy even though he knew he should have, and he further admitted that he may have

forgotten to ring it up. He also admitted that he poured from the Grey Goose bottle five times and rang it up as two shots.[3]

Given this testimony, a reasonable mind could conclude that Johns' conduct, at the very least, amounted to carelessness or negligence showing a substantial disregard for Coast's interest in having its stock of liquor properly sold or comped. *See Emp't Sec. Dep't of Nev. v. Verrati*, 104 Nev. 302, 304-05, 756 P.2d 1196, 1198 (1988) (affirming the Board's decision to deny benefits on grounds of misconduct where a casino-floor worker had been caught nodding off over a period of two hours). At most, one might conclude that Johns' conduct amounted to intentional violations of Coast's policies. *See Goodwin*, 132 Nev. at 145, 368 P.3d at 768 (noting that "an employee's violation of an employment policy is an intentional violation or willful disregard when the employee knows of the policy yet deliberately chooses not to follow [it]"). Thus, there was substantial evidence in the record to support the referee's decision. Accordingly, we affirm the referee's and the Board's decisions denying Johns unemployment benefits.

Finally, we consider whether the referee's decision on overpayment was supported by substantial evidence. Coast argues that

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[3]Johns testified that he poured only two shots of liquor; he claimed the bottle was nearly empty and that pour spouts are not as accurate in such instances, so he eyeballed the proper amount. However, Coast's witness had testified previously that bartenders only complained of pour spouts sticking and otherwise not functioning properly with respect to creamy liquids and not clear ones like vodka. The question of which testimony was more reliable was a credibility determination for the referee and the Board to make in the first instance. *See Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973) (noting that appellate courts will not pass upon the credibility of witnesses or reweigh the evidence when reviewing an unemployment compensation decision).

ESD properly ordered Johns to repay the amount of benefits he had already been paid because he was found to have committed misconduct under NRS 612.385. Johns counters that the referee did not consider any of the relevant factors under NRS 612.365, the statute governing overpayments.

> NRS 612.365(1) provides that:
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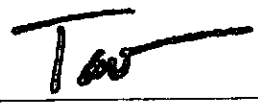
> Any person who is overpaid any amount as benefits under this chapter is liable for the amount overpaid unless:
>
> (a) The overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient; and
>
> (b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience, as determined by the Administrator.

Here, even though the referee's decision does not expressly address the factors outlined in NRS 612.365(1), substantial evidence still supports the repayment order. The referee stated compliance with the statute, made detailed findings regarding Johns' finances and extensive savings (which he does not dispute), and noted that Johns had been disqualified from receiving benefits by reason of misconduct. From those findings, this court can infer further findings that Johns was at fault for the overpayment and/or that ordering repayment would accord with equity and good conscience. *See State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982) (noting that when "the conclusion itself gives notice of the facts on which the [administrative agency] relied," the court "may imply the necessary factual findings, so long as the record provides substantial evidence to support the [agency]'s conclusion").

Based on the foregoing, we reverse the district court's order granting Johns' petition for judicial review. We direct the district court to deny the petition and affirm the administrative decisions denying benefits and ordering repayment.

It is so ORDERED.



_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Kamer Zucker Abbott
State of Nevada/DETR
Alan R. Johns
Eighth District Court Clerk