

IN THE MISSOURI SUPREME COURT

CHEIKH SECK,

Appellant,

v.

**DEPARTMENT OF TRANSPORTATION and
DIVISION OF EMPLOYMENT SECURITY,**

Respondents.

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) **Case No. SC93628**
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RESPONDENT’S SUBSTITUTE BRIEF

**Appeal from the Missouri Labor and Industrial Relations Commission
Commission No. LC-11-05508
Appeal No. 11-24621 R-A**

**NINION S. RILEY #32399
Post Office Box 59
Jefferson City, Missouri 65104
TEL: (573) 751-3844
FAX: (573) 751-2947
ninion.riley@labor.mo.gov**

**Attorney for the respondent,
Division of Employment Security**

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JURISDICTIONAL STATEMENT

The Division of Employment Security agrees that this Court has jurisdiction to resolve this controversy.

INTRODUCTORY STATEMENT

When discussing cases from other states, this Court stated the following:

These cases proceed generally upon the theory that, since the Commission is charged with the administration of the law and the protection of the fund, it has a direct interest in seeing that there is a uniform system of interpretation and application, that the funds and accounts be protected against erroneous or unwarranted decision, and that this is true regardless of the status of the claimant, who may already have been paid and thus have lost all interest. Essentially, these cases hold that the Commission may be an “aggrieved” party, even where benefits to the claimant have been denied, and that on such an appeal it is representing the interests of the public, and not the claimant.

Dubinsky Brothers v. Industrial Commission of Missouri, 373 S.W.2d 9, 13 (Mo. banc 1963); *see also*, *Division of Employment Security v. Labor and Industrial Relations Commission*, 739 S.W.2d 747, 749 (Mo.App. W.D. 1987). The Division of Employment Security is representing the interests of the public herein, not those of the employer.

Cheikh Seck (hereinafter "Claimant") was an employee of the Missouri Department of Transportation (“Employer”). His doctor released him to return to work, without any restrictions. However, Claimant altered the release to obtain two more days

of sick leave. When the falsification was discovered, Claimant was discharged. So, the issue before this Court is whether presenting an altered medical certification to an employer and taking two unnecessary sick days is misconduct under the Missouri Employment Security Law.

Unless otherwise stated to the contrary, all statutory references hereinafter are to the Revised Statutes of Missouri 2000, as supplemented through 2013. The administrative transcript will be cited herein as "Tr. ___"; the legal file will be cited as "L.F. ___"; and Claimant's brief will be cited as "Br. ___". The respondent, Division of Employment Security will be referred to as "the Division"; and the Labor and Industrial Relations Commission will be "the Commission".

STATEMENT OF FACTS

The Division provides its own Statement of Facts pursuant to Rule 84.04(f).

Claimant was hired on July 19, 2010, as a bridge maintenance worker. (Tr. 12).

On July 18, 2011, Claimant was absent from work because of a medical condition. (Tr. 22). On July 19, 2011, Claimant saw his doctor about a shoulder strain and thumb pain. (Tr. 15, 47, 54, 56). Claimant was prescribed a muscle relaxant and physical therapy. (Tr. 27-28). Claimant presented Employer two July 28, 2011, medical certifications that imposed a 20 pound lifting restriction and also stated the following in the line for prescription medication restrictions: “cannot operate heavy machinery or drive while taking muscle relaxers.” (L.F. 13 & Tr. 47). Employer told him that there was no “light duty” work available; he may not return to work until he submits a full duty medical release, on Employer’s form. (Tr. 15-16). Claimant was receiving sick leave pay during his absence. (Tr. 22). On Tuesday, August 2, 2011, his doctor signed Employer’s medical certification with a box checked that authorizes “return to work without restrictions” and nothing was written for prescription medication restrictions.¹ (Tr. 56). Claimant altered the certification by writing the following therein: “finish medicine (sic) and return to work on 8/8.”² (Tr. 19, 56). Claimant faxed the altered certification to Employer. (Tr. 19).

¹ Claimant did not ask the doctor or the nurse about his muscle relaxants when he was given the full release for work. (Tr. 27-29).

² All of the medical certifications can be found in the appendix to this brief. (A-2 to 4).

Claimant did not return to work on Wednesday August 3 or Thursday August 4, 2011.³ Employer contacted the doctor's office because of the misspelled word and was told that Claimant was released to work on August 2, 2011, and that they did not write the note about finishing medicine before returning to work. (Tr. 54). Claimant returned to work on August 8, 2011, was confronted by his supervisor about the medical certification and admitted altering it. (Tr. 19, 54). Claimant was discharged for falsifying a doctor's note. (Tr. 54, L.F. 2).

Claimant filed a claim for unemployment benefits. (L.F. 1). Employer protested the claim. (L.F. 2). The Division determined that Claimant was disqualified from receiving unemployment benefits because he was discharged for misconduct connected with work in that he "falsified a doctor's note and submitted it to his employer." (L.F. 3). Claimant appealed the determination. (L.F. 4-6). A telephone hearing was held. (Tr. 1). Claimant was asked three times why he did not ask the doctor to write on the release that Claimant needed to finish his medication before returning to work, instead of writing it on the document himself. (Tr. 19-20). Claimant's first two answers were nonresponsive. Claimant's third answer was, "... I don't want to ask him no more questions because I don't want to make him mad." (Tr. 20-21). The referee issued a decision that affirmed the disqualification. (Tr. 7-10). In the decision, the referee made the following factual findings:

³ Maintenance workers do not work Friday-Sunday. (Tr. 19).

Claimant asserts that he wanted to return to work. However, the claimant changed his return to work date from August 2, 2011 to August 8, 2011. Claimant was not credible. (L.F. 8).

Claimant appealed the decision to the Commission and attempted to submit additional evidence. (LF 11-18). The Commission majority affirmed and adopted the referee's decision. (L.F. 19-20). The Commission also refused to consider the additional evidence. (L.F. 19-20). The Commission's labor representative filed a dissent that found claimant's testimony credible. (LF 21-22).

Claimant appealed the Commission's decision to the Court of Appeals, Western District. (L.F. 23-29). The Court of Appeals issued a decision reversing the Commission. The court declared that misconduct must always involve a willful violation and there was no evidence Claimant's falsification was of any import to Employer.

The Division filed a Motion for Rehearing and/or Transfer with the Court of Appeals, which was denied. The Division filed an Application for Transfer with this Court, which was granted.

POINTS RELIED ON

Claimant committed misconduct connected with his work because he disregarded the standards of behavior that an employer has a right to expect of its employees in that he altered his doctor's medical certification to extend his sick leave unnecessarily, and submitted it to the employer as genuine.

Fendler v. Hudson Services, 370 S.W. 3d 585 (Mo. banc 2012);

West v. Baldor Electric Co., 326 S.W.3d 843 (Mo.App. E.D. 2010);

Section 288.050.2 RSMo Cum. Supp.;

Section 288.030.1(23) RSMo Cum. Supp.

ARGUMENT

Judicial review of Commission decisions in employment security matters is governed by Section 288.210. This section provides in part as follows:

Upon appeal no additional evidence shall be heard. The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the decision was procured by fraud;
- (3) That the facts found by the commission do not support the award; or
- (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

A court “defers to the Commission on issues involving the credibility of witnesses and the weight given to testimony.” *Fendler v. Hudson Services*, 370 S.W. 3d 585, 588 (Mo. banc 2012). “The Commission may believe or disbelieve all, none or any part of the testimony, even when the testimony is produced by only one of the interested parties.” *Chemtech Industries, Inc. v. Labor and Industrial Relations Commission*, 617 S.W.2d 121, 123 (Mo.App. E.D. 1981). Claimant alleged at the hearing that he told his supervisor on Wednesday that he had been released to return to work, but he needed two

more days to finish his muscle relaxants. (Tr. 19). However, it should be apparent that the Commission did not believe this assertion. The decision adopted by the Commission found that "Claimant was not credible" and that "Claimant falsified the doctor's note". (L.F. 8, 9). "Appellate courts reasonably may infer credibility decisions from the record although a trial court has not expressed them." *State v. Hamilton*, 227 S.W.3d 514, 516 (Mo.App. S.D. 2007). This Court should disregard Claimant's allegation that he was truthful with his supervisor before falsifying the doctor's release.

It is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions. *Burns v. Labor & Industrial Relations Commission*, 845 S.W.2d 553 (Mo. banc 1993). If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding. *Pulitzer Pub. Co. v. Labor & Indus. Relations Com'n*, 596 S.W.2d 413, 417 (Mo. banc 1980). "[T]he Commission determines the weight of and credibility of the evidence, and, when that evidence conflicts, the Commission's determination of the facts is conclusive." *Peck v. La Macchia Enterprises*, 202 S.W.3d 77, 82 n.6 (Mo.App. W.D. 2006) (citation omitted). A Court does not "reweigh the evidence; the Commission judges the weight to be given to conflicting evidence and the credibility of witnesses." *Panzau v. JDLB., Inc.*, 169 S.W.3d 122, 126 (Mo.App. E.D. 2005). The court must determine "whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." *Hampton v.*

Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003). A reviewing court, thus, must affirm those decisions of the Commission which are supported by substantial and competent evidence taken from the whole record.

Application of the Standard of Review to this case:

It will never be known exactly what happened in this matter. However, the following two possibilities stand out:

1. (a) Claimant knew that his doctor had released him without a medicine restriction and Claimant knew that he could not take additional sick leave with the release as written.
- (b) Claimant believed that he should finish his muscle relaxants. However, he did not want to bother the doctor about changing the release. So, he altered the release.
- (c) Claimant turned in the altered release as genuine. When asked about the alteration, he readily admitted that he altered it.
- (d) Claimant was truthful and candid at the unemployment hearing.

or,

1. (a) Claimant knew that his doctor had released him without a medicine restriction and Claimant knew that he could not take additional sick leave with the release as written.
- (b) Claimant wanted two additional days of paid sick leave, without any medical justification. Claimant was unsuccessful in getting the doctor to extend the

release date, or he did not request an extension from the doctor because he knew that it would fail. So, he altered the release.

(c) Claimant turned in the altered release as genuine. When confronted by Employer, he admitted altering the release because a lie would have failed.

(d) Claimant was evasive and lied at the unemployment hearing to obtain benefits.

The evidentiary facts support both possibilities, depending upon the weight and credibility of the evidence. Claimant is really asking this Court to adopt the innocent possibility, when the majority of the Commission adopted the untruthful possibility.

Claimant's argument is based upon the assertion that additional leave was medically necessary to take additional muscle relaxants, Claimant did not want to bother the doctor to correct the certification and his "alteration" of the doctor's release was not intended to mislead Employer.⁴ However, the doctor's return to work certification is competent evidence that a muscle relaxant was not medically necessary after August 2, 2011. Claimant's alteration of the certification is competent evidence that he knew the doctor had not authorized additional leave for muscle relaxants and Claimant knew he could not be absent the next two days without a doctor's excuse. The altered certification

⁴ In his statement of facts, Claimant omits the fact that his doctor's July 28 certifications restricted the operation of heavy machinery and autos "while taking muscle relaxers". (Br. 4). Nor does his statement of facts mention that his doctor's August 2 certification authorizes Claimant to "return to work without restrictions" and the medication restriction was missing. (Br. 3).

is competent evidence that Claimant was attempting to steal 20 hours of sick leave pay. Employer's investigation is competent evidence that Claimant submitted the altered certification as genuine.⁵ Claimant's discharge is competent evidence that alteration of a medical certification is important to Employer.

It will also never be known exactly why Claimant wanted the two additional days off work. Claimant testified that he wanted to return to work, but needed to finish his muscle relaxants. However, Claimant knew that the doctor's certification did not authorize the additional medication. The truth may be that Claimant wanted a five day weekend (Wednesday through Sunday) before returning to work and improperly used sick leave for the two work days. As noted previously, the referee found Claimant not to be credible about his desire to return to work. (L.F. 07). The more credible evidence is that Claimant just wanted to extend his leave, without justification. The need to finish his muscle relaxants was fabricated to justify his actions.

Claimant's entire brief is built upon the foundational argument that the Commission should have believed all of his testimony and drawn all inferences favorable to him. As the trier of fact, however, the Commission disbelieved Claimant's self-serving testimony and drew inferences favorable to Employer. To adopt Claimant's "medical justification" defense, this Court must reject the evidence and inferences favorable to Employer and adopt the conflicting evidence and inferences favorable to Claimant. To do

⁵ Four pages of Claimant's testimony on the matter can be found in the appendix. (A-5 to 8).

so, however, is contrary to an appellate court's standard of review. *Fendler*, 370 S.W. 3d at 588.

The court stated the following in *Madewell v. Division of Employment Security*, 72 S.W.3d 159, 162 (Mo.App. W.D. 2002):

In reviewing a decision of the Commission, an appellate court may not substitute its judgment on factual matters for that of the Commission. Section 288.210 provides that the Commission's findings of fact, if supported by competent and substantial evidence and absent fraud, shall be conclusive. Substantial evidence is evidence which has probative force on the issues, and from which the trier of facts can reasonably decide the case. [Citations omitted].

In the current matter, whether Claimant needed to take a muscle relaxant after August 2, 2011, is a question of fact for the Commission. Whether Claimant wanted to return to work as soon as medically possible, or was abusing his sick leave is a question of fact. Whether Claimant's conduct was motivated by a mistake or insubordination is also a question of fact that is reviewed for competent and substantial evidence. *Wright v. Casey's Marketing Company*, 326 S.W.3d 884, 889 (Mo.App. W.D. 2010).⁶ Whether the Commission's findings support the conclusion that Claimant is guilty of misconduct is a

⁶ However, a court declared that when a claimant provides no explanation for her actions, it is "not the place of the Commission to interject a malicious one." *Watson v. Ladelle Investment Co., Inc.*, 2013 WL 5979520, page 5 (Mo.App. 11/12/13), motion pending.

question of law that is reviewed *de novo*. *Williams v. Enterprise Rent-A-Car Shared Services, LLC*, 297 S.W.3d 139, 142 (Mo.App. E.D. 2009).

The Court of Appeals deviated from the standard of review in this case:

When an employer claims that an employee was discharged for misconduct, the burden of proving misconduct is on the employer. *Dameron v. Drury Inns, Inc.*, 190 S.W.3d 508, 512 (Mo.App. E.D. 2006). The Commission found that the credible evidence supports a “misconduct” finding. The Court of Appeals decision seems to accept that Claimant deliberately altered the doctor’s certification to obtain two additional days of leave that were not medically warranted. This should be sufficient evidence to support a *prima facie* case of misconduct.

Despite this evidence, the Court of Appeals reversed the Commission by raising conjectures, *sua sponte*. The court found that there was no showing that forging the note was related to the work. In essence, the court’s decision is based upon the following (Slip Op. at page 7):

1. The State of Missouri may not have paid Claimant for the two days that he missed.
2. The State of Missouri may not care whether its employees take two sick days that are not medically necessary.
3. The State of Missouri may not care whether its employees miss two days of work without prior notification.
4. The State of Missouri may not want its employees to return to work immediately after they have recovered from their medical problems.

5. The State of Missouri may not care about false statements on a doctor's certification, aside from the lack of attribution as to its source.

These are really factual inferences that are not supported by the evidentiary facts. At no time during the hearing did Claimant make any such assertions, or testify about any facts that would raise these inferences. The court reversed the Commission because Employer failed to rebut factual assertions - inferences that were never raised by Claimant at the hearing. This places an impossible burden upon an employer. The doctor's certification is competent evidence that additional leave was not medically justified. Claimant admitted altering his doctor's medical certification to obtain two additional days off, and failed to provide a credible excuse for doing so. This should be sufficient evidence for the Commission to find "misconduct" connected with the work.

With regard to the court's suggestion that Claimant's conduct was of little import to Employer, the evidence establishes that: Employer requires its medical certification form be used by its employees (Tr. 56); Employer investigated the authenticity of the form submitted by Claimant for his return to work (Tr. 54); and Employer discharged Claimant for "falsifying" the certification. (Tr. 54). These evidentiary facts support inferences that doctor medical certifications are very important to Employer and alteration of the certification is cause for discharge.

The court did not apply the appropriate standard of review because it disregarded reasonable inferences that support the Commission's decision, in favor of unreasonable inferences to the contrary. *Fendler*, 370 S.W. 3d at 588. Resolution of conflicting

inferences is the job of the Commission, and its resolution is binding on the reviewing court. *Stanton v. Missouri Div. of Employment Sec.*, 799 S.W.2d 202, 203 (Mo.App. W.D. 1990); *Scrivener Oil Company, Inc., v. Crider*, 304 S.W.3d 261 (Mo.App. S.D. 2009).

Claimant committed misconduct connected with his work because he disregarded the standards of behavior that an employer has a right to expect of its employees in that he altered his doctor's medical certification to extend his sick leave unnecessarily, and submitted it to the employer as genuine.

The definition of misconduct contains a number of separate provisions, with varying degrees of culpability. Section 288.030.1(23). There has been a constant stream of administrative and appellate litigation concerning this statute.⁷ A decision by this Court that the provisions should be separately applied as written would resolve much of the uncertainty in the case law.

During fiscal year 2012, claimants filed 426,833 initial claims and 6,132,712 weekly claims for benefits; and the Division paid claimants (under all programs administered by the Division) \$1.25 billion of unemployment benefits. Missouri Department of Labor and Industrial Relations Annual Report, 2012.⁸

⁷ A significant number of the appellate decisions were not published.

⁸ A court can take judicial notice of statistics contained in a governmental publication without having said publication in evidence. *City of Gainesville v. Gilliland*, 718 S.W.2d 553 (Mo.App. S.D. 1986). *See also, Sulls v. Director of Revenue*, 819 S.W.2d 782 (Mo.App. S.D. 1991). The weekly claim figure includes state and federal claims of

However, the Employment Security Law is not just about paying unemployment benefits. There are a number of provisions within the law that promote employment and dissuade unemployment. For example, if an employee is at fault for the separation (quit without good cause or discharged for misconduct), the employee is disqualified from receiving unemployment benefits (§ 288.050); and if the employee overcomes the disqualification and then receives benefits, the employer's account is not subject to charges for those benefits. Section 288.100.1(4). If the separation is the employer's fault, however, the employee will receive unemployment benefits and the employer will be charged for the unemployment benefits received by the employee. Section 288.100.1(1). In other words, the offending party is punished for causing the unemployment.

A claimant is not entitled to draw unemployment benefits just because he lost his job. *Fly v. Industrial Commission*, 359 S.W.2d 481, 483 (Mo.App. S.D. 1962). There are a number of other requirements that must be satisfied in order to receive benefits. While deciding a Missouri unemployment benefit controversy, the United States Supreme Court set forth the genesis and purpose of the Missouri Employment Security Law as follows:

The Federal Unemployment Tax Act (Act), 26 U.S.C. § 3301 et seq.,
... envisions a cooperative federal-state program of benefits to unemployed

3,340,357 (Annual Report, 2012, pg. 25-27), Extended Benefits of 332,424 and

Emergency Unemployment Compensation of 2,469,931.

(<http://www.workforcesecurity.doleta.gov/unemploy/euc.asp>).

workers. The act establishes certain minimum federal standards that a State must satisfy in order for a State to participate in the program. ...

... State programs, therefore, vary in their treatment of the distribution of unemployment benefits, although all require a claimant to satisfy some version of a three-part test. First, all States require claimants to earn a specified amount of wages or to work a specified number of weeks in covered employment during a 1-year base period in order to be entitled to receive benefits. Second, all States require claimants to be “eligible” for benefits, that is, they must be able to work and available for work. Third, claimants who satisfy these requirements may be “disqualified” for reasons set forth in state law.

Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511, 514-515 (1987). The issue litigated by the parties in the current matter is the “disqualification” portion of the test.

The Commission found that Claimant was discharged for misconduct connected with his work. The disqualifying provision in dispute herein is § 288.050.2 RSMo Cum. Supp., which states in part as follows:

If a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work, such claimant shall be disqualified for waiting week credit and benefits, and no benefits shall be paid nor shall the cost of any benefits be charged against any employer for any period of

employment within the base period until the claimant has earned wages for work insured under the unemployment laws of this state or any other state as prescribed in this section. ...

The term "misconduct", as used in § 288.050.2, is defined by statute in § 288.030.1(23) RSMo Cum Supp as:

"Misconduct", an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, **a disregard of standards of behavior which the employer has the right to expect of his or her employee**, or negligence in such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. [Emphasis added].⁹

While this statute concerns the denial of unemployment benefits, it is an integral part of promoting employment and dissuading unemployment. The Division, therefore, requests this Court find that the provisions within this statute should be separately applied as written.

“Each ‘word, clause, sentence and section’ of a statute should be given meaning.” *State ex rel. Mo. State Bd. v. Southworth*, 704 S.W.2d 219, 225 (Mo. banc 1986). “[A]ll

⁹ The recent statutory definition of misconduct is a codification of the definition used by Missouri courts for a number of years. *Rich v. Industrial Commission*, 271 S.W.2d 791, 793 (Mo.App. W.D. 1954).

words utilized by the legislature are presumed to have separate and individual meaning.” *State v. Carouthers*, 714 S.W.2d 867, 870 (Mo.App. E.D. 1986). Section 288.030.1(23) contains a number of separate provisions, with varying degrees of culpability. Despite this Court’s *Fendler* decision, the Court of Appeals continues to mix all of the provisions together and require a showing of willful – malicious conduct, regardless of the provision in question. *See, Watson v. Ladelle Investment Company, Inc.*, 2013 WL 5979520 (Mo.App. 11/12/13) (The employee’s actions must be characterized by “manifest culpability”), motion to modify pending. While acknowledging the *Fendler* decision, Claimant asserts that Employer must prove that he “intentionally acted against MoDot’s interest.” (Br. 16). As will be explained below, such a requirement is inconsistent with the statutory definition at issue.

The statutory provision at issue herein is “a disregard of standards of behavior which the employer has the right to expect of his or her employee”. “Disregard” is defined as, “to pay no attention to: treat as unworthy of regard or notice.” Webster’s Seventh Collegiate Dictionary, 1971, pg. 241. It can be safely said that employees know their employers attach great importance to time cards and medical certifications, and the alteration of them carries dire consequences. Both carry an aura of accuracy, upon which an employer may rely. One of the quickest ways to lose a job is to alter the time card, or alter the medical certification. While there are Missouri cases on the alteration of time records, alteration of a doctor’s certification appears to be an issue of first impression.

In *Mathews v. B and K Foods, Inc.*, 332 S.W.3d 273, 274 (Mo.App. S.D. 2011), the claimant “was terminated for submitting falsified timecard records that showed she was clocked in when in fact she had left the store to run a personal errand.” The court affirmed the Commission’s finding that the claimant knowingly falsified her time report and that her conduct disregarded the standards of behavior which the employer has a right to expect of her. *Id* at 277.

In *King v. Community Blood Center of the Ozarks*, 181 S.W.3d 573 (Mo.App. W.D. 2005), the Commission found that the claimant worked 4½ hours and instructed a subordinate to log 7¾ hours of work for her. The claimant appealed, based upon her testimony that this was the result of a miscommunication between her and the subordinate. *Id* at 574. The court affirmed the Commission as supported by the evidence, declaring that the Commission may choose to believe or disbelieve all or none of any witness’ testimony. *Id*.

The court stated the following in *West v. Baldor Electric Co.*, 326 S.W.3d 843, 847 (Mo.App. E.D. 2010):

... Willful misconduct can be established when a claimant, either by action or inaction, consciously disregards the interest of the employer or behaves in a way that is contrary to that which an employer has a right to expect from an employee.

We hold that the Commission did not err in determining that West’s behavior ... was “a disregard of standards of behavior which the employer

has the right to expect of his or her employee.” ... Nor is the employer required to have in place a precise work rule prohibiting such behavior in order for that behavior to rise to the level of misconduct.

In *West*, the claimant had a sexual tryst on the premises during the work shift and argued to the court that his actions were merely “poor judgment”. The court held that “an employer has a right to expect that its employees are engaging in meaningful work while being paid by the employer, and not engaging in inappropriate sexual conduct while being paid and on company property.” *Id.* Claimant would distinguish *West* with the fact that Mr. West’s action took place “while being paid and on the company property.” (Br. 17). Claimant fails to acknowledge that his forgery was the method by which he missed two days of work and obtained twenty hours of paid leave. Through the altered medical certification, he intentionally lied to Employer in order to miss work and obtain sick leave pay, without medical justification.

Other jurisdictions have held that alteration or falsification of a doctor’s note is “misconduct” justifying the denial of unemployment benefits.¹⁰ *In the matter of the claim of Cortada*, 275 A.D.2d 825 (N.Y. App. 2000); *King v. Tangipahoa Parish Police Jury*, 691 So.2d 194 (La.App. 1 Cir. 1997); *Turner v. Stokes*, 1996 WL 544377 (Tenn.Ct.App.) (not reported); *Pitts v. Unemployment Compensation Board of Review*, 2013 WL

¹⁰ Some of the foreign decisions mentioned that the employer had a rule prohibiting the submission of false documents. While the unreported foreign decisions cannot be cited as precedent, they are discussed herein to reflect a shared approach on this matter.

5761918 (Pa.Cmwlth.) (not reported) (“Claimant’s action of submitting altered notes, which she knew to be altered, was below the standard of behavior that Employer had a right to expect of her and constituted willful misconduct. Further, whether she was sick on the dates in question or was under a doctor’s care at that time were not relevant to the board’s determination that Claimant submitted altered documents.”)

In an unreported case, the Minnesota Court of Appeals stated the following in *Batterson v. Wal-Mart*, WL 1950130 (Minn.App. 2005):

Even if the altered note accurately reflected the doctor’s authorization, the altered note was misleading in that it appeared that the return-to-work date had been written by the doctor rather than Batterson. The note reflected what Batterson understood his doctor had authorized, but it was presented to the employer as if it were the doctor’s authorization, rather than Batterson’s report of what his doctor had told him. Consequently, the note could be misleading to an employer concerned about having accurate medical information before allowing an employee to return to work. As the senior unemployment review judge stated, “An employer has the right to expect honest communication from employees regarding employment matters.”

In an unreported case, the Connecticut Superior Court stated the following in *Davies v. Administrator Unemployment Compensation*, WL 3958248 (Conn.Super. 2013):

In the present case, the court is bound by the board's findings of fact, including the fact that the plaintiff altered the note and that the plaintiff had the motivation to do so in order to excuse his late return to work on February 3. These facts are sufficient to establish that the plaintiff engaged in dishonest falsification in obtaining medical leave from work. Moreover, the plaintiff's absence has an obvious negative effect on the employer's production. As such, these facts provide sufficient evidence to support the board's conclusion that the plaintiff engaged in deliberate misconduct in willful disregard of the employer's interest. The board was not required to consider the evidence of accrued time in order to reach the rational and reasonable conclusion that the plaintiff acted contrary to the employer's interest.

In the current matter, Missouri employers have a right to expect their employees not to alter medical certifications. There are important reasons why employers require employees to submit doctor certifications for medical leave and for returning to work from medical leave. Forgery of certifications and alteration of certifications are directly contrary to the reason for the using doctor certifications. In the current matter, the doctor certified that Claimant was able to return to work on August 2, without any restrictions. With Claimant's alteration, the doctor certified that Claimant could not return to work until August 8 because he needed to finish his medication. Paraphrasing the opinion in *West*, the Division sees no possible argument that would allow a court to consider

Claimant's alteration of a doctor's medical certification anything less than a disregard of the standards of conduct that Employer has a right to expect of him. Claimant used this alteration to take two days of medical leave that was not approved by his doctor. This case is not just about receiving 20 hours of sick pay, without justification. Employer was also left short handed for two days, or Employer had to adjust its work schedule unnecessarily. Employers do not need to have a rule against altering doctor certifications for this type of behavior to be misconduct.

CLAIMANT'S ACTIONS NEED NOT BE WILLFUL:

Claimant implies that Employer must prove that Claimant's actions were willful. That is not the law in Missouri. Since the *West* decision, this Court issued the *Fendler* decision. The claimant argued in *Fendler* that the Commission erred in finding that she committed misconduct because the record supported only a finding that she acted negligently, not willfully. 370 S.W.3d at 589. The court rejected the argument for two reasons, the first of which was that the statutory definition of misconduct does not require proof of willfulness in all circumstances. *Id.* The portion of the statutory definition at issue in the current matter also does not require willfulness. The definition in question is "a disregard of standards of behavior which the employer has the right to expect of his or her employee".

CLAIMANT'S ACTIONS WERE WILLFUL:

Even if a "willful" finding is necessary, Claimant's actions meet the definition of willful. "Willful" is defined as: 1. governed by will without regard to reason: obstinate; 2. done deliberately: intentional. Webster's Seventh Collegiate Dictionary, 1971, pg

1021. Claimant deliberately and intentionally altered his doctor's certification to extend his leave of absence and presented it to Employer as genuine.

This Court should conclude that Claimant's alteration of the certification, coupled with presenting it to Employer as genuine, constitutes misconduct connected with work. "Lying to one's employer has been held to be grounds for finding the employee barred from receiving benefits due to misconduct associated with work." *Miller v. Kansas City Station Corp.*, 996 S.W.2d 120, 123 (Mo.App. W.D. 1999); *see Flanigan v. City of Kansas City*, 926 S.W.2d 98, 103 (Mo.App. W.D. 1996) (holding that lying about having terminal cancer to receive concessions at work constitutes misconduct connected with work); *Aaron's Automotive Prods., Inc. v. Division of Employment Sec.*, 926 S.W.2d 229, 231 (Mo.App. S.D. 1996) (holding that making false statements concerning prior back injuries constitutes misconduct connected with work); *Massey v. Labor & Indus. Relations Comm'n*, 740 S.W.2d 680, 682-83 (Mo.App. E.D. 1987) (same holding); *Sain v. Labor and Ind. Relations Commission*, 564 S.W.2d 59, 61-62 (Mo.App. W.D. 1978) (filing an invalid health benefit claim against the employer's health insurance policy is misconduct). Lying is a deliberate act demonstrating "indifference to standards of honest behavior and the need for trust in the workplace." *Flanigan*, 926 S.W.2d at 103; *see Brown v. Division of Employment Sec.*, 947 S.W.2d 448, 451-52 (Mo.App. W.D. 1997) (dishonesty in the workplace constitutes misconduct connected with work); *Koret of California, Inc. v. Zimmerman*, 941 S.W.2d 886, 888-89 (Mo.App. S.D. 1997) (disappearance of inventory, and improper handling of deposits and inventory constitutes

misconduct connected with work).

In the current matter, however, the Court of Appeals compared the forging of a doctor's certification to lying about a pie-eating contest, with a false certificate of proof. (Slip Op. at pg. 7). The court's comparison is easily extended to an employee lying about an excellent round of golf on Saturday, with a altered score card to show at work. However, the current matter is not similar to an employee lying about his golf game; it is similar to a golf professional lying about his score to win a tournament, with the use of a false score card. Mr. Seck presented a forged doctor's certification to obtain two days of sick leave from the employer. Courts should not grant unemployment benefits to employees who falsify doctor certifications to obtain medical leave from work. This not only rewards employee conduct that is contrary to appropriate business practices; it places greater pressure on the state's unemployment trust fund.

Claimant states in his brief that he was acting in Employer's interest and following doctor's orders when he altered the medical certification and stayed home because attending work while taking muscle relaxers would be dangerous. (Br. 24). As stated in the Standard of Review, however, this assertion conflicts with the expert medical evidence and reasonable inferences. His doctor's first dual certifications contained a medicine restriction for muscle relaxants. (L.F. 13 & Tr. 47). This is evidence that the doctor was aware of the medication and its side effects. The doctor's last certification released Claimant to return to work without a medication restriction. (Tr. 56). This is competent evidence that the doctor did not believe further medication was warranted. If

Claimant spoke with his supervisor about needing additional sick leave, which is in question, he lied to the supervisor. Based upon competent medical evidence, Claimant was not acting in his employer's interest when he stayed home because he did not need to take more muscle relaxants. Rather, he willfully stole 20 hours of sick leave and left his employer short handed.

**CLAIMANT'S MEDICAL OPINION CONFLICTS WITH HIS DOCTOR'S
OPINION:**

Claimant wants this Court to take for granted that his medical condition required him to miss work after his medical release date because he had to finish his entire muscle relaxant prescription. However, this conflicts with his doctor's medical certification, which released him without restrictions. The doctor's release supports an inference that Claimant should have discontinued the muscle relaxants and returned to work the day after he was released by the doctor.

The Division is not aware of a Missouri unemployment benefit case directly on point. However, there are a number of cases holding that expert medical evidence is necessary when the medical situation is not within the common knowledge or experience of a layperson. *See, Tucker v. United Healthcare Servs., Inc.*, 232 S.W.3d 636, 639 (Mo.App. S.D. 2007) (requiring expert medical evidence to show causation when claimant contended "that she did not leave her work voluntarily because her absence was due to stress caused by her job"); *Smith v. U.S. Postal Service*, 69 S.W.3d 926, 928-29 (Mo.App. S.D. 2002) (requiring medical documentation to show causation when claimant left work because of stress, anxiety, and depression); *Kansas City Power & Light v.*

Searcy, 28 S.W.3d 891, 895-96 (Mo.App. W.D. 2000) (reversing Commission decision awarding benefits where claimant failed to present medical documentation to show causation between her work and her panic attacks); *Woodard v. Hudson Foods, Inc.*, 952 S.W.2d 331, 335 (Mo.App. S.D. 1997) (requiring medical documentation to show the work caused her depression).

The Commission was presented with expert medical evidence in this case, the doctor's certification; and the evidence supports a finding of fact that after August 2, 2011, consumption of muscle relaxants was not medically warranted. Therefore, this Court should not consider Claimant's actions to be medically justified.

CONCLUSION

Claimant was a short term employee who wanted to take the rest of the week off after recovering from his medical condition and altered his doctor's release to obtain sick leave that was not medically warranted. The Commission correctly found this to be misconduct.

The Division prays that the Commission's decision be affirmed.

Respectfully submitted,

/s/ Ninion S. Riley

 NINION S. RILEY #32399
 Post Office Box 59
 Jefferson City, Missouri 65104
 TEL: (573) 751-3844
 FAX: (573) 751-2947
 ninion.riley@labor.mo.gov
 Attorney for the respondent,
 Division of Employment Security

CERTIFICATE OF SERVICE

I certify that on December 19, 2013, a true copy of the foregoing brief was served via the electronic filing system upon Jeffery Berman and Paula Lambrecht.

/s/ Ninion S. Riley
Ninion S. Riley

CERTIFICATE OF WORD COUNT

I hereby certify the following:

1. The foregoing brief complies with the word count limitations.
2. The foregoing brief contains 7,177 words, excluding the cover, the signature block, the certifications, and the appendix

/s/ Ninion S. Riley
Ninion S. Riley