-DECISION-

Claimant:
JEWEL R LINDSEY

Employer:
ARBITRON INC

Decision No.: 1583-BH-11

Date: March 16, 2011

Appeal No.: 1025583

S.S. No.:

L.O. No.: 64

Appellant: Claimant

Issue: Whether there is good cause to reopen this dismissed case within the meaning of COMAR 09.32.06.02N.

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 15, 2011

- APPEARANCES -

FOR THE CLAIMANT:

JEWEL R. LINDSEY
VICTORIA ROBINSON, Esq.

FOR THE EMPLOYER:

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

The Agency elected not to participate in this case. *Md. Code Ann., Lab. & Empl. Art., § 8-508(b).*[1] The employer, duly notified of the date, time and place of the hearing, failed to appear. The Board notes that the employer did not provide the Agency any requested information at the commencement of this case. *See Agency Exhibit1, Agency Fact Finding Report.* The claimant's testimony and evidence is uncontradicted. The Board finds the claimant credible.

FINDINGS OF FACT

Reopening Issues

The Agency issued a benefit determination on May 20, 2010 which found that the claimant voluntarily quit her job with Arbitron, Inc. (hereinafter, "Arbitron") on June 6, 2009 but without good cause within the meaning of *§ 8-1001. Agency Exhibit 1.* The claimant filed a timely appeal of the benefit determination to the Lower Appeals Division.

On July 6, 2010, the Lower Appeals Division mailed notice for a hearing to be held on July 26, 2010 on the merits of the separation issues. The employer and the claimant separately filed motions to postpone the July 26, 2010 hearing. On June 22, 2010, the motions for postponement were granted.

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[1] "The Secretary, at the Secretary's discretion, may be a party to an appeal filed by a claimant or employing unit with the Lower Appeals Division".

On August 10, 2010, the Lower Appeals Division mailed notice for a hearing to be held on September 1, 2010 on the merits of the separation issues. On September 2, 2010, the Lower Appeals Division issued a dismissal decision because of the appellant's (the claimant) failure to appear.

From July through October 2010, the claimant was involved in a dispute with her landlord regarding building code violations in the claimant's rental unit. *See Claimant's Exhibit B-2*. For the period of the dispute, the claimant paid her rent into escrow. Consequently, the claimant and the landlord's business and personal relationship deteriorated.

The claimant had chronic problems with receiving her mail. She would often receive mail intended for other tenants. The Landlord would often receive some or all of the claimant's mail. Before the aforementioned escrow dispute, the landlord would hand the claimant her mail that was misdelivered to the landlord. After the escrow dispute, the landlord would not forward the claimant's misdelivered mail. The landlord would also intercept the claimant's mail. The claimant did not receive the hearing notice for the September 1, 2010 hearing. The claimant also did not receive other mail, most notably, mail from her attorney. *See Claimant's Exhibit B-3*.

After the claimant's attorney's office inquired about the claimant's non-response to her office's correspondence in early September 2010 did the claimant discover there was a problem with her mail delivery. The claimant took all appropriate and necessary steps to correct this problem with the U.S. Postal Service.

The claimant filed a timely request to reopen the September 1, 2010 dismissed case. On September 29, 2010, the Lower Appeals Division issued a decision granting a hearing in the case.

On October 6, 2010, the Lower Appeals Division mailed notice for a hearing to be held on October 26, 2010 on the merits of the separation issues and the threshold issue of whether the appeal should be reopened. On October 26, 2010, the Lower Appeals Division issued a decision dismissing the claimant's appeal, without the right to reopen, for failure to appear at two successive hearings.

On November 10, 2010, the claimant, by and through her attorney, filed a timely appeal of the October 26, 2010 decision.

The claimant failed to appear at the October 26, 2010 hearing due to circumstances beyond her control which prevented her from both attending the hearing and from filing a timely postponement request. The claimant was in New Orleans on October 25, 2010. The claimant had a scheduled flight to return to Baltimore on October 25, 2010 in order to attend the hearing on October 26, 2010. The claimant's flight was delayed due to maintenance issues on her scheduled plane. *See Claimant's Exhibit B-1*. The delay of the claimant's flight occurred after business hours; therefore, it was impossible for the claimant to file a postponement request. As soon as practicable, the claimant returned to Baltimore on another flight on October 27, 2010. *See Claimant's Exhibit B-1*.

Separation Issues

The claimant was employed as a part-time employee with Arbitron from April 14, 2009 through June 6, 2009. The claimant is unemployed as the result of a voluntary quit.

The claimant accepted this part-time job as a supplement to her full-time job with T. Rowe Price. The claimant was to work a part-time schedule from 6 p.m. to 12 midnight three days during the work week and five hours on Saturday. The claimant was promised a steady schedule of 23 hours per week.

Shortly after the claimant's tenure with Arbitron began, the employer ordered the claimant to go home prior to the end of her scheduled shift. This occurred twice per week totaling the loss of approximately 4 hours per week.

For reasons not relevant in this case, the claimant was discharged from T. Rowe Price during the claimant's tenure with Arbitron. The claimant began a search for a full-time job.

In early June, the claimant was offered and accepted a full-time job with Executive Financial Group.[2] The claimant was to begin this new job on June 7, 2010. In preparation for the job, and because the claimant wanted to keep her part-time job with Arbitron, the claimant filed a written request to change her part-time hours from the evening shift to the day shift so that her work hours with Executive Financial Group did not overlap. The claimant stated in her shift change request that if a day shift job was not available, she would have to tender her resignation in order to accept the full-time job with Executive Financial Group.

There was a then-existing day shift job for which the claimant could have performed at Arbitron. However, a couple of events not within the claimant's control changed the planned transition. For reasons unknown, Arbitron did not respond to the claimant's shift change request by the claimant's first scheduled work day at the Executive Financial Group. The claimant, therefore, quit her part-time job as she anticipated reporting to her new full-time job. Simultaneously, a problem arose which caused the claimant's scheduled first day and second day of work at her new job to be delayed. Unfortunately for the claimant, the new full-time job was subsequently rescinded by Executive Financial Group.

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[2] The claimant testified that the Executive Financial Group job comprised 35 hours per week. The Board finds sufficient evidence that this constituted full-time employment.

CONCLUSIONS OF LAW

The evaluation of the evidence and findings of fact are incorporated herein by reference.

I.

The threshold issue in this case is whether the claimant, as the appealing party, is entitled to the reopening of the original dismissal of this case and the second dismissal of this case. The Board finds that the claimant met her burden in both instances.

COMAR 09.32.06.02(M) provides that if a party appealing fails to appear at a hearing after having been given the required notice of the hearing, the hearing examiner may dismiss the appeal. Failure to be present at the location designated for the hearing within 10 minutes of the scheduled time is a failure to appear within the meaning of this section.

COMAR 09.32.06.02N(2) provides that a dismissed case may be reopened if the reason is attributable to Agency error, an error by the United States Postal Service, an unforeseen and unavoidable emergency, or for reasons relating to an improperly denied postponement request.

Pursuant to *COMAR 09.32.06.02(B)(1)*, "The interested parties shall be given at least 7 days' notice in writing of the time and place of any hearing before the hearing examiner or Board of Appeals." There is a rebuttable presumption that a letter property addressed will be delivered to the address in due course. *Border v. Grooms, 267 Md. 100 (1972).*

The Court of Special Appeals held in *Prince George's County Department of Social Services v. Knight, 158 Md. App. 130, 854 A.2d 907, (2004),* that there are various meanings of the noun "notice" such as knowledge, intelligence, intimation and warning. Notice may also mean a formal or informal warning or intimation of something or an announcement. The Court goes on to say that "a person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received a notice of it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered having been able to ascertain it by checking an official filing or recording." Even more specifically, the Court ruled that "one cannot 'respond' to a written 'notice' until he or she receives it." An application of the above–cited case to the facts in the instant case must lead one to conclude that the Agency Review Determination and Lower Appeals Division hearing notices herein, from which certain appeal rights flow, must be considered notices.

In the instant case, the claimant credibly testified that her mail was mis-delivered by the U.S. Postal Service and was improperly intercepted by her landlord during the period prior to the September 1, 2010 hearing. The Board is persuaded that the claimant did not receive the September 1, 2010 hearing notice until mid-September. The claimant diligently responded thereto within fifteen (15) days of when she received same.

The claimant established by a preponderance of the evidence that she is entitled to reopening of the September 1, 2010 dismissed case under the reasons enumerated in *COMAR 09.32.06.02N(2)* and because she acted diligently to preserve her appeal rights after receiving actual notice within the meaning of *Knight, 158 Md. App. 130 (2004)*.

The Board also finds that the claimant's reason for failing to appear at the October 26, 2010 was due to an unforeseen and unavoidable emergency. Under the circumstances, the timing of the claimant's flight delay prevented her from both attending the hearing and requesting a postponement. The claimant diligently acted to preserve her appeal rights. The Board notes that the claimant's attorney was present at the hearing site on the noticed date and time, communicated with the claimant, and filed a motion to conduct the hearing by telephone. Although the motion was denied, the claimant demonstrated due diligence in preserving her appeal. The claimant's actions are congruent with an honest person in an impossible uncontrollable situation attempting in good faith to preserve her rights.

The claimant has established by a preponderance of the evidence that she is entitled to reopening of the dismissed October 26, 2010 case under the reasons enumerated in *COMAR 09.32.06.02N(2)*.

Therefore, the Board finds based upon a preponderance of the credible evidence in the record, that the claimant met her burden of demonstrating that she had good cause to reopen the dismissed appeal hearings within the meaning of *COMAR 09.32.06.02N*. The Chief Hearing Examiner's decision shall be reversed for the reasons stated herein.

Finding that the claimant had good cause to reopen the appeal, the Board shall now examine the merits of the underlying separation issues and determine whether the claimant was dismissed for a disqualifying reason.

II.

"Due to leaving work voluntarily" has a plain, definite and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program, 275 Md. 69 (1975)*. A claimant's intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. App. 250, 274 (1996), aff'd sub. nom., 344 Md. 687 (1997)*. An intent to quit one's job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company, 1101-BH-82*. In a case where medical problems are at issue, mere compliance with the requirement of supplying a written statement or other documentary evidence of a health problem does not mandate an automatic award of benefits. *Shifflet v. Dept. of Emp. & Training, 75 Md. App. 282 (1988)*.

There are two categories of non-disqualifying reasons for quitting employment. When a claimant voluntarily leaves work, he has the burden of proving that he left for good cause or valid circumstances based upon a preponderance of the credible evidence in the record. *Hargrove v. City of Baltimore, 2033-BH-83*; *Chisholm v. Johns Hopkins Hospital, 66-BR-89*.

Quitting for "good cause" is the first non-disqualifying reason. *Md. Code Ann., Lab. & Empl. Art., § 8-1001(b).* Purely personal reasons, no matter how compelling, cannot constitute good cause as a matter of law. *Bd. Of Educ. Of Montgomery County v. Paynter, 303 Md. 22, 28 (1985).* An objective standard is used to determine if the average employee would have left work in that situation; in addition, a determination is made as to whether a particular employee left in good faith, and an element of good faith is whether the claimant has exhausted all reasonable alternatives before leaving work. *Board of Educ. v. Paynter, 303 Md. 22, 29-30 (1985)*(requiring a "higher standard of proof" than for good cause because reason is not job related)*; also see Bohrer v. Sheetz, Inc., Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984).* "Good cause" must be job-related and it must be a cause "which would reasonably impel the average, able-bodied, qualified worker to give up his or her employment." *Paynter, 303 Md. at 1193.* Using this definition, the Court of Appeals held that the Board correctly applied the "objective test": "The applicable standards are the standards of reasonableness applied to the average man or woman, and not to the supersensitive." *Paynter, 303 Md. at 1193.*

The second category or non-disqualifying reason is quitting for "valid circumstances". *Md. Code Ann., Lab. & Empl. Art., § 8-1001(c)(1).* There are three types of valid circumstances: a valid circumstance may be (1) a substantial cause that is job-related or (2) a factor that is non-job related but is "necessitous or compelling". *Paynter 202 Md. at 30*; (3) when the claimant's quit is caused by the individual leaving employment (i) to follow a spouse serving in the United States military or (ii) because the claimant's spouse is a civilian employee of the military or of a federal agency involved with military operations and the spouse's employer requires a mandatory transfer to a new location. *Md. Code Ann., Lab. & Empl. Art., § 8-1001(c)(1)(iii).* The "necessitous or compelling" requirement relating to a cause for leaving work voluntarily does not apply to "good cause". *Board of Educ. v. Paynter, 303 Md. 22, 30 (1985).* In a case where medical problems are at issue, mere compliance with the requirement of supplying a written statement or other documentary evidence of a health problem does not mandate an automatic award of benefits. *Shifflet v. Dept. of Emp. & Training, 75 Md. App. 282 (1988).*

Section 8-1001 of the Labor and Employment Article provides that individuals shall be disqualified from the receipt of benefits where their unemployment is due to leaving work voluntarily, without good cause arising from or connected with the conditions of employment or actions of the employer or without, valid circumstances. A circumstance for voluntarily leaving work is valid if it is a substantial cause that is directly attributable to, arising from, or connected with the conditions of employment or actions of the employing unit or of such necessitous or compelling nature that the individual had no reasonable alternative other than leaving the employment.

The Board concurs with the claimant's counsel's argument that *Total Audio - Visual v. DLLR, 360 Md. 387, 395, 758 A.2d 124, 128 (2000)* and *Plein v. DLLR, 369 Md. 421 (2002)* are inapplicable in the case at bar. In the instant case, the claimant did not quit her part-time job with Arbitron in order to accept "better employment" with Executive Financial Group for purely economic reasons. The claimant had the part-time job while she was employed full-time with T. Rowe Price. The claimant lost her full time job with T. Rowe Price on or before April 26, 2009. The claimant kept her part-time job with Arbitron after the loss of her full-time job while looking for another full-time job. The claimant intended to keep the part-time job with Arbitron after securing a replacement full-time job with Executive Financial Group; the

claimant desired to "become whole" again and return her situation back to the prior status quo of having a full-time and supplementary part-time job.

The claimant did not quit her part-time job in order to obtain "better employment". The claimant quit her part-time job in order to accept the full-time job after Arbitron delayed responding to the claimant's shift change request. But for the agreed-upon start date with Executive Financial Group and the absence of a favorable response to the shift change, the claimant would not have quit her job. The reasonable similarly-situated person would have quit the part-time job in order to secure full-time employment.

The Board finds that the claimant did not quit her job with Arbitron to accept "better employment" for purely economic reasons within the meaning of *Total Audio-Visual* and *Plein*, supra. The claimant quit to preserve her ability to preserve and obtain full-time employment when the part-time employer rendered it impossible for her to keep her part-time job. There is no reason in the record why Arbitron did not provide the claimant the opportunity to change her part-time shift to the available, vacant day shift position in order to preserve her job and obtain full-time employment. Arbitron did not provide an excuse for its delay in responding to the claimant's reasonable shift change request.

The Board finds that Arbitron's inaction with responding to the claimant's request regarding her shift change to an existing part-time vacant job as a job-related cause for her decision to quit. Therefore, the Board need not find if the cause was necessitous or compelling under *§ 8-1001(c)*. The Board shall decide whether it was due to a substantial cause relating to the employment or good cause directly relating to the employment. Whether the quit is considered to be good cause or a substantial cause is a matter of degree of the seriousness of the condition that leads to the quit.

The employer has not participated in any material stage of the proceedings in this case. The employer has presented no evidence to mitigate the claimant's testimony and evidence or to impeach the claimant's veracity or credibility. The Board finds the claimant's testimony compelling.

The Board is persuaded and finds that the claimant's reasons for quitting would reasonably impel the average, able-bodied, qualified worker to give up her employment on the facts of this case within the meaning of *Paynter, 303 Md. at 1193*. The Board finds the claimant reasonable and not super-sensitive. The Board finds the claimant acted in good faith and with due diligence; that she gave Arbitron every opportunity to respond prior to accepting the full-time job; that she desired to meet her responsibilities and duties to Arbitron; and that she pursued all avenues available to her up to and including the point where she was compelled to resign. The Board, therefore, finds sufficient evidence to support a finding of good cause; to find valid circumstances would not serve justice or fulfill the Legislative intent to construe disqualification provisions of the law strictly. *See Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*. The Board finds it would be contrary to the intent of the *Maryland Unemployment Insurance Law* to render a decision on the facts of this case any other way than in the claimant's favor.

The Board finds based on a preponderance of the credible evidence that the claimant met her burden of demonstrating that she quit for good cause within the meaning of *§ 8-1001*. The claims specialist's determination shall be reversed for the reasons stated herein.

DECISION

THE BOARD HOLDS that the claimant is entitled to reopening of this case (for both the September 1, 2010 and October 26, 2010 hearings) within the meaning of *COMAR 09.32.06.02N(2)*.

The Chief Hearing Examiner's dismissal and reopening decisions are reversed.

THE BOARD FURTHER HOLDS that the claimant voluntarily quit her job with Arbitron, Inc. for good cause within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1001*. The claimant is entitled to benefits from the week beginning April 26, 2009 provided the claimant meets the other requirements of the law.

The claims specialist's determination is reversed.

Clayton A. Mitchell, Sr., Associate Member

Donna Watts-Lamont, Chairperson

RD
Date of hearing: March 08, 2011
Copies mailed to:
JEWEL R. LINDSEY
ARBITRON INC
VICTORIA R. ROBINSON ESQ.
ARBITRON INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JEWEL R LINDSEY

SSN #

Claimant

vs.

ARBITRON 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: 1025583
Appellant: Claimant
Local Office : 64 / BALTOMETRO CALL CENTER

September 29, 2010

For the Claimant:

For the Employer:

For the Agency:

ISSUE(S)

Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

FINDINGS OF FACT

A hearing on the matter giving rise to this appeal was scheduled for September 1, 2010 at 10:30am in the Baltimore appeals location. The appellant, who is the Claimant, failed to arrive within ten minutes of the scheduled start-time for said hearing and the appeal was dismissed.

The appellant filed a timely request to reopen her appeal. The Appeals Division then notified the appellant by letter dated September 13, 2010, that she had ten days to submit any additional documentary evidence she wished to be considered in making a ruling on the request for reopening the appeal. No additional correspondence was then received.

The claimant missed the hearing because she never received in the mail the notice to appear at the hearing.

CONCLUSIONS OF LAW

COMAR 09.32.06.02M states that if a party appealing fails to appear at a hearing after having been given the required notice of the hearing, the Hearing Examiner may dismiss the appeal. Failure to be present at the location designated for the hearing within 10 minutes of the time scheduled is a failure to appear within the meaning of this section.

COMAR 09.32.06.02N(2) provides that a request for the reopening of a dismissed case may be granted for the following reasons:

(a) The party received the hearing notice on or after the date of the hearing as a result of:
  (i) an untimely or incorrect mailing of the hearing notice by the Appeals Division, or
  (ii) a delay in the delivery of the hearing notice by the United States Postal Service,

(b) An emergency or other unforeseen and unavoidable circumstance prevented a party from both attending the hearing and requesting a postponement of the hearing,

(c) A party requested a postponement for the reasons listed above, but it was improperly denied.

COMAR 09.32.06.02N(3) provides that misreading of a properly prepared hearing notice as to the date, time and place of the hearing is not good cause for reopening a dismissed case.

EVALUATION OF THE EVIDENCE

The appellant had the burden to show, by a preponderance of the credible evidence, that he fell within one of the exceptions listed in COMAR 09.32.06.02N (2).

In the instant case, the claimant met her burden of showing she fell within exception (a) because she did not receive timely notice of the hearing.

The claimant's reopening request is, therefore, granted.

DECISION

IT IS HELD THAT the appealing party established compliance with the requirements of COMAR 09.32.06.02N in the above-captioned case. The case is reopened, and a new hearing will be scheduled to take evidence on the substantive issues in the case.

Judy G. Smylie, Esq.
Chief 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.

Date of hearing : September 1, 2010
MAH/Specialist ID: RBA3A
Seq No: 002
Copies mailed on September 29, 2010 to:
JEWEL R. LINDSEY
ARBITRON INC
LOCAL OFFICE #64
ARBITRON INC
FILE