-DECISION-

Claimant:
CLARKE D BAYNE

Employer:
CHOPTANK ELECTRIC COOP INC

Decision No.: 820-BH-14

Date: March 26, 2014

Appeal No.: 1321006

S.S. No.:

L.O. No.: 65

Appellant: Claimant

Issue: Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the Md. Code Annotated Labor and Employment Article, Title 8, Sections 1002-1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: April 25, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Clarke D Bayne
Claimant's Counsel David Williams

FOR THE EMPLOYER:
Employer Counsel Pat Pilechewski,
Dr. Richard Cohn, and an Observer

After a review of the record, and additional evidence presented at the Board Hearing, the Board adopts the hearing examiner's findings of fact and conclusions of law. The Board makes the following additional findings of fact:

The blood test performed by the claimant's personal physician cannot be considered a valid test for the presence of Benzoylecgonine (hereafter "BE"). Urine testing is recognized by the US Dept. of Transportation (DOT) as the only reliable method to determine the presence of cocaine. There is no scientific correlation between levels of cocaine found in blood and found in urine. BE is the major cocaine metabolite which appears in the human body as it breaks cocaine down into its component parts. BE is specific to cocaine and not caused by other drugs, prescribed or over-the-counter, or by herbal supplements. The testing methodologies are sufficiently sophisticated to isolate this metabolite to the exclusion of other substances. BE does not appear on a drug screen in the absence of cocaine ingestion.

The collection, testing, reporting, and retesting of the claimant's urine sample were all consistent with the DOT requirements and with the procedural criteria of SAMSHA (Substance Abuse and Mental Health Services Administration) which governs and certifies testing facilities.

The lab to which the claimant's sample was sent specifically tested that sample, using the immuno-chemical method, to see if it contained more than 300 ng/ml of BE, as required under DOT regulations. Because the sample exceeded that initial screening level, the sample was then subjected to GCMS (Gas Chromatagraph Mass Spectrometry). GCMS specifically tested for BE at or above 150 ng/ml. That result was positive, confirming the initial screen test, and was reported to the Medical Review Officer (MRO). The MRO then contacted the claimant for additional information. The MRO also advised the claimant of his right to have the split-sample tested independently. The claimant exercised that right and that split-sample also tested positive. The MRO was also obligated to report the test results to the claimant's employer, which he did.

The subsequent test, performed by the claimant's physician, was not a mitigating factor. Those samples were taken on April 16, 2013, five days after the sample taken for the purpose of the employer's random test, which diminishes their relevance. And, as noted above, the blood sample is not recognized as an accurate fluid for measuring cocaine. The urine sample, however, also tested positive for BE, but at a much lower level.

The claimant takes a variety of prescribed and over-the-counter medications. One of those, lidocaine, is similar to cocaine in that it functions as a topical anesthetic. That is the only similarity, however, as there is no pharmacological (chemical or structural) relationship between them. Lidocaine would not produce BE in the claimant's body and therefore, could not cause a positive test. Another drug taken by the claimant is amoxicillin. In earlier years of drug testing, amoxicillin (and related drugs) could cause a false positive test result. As the testing methodologies and equipment have evolved, that no longer occurs. The tests specifically look for BE which only comes from the body processing ingested cocaine.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c).* Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987).*

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d); COMAR 09.32.06.04.* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1).*

In a discharge case, the employer has the burden of demonstrating that the claimant's actions rise to the level of misconduct, gross misconduct or aggravated misconduct based upon a preponderance of the credible evidence in the record. *Hartman v. Polystyrene Products Co., Inc., 164-BH-83; Ward v. Maryland Permalite, Inc., 30-BR-85; Weimer v. Dept. of Transportation, 869-BH-87; Scruggs v. Division of Correction, 347-BH-89; Ivey v. Catterton Printing Co., 441-BH-89.*

> As the Court of Appeals explained in *Department of Labor, Licensing and Regulation v. Hider, 349 Md. 71, 82, 706 A.2d 1073 (1998)*, "in enacting the unemployment compensation program, the legislature created a graduated, three-tiered system of disqualifications from benefits based on employee misconduct. The severity of the disqualification increases in proportion to the seriousness of the misconduct."

Dept. of Labor, Licensing & Regulation v. Boardley, 164 Md. 404, 408 fn.1 (2005).

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

The term "misconduct" as used in the statute means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction from duty, or a course of wrongful conduct committed by an employee within the scope of his employment relationship, during hours of employment or on the employer's premises, within the meaning of Section 8-1003 of the Labor and Employment Article. (*See, Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113*).

Simple misconduct within the meaning of *§8-1003* does not require intentional misbehavior. *DLLR v. Hider, 349 Md. 71 (1998); also see Johns Hopkins University v. Board of Labor, Licensing and Regulation, 134 Md. App. 653, 662-63 (2000)*(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under *§8-1003*). Misconduct must be connected with the work; the mere fact that misconduct adversely affects the employer's interests is not enough. *Fino v. Maryland Emp. Sec. Bd., 218 Md. 504 (1959).* Although not sufficient in itself, a breach of duty to an employer is an essential element to make

an act connected with the work. *Empl. Sec. Bd. v. LeCates, 218 Md. 202 (1958).* Misconduct, however, need not occur during the hours of employment or the employer's premises. *Id.*

Without sufficient evidence of a willful and wanton disregard of an employee's obligations or gross indifference to the employer's interests, there can be no finding of gross misconduct. *Lehman v. Baker Protective Services, Inc., 221-BR-89.* Where a showing of gross misconduct is based on a single action, the employer must show the employee demonstrated gross indifference to the employer's interests. *DLLR v. Muddiman, 120 Md. App. 725, 737 (1998).*

In determining whether an employee has committed gross misconduct, "[t]he important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dept. of Econ. & Empl. Dev. v. Jones, 79 Md. App. 531, 536 (1989).* "It is also proper to note that what is 'deliberate and willful misconduct' will vary with each particular case. Here we 'are not looking simply for substandard conduct…but for a willful or wanton state of mind accompanying the engaging in substandard conduct." *Employment Sec. Bd. v. LeCates, 218 Md. 202, 207 (1958)*(internal citation omitted); *also see Hernandez v. DLLR, 122 Md. App. 19, 25 (1998).*

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that…affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services…and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

In the claimant's appeal, his attorney offers alternate reasons for the claimant's positive drug test. Claimant's counsel again disputes any wrong-doing by the claimant. In light of counsel's arguments, and to specifically address questions which arose during the Board's review of this matter, the Board scheduled a supplemental hearing to obtain additional evidence and allow counsel for both parties the opportunity to present further argument.

On appeal, the Board reviews and considers the evidence of record from the Lower Appeals hearing. Both parties appeared and testified at both hearings. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearings. The Board is satisfied it has sufficient competent evidence from which a decision may be made.

The Board has thoroughly reviewed the record from the Lower Appeals hearing and the Board's hearing. The Board concurs with the hearing examiner's findings of fact and conclusions of law.

The employer offered the testimony of Richard Cohn, PhD., as an expert in pharmacology, toxicology and drug-testing processes. Dr. Cohn's testimony conclusively supported the results of the drug tests performed on the claimant's urine samples. Dr. Cohn established, through competent and consistent testimony, that the positive result for the claimant's drug test must have been caused by the claimant ingesting cocaine.

The claimant presented a written report from John N. D. Wurpel, PhD., in support of his contention that he never ingested cocaine and the positive result must have been either a false positive because of the

other medications he took, or because of error. [see Claimant's Board Exhibit #1) Dr. Wurpel rests his opinion on information provided to him by the claimant's counsel and was not available for live testimony or cross-examination. Without knowing what information was provided to Dr. Wurpel, and without any opportunity to question the basis for his opinion, the Board cannot and will not find this persuasive.

The Board concludes that the employer has met its burden of proof and shown, by a preponderance of the evidence that the claimant was discharged for gross misconduct.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§8-1002*. The decision shall be affirmed for the reasons stated herein and in the hearing examiner's decision.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning April 14, 2013 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is affirmed.

Donna Watts-Lamont, Chairperson

Eileen M. Rehrmann, Associate Member

VD
Date of hearing: February 25, 2014
Copies mailed to:
CLARKE D. BAYNE
CHOPTANK ELECTRIC COOP INC
DAVID M. WILLIAMS ESQ.
PATRICK M. PILACHOWSKI ESQ.
CHOPTANK ELECTRIC COOP INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CLARKE D BAYNE

SSN #

Claimant

vs.

CHOPTANK ELECTRIC COOP INC

Employer/Agency

Before the:
Maryland Department of Labor, Licensing and Regulation
Division of Appeals
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 1321006
Appellant: Employer
Local Office : 65 / SALISBURY CLAIM CENTER

September 19, 2013

For the Claimant: PRESENT, DAVID WILLIAMS, ESQ.

For the Employer: PRESENT, PAULA BISHOP

For the Agency:

ISSUE(S)

Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the MD Code Annotated Labor and Employment Article, Title 8, Sections 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

The claimant, Clarke D. Bayne, began working for the employer, Choptank Electric Cooperative, Inc., on August 26, 1986, and his last day worked was April 15, 2013. At the time of his discharge, the claimant worked full-time as a Chief Lineman, earning an hourly salary of $38.09. The employer terminated the claimant from his position for testing positive for a controlled substance.

The employer has an "Alcohol and Drug Free Workplace" policy, a copy of which the claimant signed for on February 12, 2013. (ER EX #1). This policy prohibits employees from having dangerous substances present in their bodies while in or on the employer's premises and states a positive test result on any employee for illegal drugs will result in termination. (ER EX #1, Pages 2, 6-7). Additionally, the nature of

the claimant's job duties made him subject to the regulations of the U.S. Department of Transportation (DOT). Pursuant to DOT regulations, the claimant had to submit to random drug and alcohol testing, when his name was randomly selected for testing.

On April 11, 2013, the employer informed the claimant he had been randomly selected for drug and alcohol testing and the claimant complied with the request to submit to a urine test. The testing facility, the Health Enhancement Center, forwarded the claimant's April 11, 2013, urine sample to MEDTOX for testing of the primary urine sample. The claimant's primary urine sample tested positive for Cocaine. (ER EX #3).

The employer offered the claimant an opportunity for testing of the split specimen, urine sample taken during the original April 11, 2013, testing, in accordance with Maryland Code Annotated, Health-General Article, Section 17-214.1 (c) (1) (iv). The claimant availed himself of the re-test/split specimen test option and the Health Enhancement Center forwarded the split specimen, urine sample to Quest-Lenexa for testing of the split specimen, urine sample. The claimant's split specimen, urine sample also tested positive for Cocaine. (ER EX #4).

The employer issued the claimant a "Disciplinary Action" form, with the box "Termination" marked (CL EX #2), as well as a "Notice to Employee Advising of Positive Drug Test Result and Intent to Terminate Employment" statement. (CL EX #4). The employer discharged the claimant on April 15, 2013, for violation of the employer's workplace drug policy. (ER EX #1).

The claimant denies ever using Cocaine and sought exculpatory medical testing through his Primary Care Physician, Helen A. Noble, M.D. Dr. Noble took both a urine sample and a blood sample from the claimant on April 16, 2013. The claimant's April 16, 2013, urine sample tested positive for Cocaine (CL EX #3, Page 3); however, the claimant's blood test came back negative for Cocaine. (CL EX #3, Page 2).

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the employer discharged or suspended the claimant as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises." [Rogers v. Radio Shack, 271 Md. 126, 132 (1974)].

Md. Code Ann., Labor & Emp. Article, Section 8-1002, provides an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards an employer has a right to expect and shows a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al. 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. In the case at bar, the employer met this burden.

In Lucas v. Gladney Transportation, 577-BH-90, the Board of Appeals held "The claimant drove a bus for the employer. Two days after he was hired, he took a physical which revealed chemical evidence of the use of cocaine. When the employer learned the results of the claimant's physical, the claimant was discharged. This was held to be gross misconduct." In Gordon v. Baines Management Company, 487-BR-93, the Board of Appeals held "The employer's rule forbidding employees to report to work with a detectable residue of illegal drugs in their systems was reasonable." Both the Circuit Court and the Court of Special Appeals for the State of Maryland affirmed the Board of Appeals' finding.

In the case at bar, the claimant tested positive for a controlled substance (Cocaine) during a random DOT drug test. The employer offered the claimant an opportunity for a re-test, as required under Maryland Code Annotated, Health-General Article, Section 17-214.1 (c) (1) (iv), and the re-test also came back positive for Cocaine. The claimant's own physician's urine test, although conducted five (5) days after the DOT test, also came back positive for Cocaine.

The claimant argues the three (3) urine tests are "false positives," as evidenced by the conflicting negative blood test, and may be due to the claimant's Lidocaine injection some days prior to the DOT drug test. (See CL EX #s 3 and 6). Conversely, the employer argues the urine tests are controlling, rather than the blood test, as the DOT does "not recognize blood as a medium for testing predicated on its short period of detection" (i.e., the Cocaine leaves the blood stream faster than it leaves the organs which produce urine, so a delay in testing will result in a negative result). (See ER EX #2, Page 2). The employer further contends neither the claimant's Lidocaine injection, nor any of the other medications or vitamins the claimant took, could result in a "false positive" result for the presence of Cocaine because the gas chromatography / mass spectrometry (GC / MS) testing the labs performed on the claimant's urine samples tests for the presence of Benzoylecgonine, a metabolite the human body produces in response to the presence of Cocaine specifically, and not for the presence of Cocaine. (See ER EX #2, Pages 1-2). Because the metabolite is only produced in response to Cocaine, and not to the presence of Lidocaine or any other substance, it cannot produce a "false positive." (See ER EX #2).

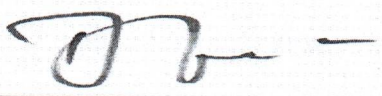
In response to the employer's medical opinion from Joseph F. Whelan, Director of DSI Medical Services, Inc., (ER EX #2), the claimant argued his medical opinions (CL EX #s 3 and 6) were authored by medical doctors, while the employer's medical opinion was not so authored. However, Mr. Whelan, while not a medical doctor, has over thirty (30) years of experience in substance abuse testing, addiction and workplace testing, and has regularly served as an expert in both civil and labor litigation on substance abuse testing and the DOT regulations. (See ER EX #2, Page 1). Conversely, the claimant's physicians, Frederick T, Lohr, M.D., and Helen A. Noble, M.D., are an Orthopedic Surgeon and an Internal Medicine physician, respectively. Neither specializes in substance abuse testing. Therefore, I find the opinion of Joseph F. Whelan superior in the field of substance abuse testing to those of Drs. Lohr and Noble and Mr. Whelan's opinion to be the controlling authority in the case at bar.

Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for testing positive for a controlled substance, constituting gross misconduct, and benefits are, therefore, denied.

DECISION

IT IS HELD the employer discharged the claimant for gross misconduct connected with the work, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning April 14, 2013, and until the claimant becomes reemployed and earns wages in covered employment equal to at least twenty-five (25) times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



D J Doherty, III, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by October 04, 2013. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : September 11,2013
TH/Specialist ID: USB3D
Seq No: 001
Copies mailed on September 19, 2013 to:

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