

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
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Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

	Decision No.:	1852-BR-92	
	Date:	October 19, 1992	
Claimant:	Denise D. Burton	Appeal No.:	9216427
		S. S. No.:	
Employer:	Thorn EMI Malco, Inc.	L O. No.:	45
		Appellant:	EMPLOYER
Issue:	Whether the claimant was discharged for gross misconduct or misconduct, connected with the work within the meaning of Section 8-1002 or 8-1003 of the Labor and Employment Article.		

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE 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

November 18, 1992

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals affirms the final decision, but disagrees with the reasoning of the Hearing Examiner.

The Board of Appeals agrees with the Hearing Examiner that the employer has the burden of proof in a discharge case. The employer was given notice of the hearing but did not appear and present any evidence.

The Hearing Examiner misinterpreted §17-214.1 of the Health General Article. Under that statute; the employer does not have to arrange for or provide a re-test of the claimant's specimen. The employer is required, under §17-214.1(c) (iv), to provide the employee with a copy of the employee's retesting rights, as set out in §17-214.1(d). This is clearly for the purpose of notifying the employee of her re-testing rights. The claimant in this case testified that the employer's personnel agent advised her about the retest, and that she was aware of her right to have the sample retested.

Re-testing or verification of the original test results, however, is not the responsibility of the employer. The statute provides that the employee "may request independent testing." The statute does not place on the employer the burden of arranging for re-testing, and it appears that it is the employee who is to designate the laboratory which is to do the re-testing. It appears that the employer's duty is to cooperate, i.e., have the sample sent to the certified laboratory designated by the employee. There is no evidence in this case, however, that the employer failed to cooperate. Although it would have been more helpful to the claimant for the employer to provide the claimant with a list of approved laboratories, the statute does not require the employer to do so, and the failure to do so does not invalidate the test results.

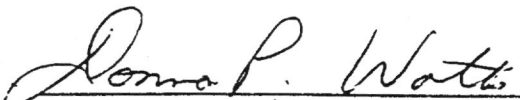
The employer has failed, however, to produce the test results. The only testimony is that the claimant did not use cocaine at any time after testing positive in May of 1992, plus the claimant's testimony that she was told by the company that her urine tested positive for cocaine on July 2, 1992. The employer did not appear at the hearing to produce the test results, and the Board cannot disqualify a claimant for drug use based solely on the fact that her employer told her that she tested positive, when the claimant denies such use in person and under oath. The Board thus agrees with the Hearing Examiner that the employer failed to meet its burden of proof, but for the reasons stated above.

DECISION

The claimant was discharged, but not for gross misconduct or misconduct, connected with the work, within the meaning of Section 8-1002 or 8-1003 of the Labor and Employment Article. No disqualification is imposed based upon her separation from employment with Thorn EMI Malco, Inc.

The decision of the Hearing Examiner is affirmed.


Chairman


Associate Member

K:D
kmb

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CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - NORTHWEST