Maryland
Department of Economic & Employment Development

William Donald Schaefer
Governor
Mark L. Wasserman
Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: (410) 333-5032

Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

- D E C I S I O N -

Decision No.: 1227-BR-93

Date: July 9, 1993

Claimant: George J. Hamel

Appeal No.: 9221155

S.S. No.:

Employer: Coldwater Seafood Corp.
c/o Payroll Dept.

L.O.No.: 010

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for gross misconduct, connected with the work, within the meaning of §8-1002 of the Labor and Employment Article.

- N O T I C E O F R I G H T O F A P P E A L T O C O U R T -

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 appeal can be found in many public libraries, in the *Annotated Code of Maryland, Maryland Rules*, Volume 2, B rules.

The period for filing an appeal expires August 8, 1993

- A P P E A R A N C E S -

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals adopts the findings of fact of the Hearing Examiner. However, based on those facts, the Board concludes that the claimant

was discharged for gross misconduct, connected with his work, within the meaning of LE, §8-1002.

In concluding that the claimant was not discharged for gross misconduct, the Hearing Examiner placed great weight on the fact that the final incident that preceded his termination, was out of his control. The Board disagrees with this for two reasons.

First, the evidence does not support a finding that this incident was not within the claimant's control. The claimant indicated his inability to report to work was due to injuries incurred from an assault. There is no evidence, however, regarding the circumstances of that assault; there are insufficient facts, therefore, upon which to conclude that the claimant was the innocent victim of an attack. When a claimant is absent, he has the burden of showing that the absence was for an excused reason. See, e.g., Leonard v. St. Agnes Hospital, 62-BR-86. The claimant failed to meet this burden with regard to the final incident.

Second, even if the last absence was unavoidable, that does not necessarily preclude a finding of gross misconduct. Where an employee misses a large number of work days, even for excused reasons, there is a heightened duty not to miss any work for unexcused reasons and also to strictly observe the employer's notice requirements. Birmingham v. S. Schwab Company, 333-SE-86. Further, the Board has held that even though a claimant's last absence was with good reason, a finding of gross misconduct is supported where the claimant is discharged for a long record of absenteeism without valid excuse or notice, which persisted after warnings. Santiago v. Seaboard Farms, Inc., 1016-SE-85.

The claimant here had a long history of absenteeism, substantial portions of which were for reasons other than illness. Applying the reasoning of the cases cited above, the Board concludes that the claimant was discharged for repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations. This is one of the definitions of gross misconduct, under LE, §8-1002.

DECISION

The claimant was discharged for gross misconduct, connected with the work, within the meaning of §8-1002 of the Labor and Employment Article. He is disqualified from receiving benefits from the week beginning August 23, 1992 and until he becomes reemployed, earns at least ten times his weekly benefit amount ($1330.00) and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.

Associate Member

Thomas W. Keech
Chairman

W:K
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COPIES MAILED TO:

CLAIMANT

EMPLOYER

Shawe & Rosenthal
ATTN: Frances Taylor

UNEMPLOYMENT INSURANCE - CAMBRIDGE

Maryland
Department of Economic & Employment Development

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— D E C I S I O N —

Date: Mailed: 04/29/93

Claimant: George J. Hamel

Appeal No.: 9221155

S. S. No.:

Employer: Coldwater Seafood Corp.
c/o Payroll Dept.

LO. No.: 010

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for misconduct connected with the work, within the meaning of the Code of MD, Labor and Employment Article, Title 8, Section 1003.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, OR WITH THE BOARD OF APPEALS, ROOM 515, 11OO NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES ON May 14, 1993
NOTE: APPEALS FILED BY MAIL INCLUDING SELF-METERED MAIL ARE CONSIDERED FILE D ON THE DATE OF THE U.S POSTAL SERVICE POSTMARK

— A P P E A R A N C E S —

FOR THE CLAIMANT:

Claimant/Present
on 01/08/93
Claimant/Not Present
on 04/20/93

FOR THE EMPLOYER:

James Doehlert,
Personnel Manager
and Roland Palmer,
Safety Director on
01/08/93
James Doehlert,
Personnel Manager on
01/20/93

FINDING OF PROCEDURAL FACT

On October 2, 1992, the local office issued a determination that the claimant had been discharged by employer for "simple" misconduct and imposed a seven week disqualification from receiving unemployment insurance benefits. The employer filed. a timely appeal of that determination on October 9, 1992. The hearing of that appeal was held on January 8, 1993 and a decision issued January 12, 1993 affirming the Claims Examiner's determination. The employer thereafter timely appealed to the Board of Appeals, and the Board of Appeals issued its Remand Order on March 1, 1993 directing the Hearing Examiner to conduct an additional hearing and issue a new decision. A new hearing was scheduled, and heard on April 20, 1993 and timely notice was sent to both parties at their last known addresses. At the hearing on April 20, 1993, the claimant did not appear, and the employer had as its representative James Doehlert, Personnel Manager. Additional testimony was taken at the April 20, 1993 hearing and additional exhibits were received into evidence.

FINDINGS OF FACT

The claimant began work on February 12, 1991 as a general production laborer at the employer's seafood processing plant. At the time of hire, the claimant was specifically advised of employer's attendance policy which stated that any employee who missed more than eighty hours of work during the year would be terminated. The policy required the employer to give a written warning to the employee at the thirty-two, forty-eight and sixty-four hour level. Certain occasions of absence, if properly notified of in advance, would be regarded as excused, and would not count against the eighty hours. These included leaves of absence, funeral leave, jury duty and time off for work related accidents. However, the first day of any illness, whether or not covered by a doctor's note, would be charged as part of the eighty hours. If there were subsequent days off attributable to the same illness, those would not be counted. During 1991, his first year of employment, the claimant had seventy-six hours of unexcused absence. He began fresh under the employer's policy in 1992, but by May 28, 1992 had accumulated sixty-four hours of unexcused absence and received the warning and suspensions required under the employer's progressive disciplinary policy. Thereafter, the claimant was absent on July 16th for car trouble for which he was charged eight hours, four hours on August 3rd for reported illness and failed to report on August 31, 1992. He was charged eight hours of absence for August 31, 1992 which gave him a total of eighty-four hours for the year, and he was terminated.

On August 29, 1992, the claimant had been physically assaulted. He had been taken by ambulance to a local hospital, where he was treated and released.. The claimant reported having been hit with fists in his mouth, nose and right eye and there was a visible swelling of the right. eye area. The claimant received writ-ten instructions upon release to have forty-eight hours rest. The second day of this forty-eight hours would have been August 31, 1992. On that date, the claimant called his employer before his shift and explained he had been injured and was home on doctor's orders. He called later to make arrangements far turning in his medical documentation and was told at that time that it was not necessary as he was terminated.

CONCLUSIONS OF LAW

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 the Code of Maryland, Labor and Employment Article, Title %, Section 1003. (See Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113).

It has long been established that absenteeism due to illness is not misconduct in the unemployment insurance context. Johns V. Alco Gravure, Inc., 913-BR-85. It is equally well established that a claimants repeated persistent and chronic absenteeism, where the absences are without notice and. excuse, and continue in the face of warnings, constitute gross misconduct, even where illness is the claimed reason for the absence, Watkins v. Employment Security Board, 266 Md. 223, 292 A.2nd 653 (1972). When claimant exceeds an employer's permitted absence hours because of illness, these two principles can come into conflict. However, in this case, the facts are essentially undisputed and show: (1) claimant was the victim Of a well documented physical assault requiring medical treatment (2) he was instructed by his treating physician to rest for forty-eight hours which would have been August 30 and 31 (3) the claimant. timely notified his employer of his inability to report for work on August 31 and offered to provide documentation. In this case the precipitating cause of the claimant's termination was his absence on August 31st which caused him to exceed the allowed eighty hours; the employer argues that it is evidence of gross. misconduct because the claimant brought himself to this point by numerous "violations of the attendance policy which were clearly his fault." Such is not the law in this case. the interpretation of gross misconduct or misconduct has always been cone-erned with whether the claimant's acts were volitional or within his control c blank. There is little rationale for warnings

at progressive stages of the disciplinary procedure unless there is some thought that the claimant has the ability to correct and control his behavior. There is no evidence here that the claimant was other than the innocent victim of an assault requiring hospitalization. In considering occurrence systems the Board of Appeals has said A violation of the employer's attendance policy is not misconduct per se, where that policy does not distinguish between absence which occurred because of legitimate medical reasons and absences for which there was no reasonable excuse. Prior to termination for reasons which may be characterized as misconduct and thta this past history contributed to claimant's termination. Randall v. Nationwide Insurance Company, 1641-BR-82.

However, where an employee has been absent for a day of scheduled work, the burden of proof shifts to the employee to explain the reason far the absence. Leonard v. St. Agnes Hospital, 62-BR-86. The evidence in this case certainly provided a reasonable non-fault explanation for the employees failure to report to work on August 31, 1993.

The evidence in this case shows that the claimant was absent numerous times for reasons which are insufficient to believe. However, the evidence is equally compelling that the claimant's ultimate absence was not willful or wanton and that he crave prompt notice of his inability to report to his employer.

DECISION

The claimant was discharged for misconduct, connected with the work, within the meaning of the Code of Maryland, Labor and Employment Article, Title 8, Section 1003. Benefits will be denied from the week beginning August 23, 1992 and for the six weeks immediately following.

The determination of the Claims Examiner is affirmed.

Henry M. Rutledge
Henry ~~M.~~ Rutledge
Hearing Examiner

Date of Hearing: 04/20/93
kc/Specialist ID: 10178
(Cassette Attached to File)

Copies mailed on 04/29/93 to:

Claimant
Employer
Unemployment Insurance - Cumberland (MABS)