-DECISION-

Claimant:
DOUGLAS A RANDALL

Employer:
UTILITY LINES CONSTRUCTION SERVICES INC

Decision No.: 4450-BR-12

Date: November 14, 2012

Appeal No.: 1216301

S.S. No.:

L.O. No.: 61

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: December 14, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However 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 his appeal, the claimant contends he was not excessively or repeatedly tardy arriving to work. He contends the employer had no evidence of this and his discharge, for that reason, should have been found non-disqualifying. The Board agrees. The Board notes that the hearing examiner also found that the employer did not establish the claimant's tardiness as the basis for his termination. However, the hearing examiner inexplicably reached back in time and found disqualifying misconduct based upon an incident which had happened three months prior to the claimant's termination from employment. The Board finds this to be an error.

As the claimant notes in his appeal, he had been suspended, without pay, for the June 2011 incident, and been restricted from driving construction vehicles for a six-month period. Near the end of that six-month period, the claimant was reinstated to driving construction vehicles, and had another incident. That was on November 29, 2011. The claimant's discharge did not occur until February 28, 2012. Most importantly, the discharge did not occur because of this past accident. The discharge occurred because the employer mistakenly believed the claimant was excessively tardy reporting to work.

The employer may have been displeased with the claimant over the accidents in June and November of 2011, but the employer did not discharge him for those. The hearing examiner improperly allowed the employer to testify that these were the basis of the claimant's termination from employment without proper inquiry as to why, after three months, these incidents would warrant discharge. There was no nexus in time established between the claimant's discharge and any act or omission by the claimant. The Board finds that the claimant was discharged at and for the convenience of the employer and not for any disqualifying reason.

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 not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002.* The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of *§ 8-1003.* 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 UTILITY LINES CONSTRUCTION SERVICES, INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD
Copies mailed to:
DOUGLAS A. RANDALL
UTILITY LINES CONSTRUCTION
UTILITY LINES CONSTRUCTION
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DOUGLAS A RANDALL

SSN #

Claimant

vs.

UTILITY LINES CONSTRUCTION SERVICES 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: 1216301
Appellant: Employer
Local Office : 61 / COLLEGE PARK CLAIM CENTER

July 25, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , CHARLES BARNETT, DAVID LAMBERT, SHEILA HARRISON

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, Douglas Randall, began working for this employer, Utility Lines Construction Services Inc., on September 22, 2010, and his last day of employment was February 28, 2012. At the time of his separation from employment the claimant worked full-time as an equipment operator at a wage of about $19 an hour.

The claimant was discharged for two reasons: repeated tardiness and the incident that gave rise to the written counseling of December 12, 2011, described below.

The claimant was not repeatedly late to work. He was late to work on only one occasion .The claimant arrived at his work site 20 minutes late on February 28, 2012. The claimant was discharged shortly after his arrival. The claimant called Charles Barnett, the foreman on the project on which the claimant was employed at the time, and advised him that he was running late because he had made a wrong turn. This was true. The claimant was unfamiliar with the route between the hotel at which he was staying and the work site in question. The claimant knew, however, that it took about 40 minutes to drive from the hotel to his work site. The claimant left his hotel an hour prior to the scheduled commencement of his work shift. A wrong turn the claimant made resulted in a 40 minute delay in his arrival.

The claimant had arrived at his work site less than five minutes after the scheduled start time on one day during the prior week. Since there was a five minute grace period, this was not tardiness.

The claimant had received only one write-up prior to his discharge. This was a "performance notice" dated December 12, 2011. It had been issued due to an incident that had occurred early on the claimant's work shift of November 29, 2011. David Lambert, the substation General Foreman and the foreman of the project on which the claimant was working, had earlier that day instructed all employees, including the claimant, to make sure that there was always another employee watching whenever they backed up any construction equipment, in order to assure that the backing up would be performed safely. A short while later, the claimant backed up a "Bobcat" -- a relatively small piece of construction equipment-- without arranging to have anyone watch. It was not necessary for the claimant to have backed the Bobcat up. There was sufficient room to maneuver the Bobcat to the desired location by going forward. However, having determined to back the Bobcat up, the claimant should have arranged for another employee to watch. The claimant did not do so. The claimant backed the Bobcat into a light pole, causing substantial property damage. The claimant received a three-day suspension for the above, beginning November 30. The above-noted "performance notice" explicitly stated that the next disciplinary step would be termination of employment.

The claimant had received a verbal counseling for a similar incident in mid-June 2011. At that time, the claimant backed a dump truck into a light pole, causing substantial property damage. The claimant was suspended from operating any employer equipment for a six-month period, ending some time in mid-December 2011. Several days prior to November 29, the claimant asked Mr. Lambert to be taken off the above-described suspension about two or three weeks early. Mr. Lambert agreed to this request but not before asking the claimant if he believed that he was ready to resume operating construction equipment. The claimant answered in the affirmative.

CONCLUSIONS OF LAW

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

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment as a disciplinary measure for gross misconduct connected with the employment. Section 8-1002(a)(1)(i) a defines gross misconduct as conduct that is a deliberate and willful disregard of standards an employer has a right to expect and shows a gross indifference to the employer's interests. Section 8-1002(a)(1)(ii) defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

EVALUATION OF EVIDENCE

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 was discharged from his employment, effective immediately, on February 28, 2012, by document of even date. (Claimant's Exhibit Number Four). This document sets for the reasons for discharge. It states the following: "Mr. Randall is to be 'Terminated' as of February 28, 2012 because of repeatedly being late for work. He has been written up before and told then, that the next incident that occurred, he would be 'TERMINATED'".

It is reasonable to infer from the evidence presented, noted below, that the above described discharge document sets forth the sole reasons for the discharge. This inference is made. Mr. Barnett testified credibly to the effect that he prepared the discharge document; that he had consulted with Ms. Harrison, the substation supervisor, prior to doing so and that Ms. Harrison had advised him to discharge the claimant. Ms. Harrison testified credibly that she made the decision to discharge the claimant.

According to this document, there were two reasons for termination: repeated tardiness and the incident that gave rise to the write-up of December 12, 2011. Although the document is not a model of clarity, it is clear that the reference in it to the prior write-up includes the claimant conduct which gave rise to it. This hearing examiner finds as a fact that these were the only reasons for the discharge. This hearing examiner does not find credible the additional reasons offered by the employer witnesses for the discharge.

The employer has not established, by a preponderance of the credible evidence, that the claimant was discharged due to repeated tardiness. To begin with, there is no employer documentation setting forth the dates on which the claimant was allegedly tardy. Ms. Harrison testified, credibly to the effect that the employer does not maintain records of employee lateness, only of the work hours missed. This is reflected in the documentation provided (employer exhibit number one). The documentation lists the dates on which the claimant missed time, as well as the hours missed. It fails to specify the reason for the work hours missed. It does not specify whether the claimant missed hours due to tardiness, leaving work early or returning late from a break -- or for some other reason. It is therefore impossible to determine from this document on which dates the claimant missed time due to tardiness. In addition, the claimant received no written warnings or counselings for tardiness. Finally, the claimant testified credibly to the effect that apart from the culminating incident, noted above, he was never late. The culminating incident does not rise to the level of misconduct. The claimant was delayed due to circumstances beyond his control and he called the foreman and advised him that he was running late and the reason why.

However, the claimant's conduct of November 29, 2011, which resulted in, among other things, the disciplinary warning of December 12, 2011, rises to the level gross misconduct within the meaning and intent of Section 8-1002(a)(1)(i). This defines gross misconduct as conduct that is a deliberate and willful disregard of standards an employer has a right to expect and shows a gross indifference to the employer's interests. The claimant offered no mitigating or exonerating evidence relevant to the accident of November 29, 2011.

In Jefferson v. Overnite Transportation, 252-BH-83, the Board of Appeals held "The claimant tractor-trailer driver was involved in (an) accident . . . because he was in a hurry, (and failed) to either set the air brakes or chock the wheels as required by procedure. The claimant's deliberate choice to shortcut the parking procedures showed a gross indifference to the financial risk imposed on the employer and the safety risk to the general public, and constitutes gross misconduct.". Similarly, the circumstances surrounding the incident of November 29, 2011 establish gross misconduct. There are numerous aggravating circumstances, which manifest beyond a doubt that the claimant's conduct was a deliberate and willful disregard of standards an employer has a right to expect and that it showed a gross indifference to the employer's interests. The accident occurred just a short while after the claimant's foreman, Mr. Lambert, had instructed all employees that due to safety concerns, they needed to always make sure make sure that there was an employee watching them back up., Notwithstanding this important safety admonition, the claimant backed up a Bobcat without anyone watching and thereby caused substantial property damage. The claimant had received a verbal counseling for a similar incident in mid-June 2011. At that time, the claimant had backed a dump truck into a light pole, causing substantial property damage. The claimant was therefore well aware of the dangers of backing up construction equipment without having another employee watch the process. As a result of the June 2011 incident, the claimant was suspended from operating any employer construction equipment for a six-month period, ending some time in mid- December 2011. Several days prior to November 29 the claimant asked Mr. Lambert issue to be taken off the above-described suspension about two or three weeks early. Mr. Lambert agreed to this request but not before asking the claimant if he believed that he was ready to resume operating construction equipment. The claimant answered in the affirmative. Based on the foregoing, the claimant was under a heightened duty to make sure that he complied with employer procedures when he operated construction equipment.

There is another reason the claimant's conduct of November 29, 2011 constitutes gross misconduct.

The Board of Appeals has consistently held, unless a request is illegal, unethical or ambiguous, (See Hatfield v. Tri-State Oil, 390-BR-82, Leon v. Southern States Cooperative, 885-BR-83, and Walker v. Domino's Pizza of Maryland, Inc., 200-BH-87, respectively) a claimant's failure to follow an employer's reasonable instruction(s) constitutes misconduct. [See Gray v. Valley Animal Hospital, Inc., 224-BR-90, "A violation of the (employer's reasonable) procedures requires an explicit authorization. The claimant's failure to get such authorization amounts to misconduct."]. Depending on the importance of the policy or instruction involved and the number of times the claimant violated the subject policy, failure to act in accordance with the employer's instruction(s) can constitute gross misconduct. (See Dunavent v. Federal Armored Express, Inc., 949-BR-85).

In the case at bar, the preponderance of the credible evidence establishes that the claimant violated an important and reasonable safety procedure -- having another employee watch while backing up construction equipment. The claimant failed to comply with this employer procedure, and he did so within a short time after his supervisor communicated it to all employees. The claimant engaged in this policy violation on the

very same day that it was publicly announced. The claimant's failure to comply with this policy resulted in an accident causing substantial property damage. Under the circumstances the claimant's conduct was a deliberate and willful disregard of standards an employer has a right to expect and that showed a gross indifference to the employer's interests.

DECISION

IT IS HELD the employer discharged the claimant for gross misconduct connected with the work, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(I). The claimant is disqualified from receiving benefits from the week beginning February 26, 2012, and until the claimant becomes reemployed and earns wages in covered employment equal to at least twenty-five (25) times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

A. Scheinberg

Adlai Scheinberg, 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 August 09, 2012. 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 : July 12,2012
TH/Specialist ID: WCP39
Seq No: 001
Copies mailed on July 25, 2012 to:

DOUGLAS A. RANDALL
UTILITY LINES CONSTRUCTION
LOCAL OFFICE #61
UTILITY LINES CONSTRUCTION