

 **Maryland**  
Department of Economic &  
Employment Development

*Parris N. Glendening*  
Governor

*Mark L. Wasserman*  
Secretary

*Board of Appeals*  
1100 North Eutaw Street, Room 515  
Baltimore, Maryland 21201  
Telephone (410) 767-2781  
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**- D E C I S I O N -**

Claimant:

TIMOTHY F. NOLAN

Employer:

LYON CONKLIN & CO INC

Decision No.: 00115-BR-95

Date: January 20, 1995

Appeal No.: 9417366

S. S. No.:

L. O. No.: 02

Appellant: Employer

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

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**- 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: February 19, 1995

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**REVIEW ON THE RECORD**

The Board adopts the findings of fact of the hearing examiner, and after review of the record, finds the following additional facts and reaches a different conclusion of law.

The Board finds that there is no evidence in the record that the claimant ever refuted the results of the drug test. The Board further notes that a letter addressed to the claimant dated July 28, 1994 was sent to the claimant notifying him of the test results.

The claimant never denied using drugs and did not argue that there was no possibility that drugs could have been present in his system as alleged by the employer. In fact, in the claimant's testimony he stated that he had a "relapse" of his addiction to drugs. When the claimant was asked by the hearing examiner if he had any objections to the admission of a copy of the drug urine analysis results into evidence, the claimant stated that he had "no objections" and further stated that "it (the drug test) is right".

The Board finds no evidence that the integrity of the chain of custody of the drug test was breached.

### CONCLUSIONS OF LAW

The Board finds that when the claimant reentered the facility where the drug test was performed, and disposed of his urine sample test (albeit in tact), he showed a deliberate disregard to the standard of behavior that his employer has the right to expect. The Board finds that this act alone rises to the level of gross misconduct within the meaning of Section 8-1002 of the Labor and Employment Article.

The Board held in Boyd v. Cantwell Cleary, 1845-BH-92, that whether the claimant is informed of, or given the opportunity to have a second testing of the same sample is not relevant when the claimant does not deny that the results of the drug test are accurate. In this case, the claimant does not deny any of the results of the drug test and further admits to a "relapse" in the use of illegal substances. The Board, therefore, finds that the claimant's actions in this regard, rises to the level of gross misconduct within the meaning of Section 8-1002 of the Labor and Employment Article.

### DECISION

The claimant was discharged for gross misconduct, connected with the work, within the meaning of §8-1002 of the Labor and Employment Article. He is disqualified from receiving benefits from the week beginning July 24, 1994 and until he becomes reemployed, earns at least twenty times his weekly benefit amount (\$4180) and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.



Clayton A. Mitchell, Sr., Associate Member



Hazel A. Warnick, Chairperson

kjk

Copies mailed to:

TIMOTHY F. NOLAN  
LYON CONKLIN & CO INC  
GABRIELLE ALLEN  
Local Office - #02

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

TIMOTHY F. NOLAN  
1628 CLARKSTON ST  
BALTO, MD 21230-

SSN #213-78-3515  
**Claimant**

vs.

LYON CONKLIN & CO INC  
RACE & MCCOMAS STS  
BALTIMORE, MD 21230-0000

**Employer/Agency**

Before the:

**Maryland Department of Economic and  
Employment Development  
Appeals Division**  
1100 North Eutaw Street  
Room 511  
Baltimore, MD 21201  
(410) 767-2421

Appeal Number: 9417366  
Appellant: Claimant  
Local Office: 02 / Glen Burnie

October 18, 1994

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, DONNA GARDINER, ADP; RICHARD CONRAD,  
OPERATIONS MGR. ; KEVIN DOUGHER

**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 1003 (misconduct connected with the work).

**FINDINGS OF FACT**

The claimant was employed from March 13, 1978 through July 28, 1994 as a warehouse helper. He earned \$8.70 per hour working full time for the employer. On November 16, 1987, the claimant tested positive for use of illegal substances. At that time, the claimant, the employer and the claimant's union entered into a settlement agreement whereby the claimant would enter drug treatment, submit to drug tests and should the claimant ever resume his use of narcotic drugs, the employer will have the right to discharge the claimant immediately. On July 7, 1994, the claimant complained to his supervisor of an injury to his back. The claimant declined the opportunity to go to the clinic for treatment and tried to work through the pain. However, the claimant began vomiting later that day. Since the vomiting could not, in the claimant's supervisor's eyes, be directly related to

a back injury, the claimant's supervisor requested that the claimant take a drug urinalysis test. The claimant did so. After taking the test, the claimant was seen again entering the clinic. When the claimant left the clinic the second time, his urinalysis specimen was missing. The specimen was found, sealed in the trash with chain of custody papers intact. The employer tested the specimen and determined that the specimen tested positive for cannabinoids and phencyclidine. As a result, the claimant was placed on immediate suspension pending termination and was ultimately terminated on July 28, 1994.

During the time of the claimant's suspension, up to and including the date of his termination and after, the claimant was never given a copy of the test results. Nor was he given notification of his right to have the sample retested. At some point in 1994, but not necessarily at the time of the drug test, the claimant was given a copy of the employer's drug testing policy.

### CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp., Section 8-1002(a)(1)(i) (Supp. 1994) provides that an individual shall be disqualified from receiving benefits where he or she is discharged from employment because of behavior which demonstrates a deliberate and willful disregard of standards that an employer has a right to expect and shows 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., Section 8-1003 (Supp. 1994) provides for a disqualification from benefits where the claimant is discharged (or suspended) as a disciplinary measure for acts connected with the work which the Secretary determines to be misconduct. The term "misconduct" is undefined in the statute but has been judicially defined as "... a transgression of some established rule or policy, 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." Rogers v. Radio Shack, 271 Md. 126, 132, 314 A.2d 113 (1974).

Under the Annotated Code of Maryland, Health-General Article, Section 17-214.1(c), an employer who requires an employee to be tested for job-related reasons, for use or abuse of any controlled dangerous substance or alcohol, after confirmation of a positive test result, must provide the employee with a copy of the laboratory test, indicating the test result; a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by an employee, contractors or other persons; if applicable, written notice of the employer's intent to take disciplinary action, termination of employment or change in conditions of continued employment; and provide a statement or copy of the provisions set forth in subsection (d) of Section 17-214.1 permitting an employee to request independent testing of the same sample for verification of the test result. The Board of Appeals has determined in Webe v. Anderson Oldsmobile Company, 88-BR-91, that if an employer fails to meet the requirements of Section 17-214.1, any evidence of test results which are not acquired in conformity with law cannot be considered in rendering a decision.

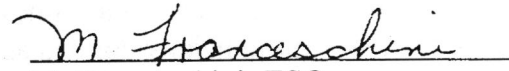
## EVALUATION OF EVIDENCE

The credible evidence presented at the hearing shows that the employer did not meet its burden of proving gross misconduct by the claimant. Since the employer could not affirmatively show that the claimant was provided with a copy of the laboratory test results, the employer's written policy, or a statement setting forth the claimant's opportunity to obtain independent testing of that sample, all evidence concerning the results of that drug test cannot be considered in rendering a decision in this case. However, the claimant's actions regarding his attempt to take the urinalysis sample and discard it in the trash before it was actually tested, can be considered a course of wrongful conduct within the scope of his employment relationship. When one considers this single act, after virtually seven years of being drug free, it cannot be found that this action in the heat of the moment by the claimant was a deliberate and willful disregard of the standards that the employer had a right to expect, showing a gross indifference to the employer's interests. Therefore, gross misconduct cannot be found in this case.

## DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp., Section 8-1003 (Supp. 1994). Benefits are denied for the week beginning July 24, 1994 and for the nine weeks immediately following.

The determination of the claims examiner is reversed.

  
M. Franceschini, ESQ  
Hearing Examiner

## Notice of Right of Further Appeal

Any party may request a further appeal either in person or by mail which may be filed in any local office of the Department of Economic and Employment Development, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by **November 2, 1994.**

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: October 3, 1994  
KB/Specialist ID: 02417

Seq. No.: 001

Copies mailed on October 18, 1994 to:

TIMOTHY F. NOLAN  
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LYON CONKLIN & CO INC