DECISION

Claimant:
ESTANISLAO ESCOBAR

Employer:
SONCO WHLESLE FENCE INC

Decision No.: 5213-SE-13

Date: December 18, 2013

Appeal No.: 1307196

S.S. No.:

L.O. No.: 62

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: January 17, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Estanislao Escobar
Seema Morse – Attorney
Lucy Pardo – Interpreter

FOR THE EMPLOYER:
Kellie Long – Human Resources

PROCEDURAL HISTORY

The claimant, Estanislao Escobar, filed a claim for unemployment insurance benefits after he was discharged from his employment with the employer, Sonco Wholesale Fence, Inc. The Agency issued an initial Benefit Determination on February 28, 2013, allowing unemployment insurance benefits.

The employer filed a timely appeal to the Benefit Determination and a hearing was scheduled before a Lower Appeals Division hearing examiner. That hearing was held on March 25, 2013. Present at that hearing were the claimant and on behalf of the employer, Kellie Long and Frederic McCann. The hearing examiner issued his decision on April 2, 2013, reversing the decision of the claims specialist and finding that the claimant had been discharged for gross misconduct within the meaning of *Maryland Code Ann., Labor and Employment Article, Section 8-1002(a)(1)(i).* The claimant was disqualified from the receipt of unemployment insurance benefits from the week beginning January 6, 2013 and until he became reemployed, and earned wages in covered employment that equaled at least 25 times his weekly benefit amount.

The claimant filed a timely appeal to the Board of Appeals ("Board"). Subsequently, Seema D. Morse, Attorney at Law, entered her appearance in the case, on behalf of the claimant.

The Board determined that additional evidence was needed in this matter and scheduled a continued hearing before the Board for November 19, 2013. The Board's Notice of Hearing included along with its usual notice provisions the following note in bold:

> **The Board is particularly interested in testimony from Miguel Gomez and Bobby Cunningham regarding the claimant's request to leave work early or to have time off. The Board is also interested in corroborating medical documentation that were the subject of the testimony in the March 25, 2013 hearing.**

Neither Mr. Gomez nor Mr. Cunningham appeared at the Board hearing. The claimant did provide the medical documentation requested.

The Board was interested in hearing first-hand testimony from Mr. Gomez and Mr. Cunningham, as they were both mentioned during the Lower Appeals Division hearing as being the claimant's supervisor and having given the claimant permission to leave on the dates in question.

EVALUATION OF THE EVIDENCE

The Board has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

Two hearings, one at the Lower Appeals Division and one at the Board, have now been held on this matter. The employer failed to present any first-hand testimony at the Lower Appeals Division hearing

Despite the Board's notation on its hearing notice regarding its particular interest in hearing first-hand testimony from Mr. Gomez and Mr. Cunningham, the employer failed to make either witness available. At the Board's hearing, Ms. Long additionally testified that another supervisor, Mr. Busler, had first-hand knowledge of one of the incidents at issue. The employer neither presented Mr. Busler as a witness nor did it present or offer for admission into evidence an alleged video recording of one of the incidents at issue. The Board draws negative inferences from the employer's failure to produce video evidence which its witness testified it keeps in the ordinary course of business and from its failure to present Mr. Gomez, Mr. Cunningham, and Mr. Busler as first-hand witnesses - all of whom remain in its employ.

The Board finds the claimant's testimony credible. The claimant's testimony regarding the April 20, 2012 event is corroborated by the medical documentation entered as evidence into the record.

FINDINGS OF FACT

The claimant, Estanislao Escobar, was employed from October 1, 2002 until January 17, 2013, as a weaver operator. The claimant was discharged for two alleged violations of the employer's attendance policy and time theft on April 20, 2012 and on December 11, 2012.

On April 20, 2012, the claimant reported to work. While the claimant was working, a piece of the claimant's clothing became caught in a weaving machine. The claimant was pulled up against the weaving machine resulting in an injury to his chest. A co-worker turned off the machine and cut the claimant free. The claimant left the workplace due to the injury and drove himself to the Prince George's Hospital Center.

The claimant was examined by Dr. Willie Blair who found that the claimant had contusions to his chest. The claimant was admitted to the hospital and was not released until April 22, 2012. *See Claimant's Exhibit B3.*

On December 12, 2012, the claimant reported to work. The claimant requested and his supervisor, Mr. Cunningham, granted him permission to leave work to receive a flu shot. *See Claimant's Exhibit B4.* Mr. Cunningham told the claimant it was "not a problem" and for the claimant to use Paid Time Off ("PTO"). The claimant did not realize that he did not have any PTO time available.

The claimant did not violate the employer's attendance policy and did not commit time sheet fraud.

CONCLUSIONS OF LAW

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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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*. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. Natioal Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

> 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 the instant case, the employer's only witness at both hearings was Ms. Long. Ms. Long was not the claimant's supervisor, she was not present at the claimant's work location on April 20, 2012 and she was not present when the claimant spoke to Mr. Cunningham on December 12, 2012. She was not present when the claimant was discharged. While Ms. Long was able to offer some first-hand testimony regarding the employer's policies and operations, she offered no first-hand testimony regarding the alleged incidents for which the claimant was discharged. None of the employer's first-hand witnesses testified at either hearing.

The employer's case was substantially hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the Board and a hearing examiner may rely on hearsay evidence in making their determination, they must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept., 115 Md. App. 395, 413 (1997); also see Kade v. Charles H. Hickey School, 80 Md. App. 721, 725 (1989)* ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade, 80 Md. App. at 726, 566 A.2d at 151, Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 194, 436 A.2d 525, 529*, or made close in time to the incident, see *Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*, or corroborated, *see Consolidated Edison v. N.L.R.B, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938)* ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972)*, ordinarily is presumed to posses a greater caliber of reliability. *Cited in Travers 115 Md. App. at 413. Also see Parham v. Dep't of Labor, Licensing & Reg[ulation], 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009); Cook v. National Aquarium in Baltimore, 1034-BR-91*(the employer offered not a single specific example of the alleged misconduct as observed or testified to by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The Board finds that the employer's evidence is insufficient to overcome the claimant's sworn first-hand testimony. The claimant's testimony is corroborated by his medical documentation. The employer failed to produce any of its possible witnesses to the incidents or the conversations pertaining to the claimant's alleged misconduct.

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 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 SONCO WHLESLE FENCE INC

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

Eileen M. Rehrmann, Associate Member

VD

Date of hearing: November 19, 2013
Copies mailed to:
ESTANISLAO ESCOBAR
SONCO WHLESLE FENCE INC
SEEMA D. MORSE ESQUIRE
KELLIE LONG HR MANAGER
SONCO FENCE
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ESTANISLAO ESCOBAR

SSN #

Claimant

vs.

SONCO WHLESLE FENCE 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: 1307196
Appellant: Employer
Local Office : 62 / COLLEGE PARK CLAIM CENTER

April 02, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, KELLIE LONG, FREDERIC MCCANN

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, Estanislao Escobar, filed a claim for benefits establishing a benefit year beginning February 3, 2013. He qualified for a weekly benefit amount of $414.

The claimant began working for this employer, Sonco Wholesale Fence Inc., on October 1, 2002. At the time of separation, the claimant was working as a weaver operator. The claimant last worked for the employer on January 7, 2013, before being terminated for time sheet fraud. On April 20, 2012, the claimant left work to go to the doctor's office. He did not clock out when he left. He returned at the end of the work day and clocked out. He was given a warning regarding this incident. On December 11, 2012, the claimant again left work for a doctor's appointment. He did not clock out when he left and returned at the end of the

day to clock out at his regular time.

The employer discharged the claimant after it discovered that he once again left work without clocking out and then later returned to clock out at the end of the day.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that 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. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute 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 Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

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 for time theft. The claimant repeatedly left work without clocking out and then returned to work later in that day to clock out. This resulted in him getting paid for time he was not working. This constitutes theft from the employer and is gross misconduct.

I hold that the claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged 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 January 6, 2013 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

S Weber

S Weber, 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 April 17, 2013. 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: March 25, 2013
DW/Specialist ID: WCP8A
Seq No: 001
Copies mailed on April 02, 2013 to:
ESTANISLAO ESCOBAR
SONCO WHLESLE FENCE INC
LOCAL OFFICE #62
SONCO FENCE