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.: 205-BH-93

Date: February 4, 1993

Claimant: Willie Nunnallv, Jr.

Appeal No.: 9208610

S. S. No.:

Employer: Ace Hardware Corp.
c/o The Frick Company

L. O. No.: 2

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for gross misconduct or misconduct, connected with the work, within the meaning of §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 March 6, 1993

— APPEARANCES —

FOR THE CLAIMANT:

Willie Nunnally, Jr. - Claimant
Ronald Silkworth, Esq.

FOR THE EMPLOYER:

Michael McGuire, Esq.
Bob Ingle
Barbara Holman - Human Resources Manager
Robert Best - Traffic

Manager
Shirley Kron
Sal Sylvester

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.

FINDINGS OF FACT

The claimant was employed from June 19, 1992 until March 25, 1992 as a tractor-trailer truck driver. The claimant became separated from his employment due to discharge.

On March 11, 1992 the claimant was selected for a random drug test, pursuant to the employer's drug testing policy. The claimant presented himself, to the New Ridge Medical Center (Center), as instructed and provided a specimen for testing. The claimant's specimen was collected, marked for identification and sealed in vials in compliance with the required procedures.

By the time the claimants sample was collected and sealed, the final pick up of specimens, to be taken to the lab for testing, had been made for that day. The claimant's specimen was placed in the refrigerator for pick up the next day. As it turned out the claimant's specimen remained in the refrigerator for five days unlocked. At least five people had access to this refrigerator.

On March 12,1992, before the claimant's specimen could be sent out, the lab called the Center and informed them that from then on specimens were to be sent in a new package that they were providing. (It is unknown why the specimen of the claimant could not have been sent, as it had already been collected and packaged.)

The claimant was contacted and told that he had to return to the Center. The claimant returned to the Center on March 17, 1992. At that time he was informed of the need to change the packaging and re-write the paper work for the testing of his specimen.

The claimant was seated and assisted by Shirley Kron, a Medical Assistant at the Center. At this point the testimony of the parties conflict. Ms. Kron testified that she removed the specimen from the refrigerator and showed it to the claimant in order for him to see that the seals had not been tampered with. Ms. Kron further testified that she explained to the claimant what was being done, removed the seals in front of the claimant, poured the specimen into new clean vials, had the claimant sign the necessary forms, re-sealed and packaged the specimen, all in the claimant's presence.

The claimant's testimony was that after he was seated and it had been explained to him that the specimen had to be re-packaged, he began to fill out the forms that had been given to him. That from the corner of his eye he could see Ms. Kron doing something, but that the package with his specimen was not shown to him while still packaged. That when he turned around there were two vials on the table containing a specimen. Ms. Kron told him that it was his specimen but he had not seen her break the seal on his specimen or pour it into the new vials. Ms. Kron assured him that this was in fact his specimen and therefore he signed the new seals.

Which version of the facts is the truth is normally a question of credibility for the Board to decide. However, the Board need not reach this credibility issue in this case. The Board finds that the test results were invalid. Therefore whether we accept the claimant's version or the employer's version, the outcome of this decision will not be affected.

The new vials were sent to the lab for testing on March 18, 1992. The test results were positive for the presence of marijuana. The claimant was discharged for failing the random drug test.

The claimant denied any use of illegal drugs.

CONCLUSIONS OF LAW

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and wilful 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 employers 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).

The only evidence of misconduct on the part of the claimant is the results of the random drug test, indicating the presence of marijuana. The Board of Appeals concludes that this test result is invalid for the purposes of finding misconduct on the part of the claimant.

The procedure used to collect the claimant's specimen was compromised and therefore the test results can not be used as evidence against the claimant. The initial collection of the specimen followed the proper procedure. However the fact that the

claimant's specimen sat in an unlocked refrigerator, that was accessible to a least five people, for five days, taints its validity. Taking this factor into consideration, along with the breaking of the seal and the re-packaging of the specimen, the Board cannot give the test results any credibility.

The Board of Appeals is at a loss to understand several of the incidents surrounding the gathering of this claimant's specimen. Why did the lab courier not wait for the claimant's specimen on March 11, 1992? Why was the claimant's specimen allowed to sit in an unlocked refrigerator for five days? Why was it necessary to re-package the claimant's specimen? In light of the fact that this was a random drug test, and not the result of any conduct on the claimant's part, why wasn't another specimen taken at another time, if the original specimen could not be sent as packaged?

Denial of unemployment benefits is a serious step having possible dire consequences. Given the large number of unexplained deviations from the normal procedure, the Board of Appeals will not deny benefits based upon the test results obtained in this case.

DECISION

The claimant was discharged, but not for gross misconduct or misconduct, connected with the work as defined in §8-1002 or §8-1003 of the Labor and Employment Article. No disqualification from the receipt of benefits shall be imposed based upon either of these sections of the law.

The decision of the Hearing Examiner is affirmed.

Associate Member

Associate Member

DW:W

Dissenting Opinion

This decision hinges on the validity of a chemical test for evidence of marijuana in the claimant's urine. The test was performed as part of the employer's random drug testing policy, which the employer had imposed because of the claimant's duties as a truck driver. No serious issue was raised concerning the reasonableness of the employer instituting this drug testing procedure. The majority of the Board, however, finds the drug testing procedure itself unreliable.

Only one serious credibility question arose concerning the testing procedures. The lab technician testified that she showed the claimant the sealed bottle containing his urine specimen, broke the seal in front of him, poured the specimen into another clean container, resealed it in front of him, and had him initial that this was his specimen. The claimant admitted that he initialed the seal on this occasion, but said that he only saw the specimen being poured from one container to the other "out of the corner of my eye." The testimony seems to be designed to cast doubt on the reliability of the procedures without taking the risk of actually denying any of the hard facts testified to by the lab technician. In fact, this testimony is an admission that the claimant did see the specimen transfer. In fact, the claimant initialed an acknowledgement that the second container held his specimen. If he saw the procedure well enough to verify it in writing on the spot, his later attempts to cast doubt on the procedure should be seen as a transparent attempt to confuse the issue.

The majority of the Board, however, is not relying on this particular testimony of the claimant. Rather, the Board finds that the lab procedures, under either version of events, compromised the test results. Since I do not think that there is any evidence that the test was compromised, I disagree.

The claimant's specimen was collected by a Medical Assistant at the New Ridge Health Center in Hanover, Maryland. It was provided by the claimant himself into the container, and it was sealed, with the seal initialed by the claimant. It was collected on the 11th. The New Ridge Health Center does not chemically analyze the specimens but merely forwards them in the appropriate containers, together with the required forms, to the testing laboratory. The specimen was collected and paperwork finished too late to be picked up by the courier on the 11th.

Meanwhile, the drug analysis company called and told the Medical Center that it now required different forms for this type of test, and different containers. When these new forms and containers arrived on the 16th, the claimant was called in. The claimant was called in to sign the revised forms and to witness the transfer of his specimen from the original sealed and initialed containers into new, empty containers which he saw filled and sealed, and on which he again initialed the seal. The new containers were then sent to the drug analysis company, which reported that the specimen tested positive for marijuana.

There is nothing in the record which would indicate that this procedure compromised the validity of the test results. The employer clearly established that the specimen given to the Health Center on the 11th was the same one sent to the drug analysis company on the 16th. The claimant did not produce any evidence at all to controvert the Medical Assistant's testimony that this was true. The process of repackaging the specimen was clearly explained in detailed testimony which the claimant did not really

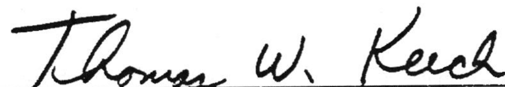
deny. The evidence concerning the repackaging, which was witnessed by the Medical Assistant and the claimant and initialed by the claimant himself, casts not the slightest shadow of a doubt on the identity of the specimen.

The specimen did sit in an unlocked refrigerator for five days, but it is unclear what inference the Board is drawing from this fact. If the inference is that someone may have tampered with the sample during that time, that inference would be unwarranted because: (1) there was no motive shown why anyone would tamper with the sample; (2) there was no evidence that anyone had done so; and (3) there was strong evidence (the sealed and initialed container) that the sample was <u>not</u> tampered with. An inference that the sample had been tampered with would be speculation unsupported by any actual evidence.

Another inference that might be made is that the specimen itself might naturally chemically deteriorate over a period of five days, thus resulting in a faulty chemical analysis and inaccurate test results. The problem with this inference is that there is no evidence in the record that such a chemical deterioration process occurs. The natural deterioration of a drug-free urine specimen into one in which chemical evidence of drugs are present is not something that one would ordinarily expect. An inference that this might have happened would require at least some minimal support in the record, but there is none.

There is a difference between changing packaging and "compromising" the validity of collection procedure and chemical analysis. The claimant did prove that the packaging procedures were changed midstream, but he did not show any way in which this could have possibly affected the results.

Since I would find that the test was valid, I would find that the claimant violated a reasonable work rule by reporting to his work driving a truck with the presence of a controlled dangerous substance in his system. I would therefore disqualify the claimant for "gross misconduct" under §8-1002 of the law.



Chairman

K
kbm
Date of Hearing: October 6, 1992

COPIES MAILED TO:

CLAIMANT

EMPLOYER

J. Michael McGuire, Esq.
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Ronald A. Silkworth, P.A.

UNEMPLOYMENT INSURANCE - GLEN BURNIE

William Donald Schaefer, Governor
Mark L. Wasserman, Secretary

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Telephone: (410) 333-5040

—DECISION—

Date: Mailed: 6/10/92

Claimant: Willie D. Nunnally, Jr.

Appeal No.: 9208610

S. S. No.:

Employer: ACE Hardware Corp.
c/o The Frick Co.

L. O. No.: 02

Appellant: Claimant

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

— 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.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES ON June 25, 1992

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— APPEARANCES —

FOR THE CLAIMANT:

Claimant

FOR THE EMPLOYER

Bob Best, Traffic Manager
Patrice Hebda, Frick Co.

FINDINGS OF FACT

The claimant was employed on June 19, 1989 and continued working until his separation on March 25, 1992. The claimant was a tractor-trailer truck driver and was earning a salary of approximately $37,000 per year at the time of his separation.

The record shows that the claimant was discharged for failing to pass a random drug test. The samples collected on March 11, 1992 were put into two separate vials. One was to be tested and results sent to ACE Hardware, the employer, and the second to the Department of Transportation. Both containers were signed and sealed by the claimant on March 11, 1992. In addition, the claimant also signed the drug testing custody and control document which accompanied these samples and verify the chain of custody. On March 17, 1992, the claimant was notified that he had neglected to sign certain documents and was advised to report to the laboratory again. On this date, he was given samples which reportedly were the same ones he signed on March 11, 1992. He was asked to sign and seal the vials once again and sign additional custody and control paperwork. The claimant saw the technician remove the seal from two sample vials, but does not know the origin of the vials or whether they were, in fact, his original samples.

His samples tested positive for marijuana and was told he had the right to retest the samples. The claimant did not avail himself of his rights since he was not certain that the vial sample tested was his own. The claimant was discharged.

CONCLUSIONS OF LAW

The Maryland Code, 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.

The facts in this case show that there was an improper and/or an inappropriate procedure involved in the collecting and custody and control of the claimant's samples. The date of collection was March 11, 1992 and documents were signed on that date which coincides with the vials holding the claimant's samples. However, the claimant produced documents showing that on March 17, 1992, he was given an additional set of custody and control documents to sign along with two vials from which seals were removed and new ones replaced for claimant's signature. This mix-up impugns the credibility of the test and invalidates the test results.

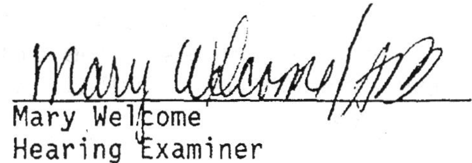
The employer failed to meet the requirement of Section 17-214.1 of the Annotated Code of Maryland, Health General Article and, therefore, we must conclude that the claimant was discharged for no misconduct. The Board of Appeals has held that it cannot consider as evidence test results which were not acquired in conformity with the Law.

The determination of the Claims Examiner will be reversed.

DECISION

The claimant was discharged, but not for gross misconduct or misconduct, connected with the work within the meaning of the MD Code, Labor and Employment Article, Title 8, Sections 1002 or 1003. No disqualification is imposed based upon his employment with ACE Hardware.

The determination of the Claims Examiner is reversed.



Mary Welcome
Hearing Examiner

Date of Hearing: 5/13/92
lc/Specialist ID: 02439

Copies Mailed on 6/10/92 to:
Claimant
Employer
Unemployment Insurance - Glen Burnie (MABS)

Bob Best
Traffic Manager
Ace Hardware Corp.
Baltimore Commons Industrial Park