

 **Maryland**  
Department of Economic &  
Employment Development

*William Donald Schaefer, Governor*  
*Mark L. Wasserman, Secretary*

*Board of Appeals*  
*1100 North Eutaw Street*  
*Baltimore, Maryland 21201*  
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*Board of Appeals*  
*Thomas W. Keech, Chairman*  
*Hazel A. Warnick, Associate Member*  
*Donna P. Watts, Associate Member*

**— DECISION —**

	Decision No.:	224-BH-93	
	Date:	February 5, 1993	
Claimant:	Edward E. Poe	Appeal No.:	9214281
	Higs Dairies, Inc. Attn: Jack Darden	S. S. No.:	
Employer:		L O. No.:	002
		Appellant:	EMPLOYER
Issue:	Whether the claimant was discharged for gross misconduct, connected with the work, or misconduct, connected with the work, within the meaning of §8-1002 or §8-1003 of the Labor and Employment Article.		

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**— NOTICE OF RIGHT OF APPEAL TO COURT —**

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES

March 7, 1993

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**— APPEARANCES —**

FOR THE CLAIMANT:  
Edward E. Poe - Claimant

FOR THE EMPLOYER:  
Jack Darden, V.P., Human  
Resources  
Dennis Wilson, Mgr. of  
Engineering

## EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all the documentary evidence introduced in this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

The employer's evidence shows that the claimant's concentration of alcohol in the urine was 49.0 mg/dl (see, Employer's exhibit no. B-1). The exhibit also indicates that this result is "outside the reference range." However, the employer provided no medical evidence to explain the significance of this finding or what it proves about the claimant's condition at work.

Under the employer's policy, any finding of alcohol in the claimant's urine would be sufficient to terminate him. However, for the Board to disqualify the claimant from unemployment insurance benefits, there must be evidence that the claimant did something (i.e., reported to work intoxicated or consumed alcohol on the job) that amounts to misconduct or gross misconduct connected with his work. Therefore, the significance of the test result is a crucial finding that the Board must make.

In evaluating the medical evidence submitted by the employer, the Board has referred to a recognized textbook, Goth, Medical Pharmacology 12th Edition (The C.V. Mosby Company, 1988).<sup>1</sup> Based on the information from the medical textbook, the Board takes notice that a urine alcohol level of 49.0 mg/dl is equivalent to a blood alcohol level of 37.7 mg/dl, which is equivalent to 0.037 grams per 100 milliliters of blood, or .037 blood alcohol concentration. Under Maryland law, if a person's blood alcohol level is 0.05 or less, it is presumed that he is neither intoxicated nor under the influence of alcohol. See, Ann. Code of Md, Courts and Judicial Proceedings, §10-307 (b) (1992).

Therefore, employer has failed to prove that the claimant was intoxicated or under the influence of alcohol at work.

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<sup>1</sup>The Board notified the parties in writing that it would be using this medical text in evaluating the evidence in this case. Neither party objected.

#### FINDINGS OF FACT

The claimant was employed by High's Dairies, Inc. as a maintenance man for over twenty two years, until he was discharged on or about April 27, 1992.

The claimant had generally been a good employee although his performance began to deteriorate during the last few years and particularly during the last few months of his employment. The employer suspected that this was largely caused by a problem with alcohol. The claimant was counseled several times and was offered assistance by his employer, but he refused assistance, denying that he had an alcohol problem.

The employer had a policy that provided for random drug and alcohol tests. The claimant was aware of this policy. On April 20, 1992, the claimant was selected to participate in a such a test. The results showed that the claimant's urine alcohol level was 49.0 mg/dl.

The claimant was discharged as a result of this drug test. At the time the test was administered, the employer had decided that the claimant would be fired if any alcohol showed up in his system.

#### CONCLUSIONS OF LAW

In a case where the claimant has been discharged, the employer has the burden of proving that the discharge was for misconduct or gross misconduct. See, e.g., Hartman v. Polystyrene Products Co., Inc., 164-BH-83. The employer here has failed to meet that burden.

The claimant was discharged due to a random drug test showing that his urine alcohol level was 49.0 mg/dl. This corresponds to a blood alcohol concentration of .037, which, under Maryland law, gives rise to a presumption that he was neither intoxicated nor under the influence of alcohol. The employer's own exhibit B-1, the Laboratory Report, indicates that this result is "outside the reference range" as well.

The claimant technically violated the employer's policy that forbade an employee from reporting to work with even the smallest trace of alcohol in his system. However, having such

a small amount of alcohol in one's urine is neither illegal nor detrimental to the employer's interest. It is insufficient to prove either that the claimant reported to work unfit for duty or that he consumed alcohol while working. Therefore, the Board finds that the application of this policy in these circumstances is unreasonable and the claimant's violation of it is not misconduct.

The employer has failed to meet its burden of proving either gross misconduct or misconduct within the meaning of §8-1002 or §8-1003 of the Labor and Employment Article. The decision of the Hearing Examiner will be affirmed.

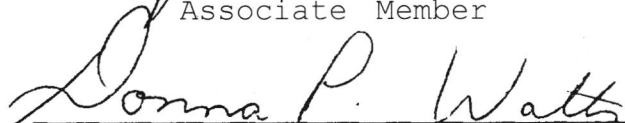
DECISION

The claimant was discharged, but not for gross misconduct or misconduct, connected with his work, within the meaning of s8-1002 or 8-1003 of the Labor & Employment Article.

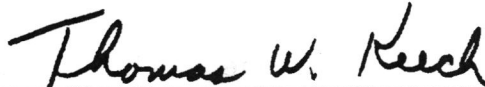
The decision of the Hearing Examiner is affirmed.



Associate Member



Associate Member



Chairman

W:W:K

DATE OF HEARING: November 24, 1992

COPIES MAILED TO:

CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - GLEN BURNIE

 **Maryland**  
Department of Economic &  
Employment Development

*William Donald Schaefer, Governor*  
*Mark L. Wasserman, Secretary*

*Gary W. Wiedel, Administrator*  
*Louis Wm. Steinwedel, Chief Hearing Examiner*

*Room 501*  
*1100 North Eutaw Street*  
*Baltimore, Maryland 21201*

*Telephone: (410) 333-5040*

**— DECISION —**

	Date:	Mailed:	08/21/92
Claimant:	Edward E. Poe	Appeal No.:	9214281
		S. S. No.:	
Employer:	Highs Dairies, Inc.	L. O. No.:	002
		Appellant:	CLAIMANT

issue: Whether the claimant was discharged for gross misconduct connected with the work, within the meaning of the Code of MD, Labor and Employment Article, Title 8, Section 1002.

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**— NOTICE OF RIGHT OF FURTHER APPEAL —**

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, OR WITH THE BOARD OF APPEALS ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

September 8, 1992

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES ON

NOTICE: APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

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**— APPEARANCES —**

FOR THE CLAIMANT:

Edward E. Poe - Present

FOR THE EMPLOYER:

Jack Darden, Human  
Resources Manager

FINDINGS OF FACT

The claimant was employed from October 1, 1969 until April 27, 1992, with Highs Dairies, Inc. His position was as a maintenance man at a rate of pay of approximately \$15.25 per hour.

On October 30, 1989, the claimant signed a consent form acknowledging the employer's random drug/alcohol screening test. On April 20, 1992, the claimant and eighteen other employees were scheduled by the employer to take a random drug/alcohol test. The claimant's test result was positive for alcohol.

The employer failed to present at this hearing any written documentation indicating the results of the alcohol test given to the claimant. The employer testified that the results for the claimant was "47" Under questioning from the Hearing Examiner, the employer then stated that the results were .47. Although the claimant acknowledges that he is a heavy drinker and drinks seven days a week, that he did not have anything to drink while on the job the day of the alcohol test. Furthermore, the alcohol test was given to the claimant within a half hour of the end of his eight hour shift. The claimant denies that he was in an intoxicated state on the job.

It should be noted that judicial notice is taken of the fact that in the State of Maryland .10 is considered the level of intoxication for purposes of driving a motor vehicle. In this case, the employer is contending that the claimant was intoxicated to the extent of nearly five times the legal limit for intoxication. Furthermore, at that alcohol level, the claimant would likely be unconscious or in dire medical distress. However, there is not even any evidence that he was not functioning capably on that day. Based on the totality of the evidence, it cannot be held that the employer's verbal submission of the results of the claimant's alcohol test is valid. Nevertheless, the claimant was terminated from his employment by Highs Dairies, Inc. on April 27, 1992.

#### CONCLUSIONS OF LAW

The claimant was terminated from his employment by Highs Dairies, Inc. on April 27, 1992. This was the result the claimant testing positive for an alcohol test that was given to him on April 20, 1992. However, the employer has the burden of proof in this matter and has failed to prove that the alcohol test was reliable and competent. Therefore, it cannot be held that the claimant was discharged for what would be considered wrongful conduct by him.

The Code of Maryland, Labor and Employment Article, Title 8, Section 1002(a)(1)(i), (ii) provides for a disqualification from benefits where an employee is discharged for actions which constitute (1) a deliberate and willful disregard of standards which the employer has a right to expect or (2) a series of violations of employment rules which demonstrate a regular and

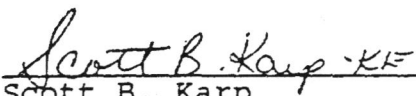
wanton disregard of the employee's obligations to the employer. The preponderance of the credible evidence in the instant case will support a conclusion that the claimant's actions do not rise to the level of gross misconduct within the meaning of the Statute.

The Code of Maryland, Labor and Employment Article, Title 8, Section 1003(a)(b) provides for disqualification, from benefits where a claimant is discharged for actions which constitute a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty or a course of wrongful conduct committed within the scope of the employment relationship, during hours of employment or on the employer's premises. The preponderance of the credible evidence in the instant case will support a conclusion that the claimant's actions do not rise to the level of misconduct within the meaning of the Statute.

DECISION

It is held that the claimant was discharged from his employment, but not for gross misconduct or misconduct connected with the work, within the meaning of the Code of Maryland, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed upon the claimant based on his separation from employment with Highs Dairies, Inc.

The determination of the Claims Examiner is reversed.

  
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Scott B. Karp  
Hearing Examiner

Date of Hearing: 08/04/92  
ke/Specialist ID: 02413  
(Cassette Attached to File)

Copies mailed on 08/21)92 to:

Claimant  
Employer  
Unemployment Insurance - Glen Burnie (MABS)