- D E C I S I O N -

Claimant:
TYRONE T PINDER SR

Employer:
SOLO CUP OPERATING CORP

Decision No.: 1914-BR-11

Date: April 08, 2011

Appeal No.: 1024060

S.S. No.:

L.O. No.: 63

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: May 09, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of facts and conclusions of law. The of the hearing examiner's decision is reversed.

The claimant was employed as a full-time maintenance mechanic for the employer from August 4, 2008 through March 21, 2010.

The claimant was discharged for an alleged incident of alcohol consumption prior to his arrival to work.

On March 21, 2010 the claimant arrived to work for his shift at 7 p.m. He was at work for approximately 2 hours when he went into the office and the claimant's production supervisor, Steve told the claimant that he smelled alcohol on his breath. The claimant vehemently denied these allegations.

Steve then proceeded to call Ron Huey at home. Mr. Huey was the maintenance manager. The claimant explained to Mr. Huey that he had not been drinking, but that Steve told him to go home. Mr. Huey told the claimant that he should go home and the matter would be dealt with the following day.

However, in the meantime, Mr. Huey referred the matter to Dottie McCracken, Human Resources Manager. Ms. McCracken informed Mr. Huey that he should send the claimant immediately to get a blood test. However, the claimant had already left to go home per his previous instructions from Mr. Huey.

The claimant was discharged because he failed to submit to alcohol testing.

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).*

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."

Failing a drug or alcohol test may be gross misconduct. *Lucas v. Gladney Transportation, 577-BH-90.* An employee's refusal to submit to a drug screening test may be grounds for a finding of gross misconduct. *Stauffer v. Noxell Corp., 1111-BH-88*; *Gintling v. BGE, 913-BH-92*; *Deluca v. Montgomery County Public Schools, 1632-BR-93.*

The employer must adhere to the provisions of *Md. Code Ann., Health-Gen. art., § 17-214* in order to have the test results be considered as evidence of misconduct. This section requires, among other things, that the employer give the employee written notice of his right to resubmit the same test sample to a laboratory of the employee's choosing. If the employer fails to offer this option to the employee, the test may not be used as competent evidence of or as a basis for a finding of misconduct. *Webe v. Anderson Oldsmobile Company, 88-BR-91.* However, whether the claimant was informed of, or given the opportunity to have a second testing of the same sample is irrelevant when the claimant does not deny that the results of the drug test are accurate. *Boyd v. Cantwell Cleary Company, Inc., 1845-BH-92*; *Nolan v. Lyon, Conklin and Company, Inc., 115-BR-95*; *Jones v. Race Track Payroll Account, Inc., 2204-BR-95.*

The employer's case was substantially hearsay. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept., 115 Md. App. 395, 413 (1997).* "The Court has remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id. at 411. See also Kade v. Charles H. Hickey School, 80 Md. App. 721, 725 (1989)* ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade, 80 Md. App. at 726, 566 A.2d at 151, Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 194, 436 A.2d 525, 529*, or made close in time to the incident, see *Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*, or corroborated, see *Consolidated Edison v. N.L.R.B, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938)* ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972)*, ordinarily is presumed to posses a greater caliber of reliability. *Cited in Travers 115 Md. App. at 413. Also see Parham v. Dep't of Labor, Licensing & Reg[ulation], 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see Cook v. National Aquarium in Baltimore, 1034-BR-91*(the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston, 322 Md. 493, 505, 588 A.2d 772, 778 (1991).* A fully explained administrative decision also

fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision . . . ." *Id.*; *also see Mehrling v. Nationwide Ins. Co., 371 Md. 40, 56 (2002)*; *Fowler v. Motor Vehicle Administration, 394 Md. 331, 353 (2006)*; *Crumlish v. Insurance Commissioner, 70 Md. App. 182, 187 (1987)*.

In *Kade v. Charles H. Hickey School,* the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

> Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent*. The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case.

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 hearing examiner bases his credibility determination on what he perceives as conflicting statements. The hearing examiner's credibility determinations are not demeanor-based.

Because the hearing examiner's credibility determinations were not demeanor-based, the Board does not owe the hearing examiner "special deference" as to his findings in this regard. *See Dept. of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 299 (1994)*. The Court of Appeals distinguishes between: (1) testimonial inferences, "credibility determinations based on demeanor," and (2) derivative inferences, "inferences drawn from the evidence itself." *Shrieves, 100 Md. App. at 299* (citations omitted). The Court explained:

> Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records."....But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation makes weighty only the observers testimonial inferences.

Shrieves, 100 Md. App. at 299-300.

The hearing examiner derived his credibility determinations in this regard from what he perceived as conflicting evidence in the record:

> The claimant failed to submit to a drug test as required. The claimant's subsequent termination was for actions that constitute misconduct.

The Board does not adopt the hearing examiner's credibility determinations regarding the employer's witnesses.

The employer's entire testimony is based on hearsay evidence. None of the witnesses who allegedly smelled alcohol on the claimant's breath testified at the hearing. None of the witnesses who requested the claimant to sit and wait to be transported for a blood test testified.

The only individuals present at the August 6, 2010 Lower Appeals' hearing were supervisors who were not present on the day the claimant was accused of having alcohol on his breath. The testimony was from the managers who "assumed" that the claimant was told by Steve, claimant's production supervisor, that he would be transferred for a blood test. Steve was not available at the Lower Appeals' hearing.

The claimant credibly testified that he was told to go home by Steve. The claimant credibly testified that he was not asked to wait and go to the hospital for a blood test. The claimant further credibly testified that he was not drinking. If he had been asked to take a blood test, he would have gone willingly.

It is the responsibility of the employer to have competent, first-hand testimony in a case where an employee is accused by another co-worker of misconduct. The employer failed to have the competent witnesses testify that they were in the place of business, during the incident, and they knew exactly the sequence of events. The claimant is unable to cross examine any of the witnesses that are accusing him of a violation of the workplace rules. It is especially important when a claimant vehemently denies that he engaged in any misconduct.

Further, Hearing Examiner Greer has absolutely no evaluation in his evidence as to why the employer's testimony was more credible than the claimant's testimony. All the Board can discern from the record is that Hearing Examiner Greer gave more weight to the employer's hearsay testimony than that of the claimant. But, Hearing Examiner Greer did not elaborate in his decision as to why the employer's witnesses were more credible. The Board rejects the Hearing Examiner's credibility determination.

The Board finds based on a preponderance of the credible evidence that the employer did not meet 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 reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with SOLO CUP OPERATING CORP.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mr
Copies mailed to:
TYRONE T. PINDER SR
SOLO CUP OPERATING CORP
SOLO CUP OPERATING CORP
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

TYRONE T PINDER SR

SSN #

Claimant

vs.

SOLO CUP OPERATING CORP

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: 1024060
Appellant: Employer
Local Office : 63 / CUMBERLAND CLAIM CENTER

August 30, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , DOTTIE MCCRACKEN, RON HUEY

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 was employed from August 4, 2008 to March 21, 2010. He worked full-time as a(n) Maintenance Mechanic II earning $15.00 per hour.

The claimant was discharged for failure to submit to an alcohol test. On July 15, 2009, the claimant smelled of alcohol on the job. The claimant admitted he had drank two beers earlier in the day while cutting grass. The claimant was sent home by way of his wife picking him up from work. On March 21, 2010, claimant's supervisor smelled what he believed to be alcohol on the claimant's breath while at work. The claimant denied that he had been drinking. The matter was referred to Ron Huey, Maintenance Manager, who in turn referred the matter to Dottie McCracken, Human Resource Manager. Ms.

McCracken directed the managers to send the claimant for alcohol testing at the local hospital. An arrangement had been made with that hospital for after-hours alcohol testing. The claimant was directed over the phone by Mr. Huey to not leave the premises and that he would need to submit to an alcohol test. He further informed him that arrangements were being made to transport him for that test. Not long thereafter, the claimant left the premises without the permission of management. When management looked for the claimant he was not on the premises. Management attempted to contact him but to no avail. The following day the claimant reported to work. He was sent home pending an investigation into the matter. He was later discharged.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that 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 that an employer has a right to expect and that show 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).

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended 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).

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

The employer had the burden to show, by a preponderance of the credible evidence, that the claimant was discharged for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The claimant failed to submit to a drug test as required. The claimant's subsequent termination was for actions that constitute gross misconduct. Benefits are, therefore, denied.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002. The claimant is disqualified from receiving benefits from the week beginning March 21, 2010, and until the claimant becomes reemployed

and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claim Specialist is reversed.

W E Greer, 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

Any party 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 September 14, 2010. 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: August 06, 2010
DW/Specialist ID: WCU3C
Seq No: 001
Copies mailed on August 30, 2010 to:
TYRONE T. PINDER SR
SOLO CUP OPERATING CORP
LOCAL OFFICE #63
SOLO CUP OPERATING CORP