



Maryland

Department of Economic & Employment Development

*William Donald Schaefer, Governor
Mark L. Wasserman, Secretary*

*Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201*

Telephone: (410) 333-5032

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

— DECISION —

	Decision No.:	28-BH-93
	Date:	January 8, 1993
Claimant:	Appeal No.:	9117871
	S. S. No.:	
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Employer:	L. O. No.:	45
	Appellant:	CLAIMANT
Issue:	Whether the claimant was discharged for gross misconduct or misconduct, connected with the work, within the meaning of ?J8-1002 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 MAYBE 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

February 7, 1993

— APPEARANCES —

FOR THE CLAIMANT:
Roland Scott - Claimant
Jim Mayhew - Attorney, Legal Aid Bureau

FOR THE EMPLOYER:

Leslie Goldstein
Attorney
Brian Stoddard -
Dir. of Safety
Mike Slywczuk -
Manager

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 August of 1989 through August 27, 1991 as a truck driver for the employer. He worked as a local driver in the Baltimore, Maryland area.

On August 7, 1991, pursuant to the employer's drug testing policy, the claimant's urine was tested for controlled dangerous substances. The test, conducted at a federally certified laboratory, Med Express of Memphis, Tennessee, showed a positive result for a metabolize of cocaine. This was reported on August 12, 1991 to the medical review officer set up pursuant to federal regulations. The medical review officer called the claimant three times in an attempt to ascertain if there was anything in the claimant's medical history or prescription history which would account for a finding of a cocaine metabolize. The medical review officer was unable to reach the claimant. The medical review officer then reported to the employer that the claimant had tested positive for the use of cocaine. The employer then relayed this information to the claimant and discharged him.

A copy of the test results was not given to the claimant. A written notification of the claimant's right to have his specimen retested at a laboratory of his choice at his expense was not given to the claimant. The claimant, however, knew of this right from his experiences with a previous employer. The claimant made no serious effort to have his specimen retested.

CONCLUSIONS OF LAW

The employer has established that the claimant, a truck driver, tested positive for the use of cocaine on a recognized test conducted by an established laboratory.

The procedures used by the employer, including the procedure used by the medical review officer, appears to comply with the regulations issued under the federal Motor Carrier Safety Act, 49 C.F.R. §391 et. seg., but these procedures do not comply with the Maryland law regulating drug testing by all employers. See, the Health-General Article, §17.214-1. That Maryland statute requires that any employee who is subject to a drug test must be given a written copy of that test, and, more importantly, must be notified in writing of his right to have the sample retested by another independent laboratory of his choice and at his expense.

The Maryland law is not preempted by the federal Motor Carriers Safety Act. That federal statute has specific provisions for the administrative preemption of any state law or regulation which may tend to conflict with federal law. Under those provisions, the federal Secretary of Transportation's safety panel is to analyze the laws and regulations of each state and determine which pertain to commercial vehicle safety and which should be preempted by the federal law. The Secretary of Transportation makes the ruling as to whether the state law or regulation is preempted. States have the right to petition the Secretary for a waiver of preemption in any particular case. 49 U.S.C. Appx. §§2506, 2507.

The employer presented no evidence that the Maryland statute has ever even been presented to the safety panel for review, much less that the Secretary of Transportation has ruled that that section is preempted by the Federal regulations with respect to drug testing of transportation employees. Therefore, the Board must conclude that the Maryland Health General Article has not been preempted. This state law thus does apply to this employer, along with the federal requirements. The statutes are not in conflict. The Maryland statute merely provides more extensive procedural rights to the tested employee. The Board will therefore analyze whether the results of the test can be admitted into this case under state law.

The Board has ruled in the past that, absent a showing that the employer has complied with the Health-General section cited above, the Board will not consider drug test results as probative evidence in a discharge case. Webe v. Anderson Oldsmobile, 88-BR-91. The Board has recognized an exception to that rule, however, in a case where the employee has admitted the drug use in question. Boyd v. Cantwell Cleary, 1845-BH-92.

In this case, the Board notes that, although the claimant did not receive a written notification that he had the right to have the sample retested at his own expense, he actually knew of this right from his experience at a previous employer. He made no substantial effort to obtain a retest. Under these circumstances, the Board concludes that the results of the test can be used against the claimant, even though he was not formally notified of his ability to have the sample retested. The purpose of the Health-General section is met by the claimant's actual knowledge of his right to have a retest; requiring written notification is simply an added formality in this case.

It is also true that the claimant was not given a written copy of the test results before he was fired. It is hard to see how this prejudiced him in any way, however, since he was told that the test was positive for cocaine use and he has not,

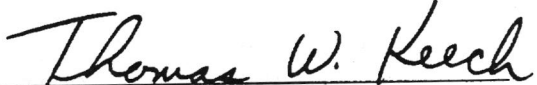
even up to the present, come up with a reasonable explanation for the presence of this substance in his body.

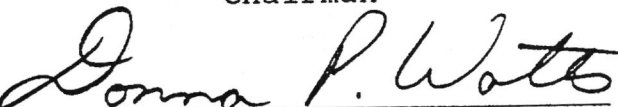
Since the letter of the Motor Carrier Safety Act Regulations were met, and since the employer's failure to comply with the Maryland Health-General Article did not result in any actual detriment to the claimant in this case, the Board accepts this test as evidence that the claimant was abusing a controlled dangerous substance at the time of his employment as a truck driver with this employer. This constitutes a deliberate violation of standards of employment the employer has a right to expect, showing a gross indifference to the employer's interest. This is gross misconduct within the meaning of s8-1002 of the Maryland Unemployment Insurance Law.

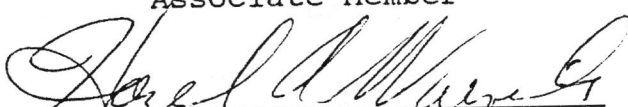
DECISION

The claimant was discharged for gross misconduct, connected with his work, within the meaning of §8-1002 of the Labor & Employment Article. He is disqualified from receiving unemployment benefits from the week beginning August 25, 1991 and until he becomes reemployed, earns at least ten times his weekly benefit amount (\$2,230.00) and thereafter becomes unemployed through no fault of his own.

The previous decision of the Hearing Examiner and Board remain in effect.


Chairman


Associate Member


Associate Member

kmb

DATE OF HEARING: October 20, 1992

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Jim Mayhew, Esquire
Legal Aid Bureau, Inc.



Maryland

Department of Economic & Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

William R. Merriman, Chief Hearing Examiner
Louis Wm. Steinwedel, Deputy Hearing Examiner

1100 North Eutaw Street
 Baltimore, Maryland 21201

Telephone: 333-5040

— DECISION —

Claimant:	Ronald Scott, Jr.	Date:	Mailed: 11/04/91
		Appeal No.:	9117871
		S. S. No.:	
Employer:	Old Dominion Freight Line c/o James E. Frick, Inc.	L. O. No.:	045
		Appellant:	EMPLOYER

Issue: Whether the claimant left work voluntarily, without good cause, within the meaning of the Code of MD, Labor and Employment Article, Title 8, Section 1001. Whether the appealing party filed a timely appeal or had good cause for an appeal filed late, within the meaning of the Code of MD, Labor and Employment Article, Title 8, Section 806.

— 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 APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON November 19, 1991

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

Roland Scott, Jr. - Present

Gerald Niles,
 Manager, Sales &
 Service

FINDINGS OF FACT

The claimant was employed as a truck driver from August 8, 1989 through August 27, 1991. The employer is a trucking company winch

Leslie S. Goldstein, Esquire

UNEMPLOYMENT INSURANCE - NORTHWEST

has to operate under the Department of Transportation Federal Regulations which require physical and substance abuse testing of drivers at least every two years. On August 7, 1991, approximately two years after the claimant was first employed, a test was administered by Immediate Care Medical Center and sent to Medical Review Service of Bell Chase, Louisiana. It was reported to the employer that the urine test of the claimant proved positive for cocaine. The urine test was made in conjunction with a regular two year physical of the claimant. In accordance with the United States' Department of Transportation guidelines and relations the employer was required to discharge the claimant for testing positive for cocaine.

CONCLUSIONS OF LAW

The Code of Maryland, Labor and Employment Article, Title 8, Section 1002(a)(1)(i) provides that an individual shall be disqualified from benefits where he/she is discharged from employment because of behavior which demonstrates a deliberate and willful disregard of standards which the employer has a right to expect. The preponderance of the credible evidence in the instant case will support a conclusion that the claimant was discharged for actions which meet this standard of the Law.

The employer has met its burden of proof in establishing gross misconduct on the part of the claimant which resulted in the claimant's discharge. The ingestion of a dangerous drug by the claimant demonstrates a deliberate and willful disregard of standards of the employer as well as of the public.

DECISION

The determination of the Claims Examiner is reversed and it is held that the claimant was discharged for gross misconduct, connected with the work, within the meaning of the Code of Maryland, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning August 25, 1991 and until he becomes re-employed and earns at least ten times his weekly benefit amount (\$2,230.00) and thereafter becomes unemployed through no fault of his own.

Raymond Earl Frederick
Raymond Earl Frederick
Hearing Examiner

Date of Hearing: 10/31/91
ke/Specialist ID: 45541
Cassette No: 10605

Copies mailed on 11/04/91 to:

Claimant
Employer
Unemployment Insurance - Northwest (MABS)

Gerald Niles
Manager, Sales & Service
