-DECISION-

Claimant:
GREGORY BROWN SR

Decision No.: 3354-BR-13

Date: August 19, 2013

Appeal No.: 1309433

S.S. No.:

Employer:
CHUCK'S BODY & FENDER INC

L.O. No.: 65

Appellant: Employer

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

- 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: September 18, 2013

REVIEW OF THE RECORD

After a review of the record, the Board rejects all but the first paragraph of the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The claimant began working for this employer on June 29, 2011. At the time of separation, the claimant was working as a Painter's Helper. The claimant was hired with expectations that he could perform his job duties properly because he had years of prior experience. The claimant last worked for the employer on February 20, 2013. He was terminated on February 21, 2013, for poor work performance.

The employer gave the claimant at least two verbal warnings that his work performance was not acceptable and that he must improve. On December 6, 2012, the employer issued an Employee Warning Notice to the claimant because he had not properly completed a job to which he was assigned. The claimant explained to the employer that his supervisor had called him away from the job to begin working on another job. That did not, however, explain why the work which was done was done improperly. On December 18, 2013, the employer issued another Employee Warning Notice to the claimant for poor work performance.

The employer did not offer specific training to the claimant, believing he had the skills to perform his duties. Other training which was offered specifically to the painters was also available to the claimant but that training was not targeted toward his duties. The claimant was resistant to criticism.

On occasion, the employer would not have painting work available, but would allow the claimant to perform other duties at his regular pay rate to maintain his full-time hours. The employer would further permit the claimant to leave early, upon his request, when there was no other work to be performed.

The claimant was discharged on February 21, 2013, when the employer discovered another instance of unacceptable work after the claimant had left early on February 20, 2013.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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)*. 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)*.

In its appeal, the employer reiterates much of its testimony from the hearing. The employer contends the hearing examiner erred in her findings of fact and conclusions of law and ignored much of the employer's

evidence. The employer contends the claimant had the skills, tools, training, equipment, and experience necessary to properly perform his work duties, but failed to do so on a recurring basis. The Board agrees.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. 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 hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists from which the Board may make its decision.

The Board has thoroughly reviewed the record from the hearing. The record does not support the hearing examiner's findings and does not support her decision. The claimant was hired with years of experience for the position with the employer. The claimant professed to have the experience and ability to perform the duties of that position. The employer, however, discovered the claimant was not performing his work to its satisfaction. The employer was concerned the poor quality could have a negative impact on the employer's business reputation and its contractual arrangements with insurance companies.

The employer gave the claimant verbal warnings that his work performance was not up to their standards. The employer gave the claimant opportunities to improve his work. The employer transferred the claimant to a different location hoping his work quality would improve. The employer made reasonable attempts to give the claimant work to do, at his same pay rate, when painting work was slow so that he could maintain forty hours of work each week. The employer also allowed the claimant to leave early on occasion, at his request. The evidence established that the claimant, despite warnings, did not improve his work performance. There was no evidence the claimant was incapable of proper performance or that the employer's expectations were unreasonable.

The Board concludes that the greater weight of the evidence demonstrated the claimant was not performing his work to acceptable levels due to either repeated carelessness or deliberate disregard for the employer's expectations. The Board finds 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 has 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 reversed for the reasons stated herein.

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 February 17, 2013, and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KP/MW
Copies mailed to:
GREGORY BROWN SR
CHUCK'S BODY & FENDER INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

GREGORY BROWN SR

SSN #

Claimant

vs.

CHUCK'S BODY & FENDER 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: 1309433
Appellant: Employer
Local Office : 65 / SALISBURY CLAIM CENTER

April 26, 2013

For the Claimant: PRESENT

For the Employer: PRESENT , JOHN BERG

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 (Gregory Brown, Sr.) filed a claim for benefits establishing a benefit year beginning February 17, 2013. He qualified for a weekly benefit amount of $199.00.

The Claimant began working for this Employer (Chuck's Body & Fender, Inc.) on June 29, 2011. At the time of separation, the Claimant was working as a Painter's Helper. The Claimant last worked for the Employer on February 20, 2013, before being terminated alleged for poor work performance.

The Employer wrote up Employer Warning Notices date June 26, 2012, November 9, 2012, and December 18, 2012. (Employer's Exhibits 1, 2, and 5). None of the warning notices were provided to the Claimant.

On December 6, 2012, the Employer issued an Employee Warning Notice to the Claimant because he allegedly did not properly complete a job. The Claimant explained to the Employer that his supervisor had called him away from the job to begin working on another job, which is why he did not complete cutting a vehicle fender he was preparing for painting. On December 18, 2013, the Employer issued another Employee Warning Notice because the Claimant allegedly did not properly sand the ledge of a van for painting. The Employer did not provide the Claimant with any additional training to assist with his work performance as a painter's assistant. Any training provided by the Employer was allocated to the actual painters. On December 21, 2013, the Claimant punched out early because the Employer had no available work. The Employer would often not have available work and during said times would require the Claimant to paint the Employer's wall, clean the bathroom and the lunch room. The Employer would further permit the Claimant to leave early when there was no other work to be performed. The Employer had no available vehicle painting preparation work during the last week of the Claimant's employment. The Claimant was terminated on December 22, 2012 for allegedly poor work performance.

CONCLUSIONS OF LAW

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 Employer documented several written warnings regarding the Claimant's work performance, all of which the Claimant was never provided with. The Claimant was provided with a written warning for not completing a job which he had been taken away from by another supervisor and could not complete on said day. Therefore, I find that the Employer did not place the Claimant on notice that his job was in jeopardy because even though it may have written up warning notices it never provided the same to the Claimant. The Employer further often did not have available paint preparation work for the Claimant and instead would engage him in cleaning the Employer's premises and painting its wall. The Employer further permitted the Claimant to clock out early on some days that it did not have work. For example, during the last week of the Claimant's employment the Employer had no available paint preparation work. On his last day at work, the Claimant clocked out a little early because there was no work to be done and was terminated as a result there. Consequently, the Employer has failed to prove that the Claimant committed some wrongful or forbidden act within the scope of his employment.

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 May 13, 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 : April 19,2013
TH/Specialist ID: USB1C
Seq No: 001
Copies mailed on April 26, 2013 to:

GREGORY BROWN SR
CHUCK'S BODY & FENDER INC
LOCAL OFFICE #65

I hold that the Claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the Claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

I hold that the Claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the Claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

The determination of the Claims Specialist is reversed.

L Williamson Esq.

L Williamson, 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.