

**- DECISION -**

Claimant:	Decision No.:	682-BR-12
GORDON PINDELL	Date:	April 18, 2012
	Appeal No.:	1135809
Employer:	S.S. No.:	
NATIONAL FIRE PROTECTION LLC	L.O. No.:	64
	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).

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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: May 17, 2012

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**REVIEW OF THE RECORD**

After a review of the record, and after deleting "or about" from the first and third sentences of the second paragraph, the Board adopts the hearing examiner's modified findings of fact. However the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

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*.

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 his appeal, the claimant reiterates his testimony from the hearing. He disputes that the photographs received into evidence show any wrong-doing by the claimant. And, he contends that he was discharged as a "scapegoat". The claimant questions the employer's indication that he could be rehired if, as the employer alleged, the claimant performed his work so poorly.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board is of the opinion that the evidence is not sufficient to support the hearing examiner's conclusions or decision.

The employer's evidence was entirely hearsay. Hearsay is admissible in administrative proceedings such as this, but it must be weighed in light of credible first-hand evidence from the opposing party. In this case, the employer's witness, who appeared and testified, had no direct knowledge of any of the events for which the claimant was terminated. The person with first-hand knowledge, did not appear. The employer testified about the various photographs, but his only knowledge of those also came from someone else. The photographs apparently show errors, mistakes or problems but do not, in any way, show that these were attributable to the claimant. This evidence was hearsay within hearsay and was inherently unreliable. The employer provided no corroborating evidence for its hearsay-based conclusions.

Additionally, the Board notes that the claimant had worked for this employer for several years, but this was apparently the first indication of any substandard work. It seems unlikely to the Board that the claimant would work without incident or concern for years only to suddenly be incapable of performing the basic duties of the position once he was working under another foreman. The claimant's explanation was as plausible, if not more so, than the employer's speculation.

As noted, the employer bears the burden of proof in a discharge case. This means that the employer must bring forth a preponderance of competent and credible evidence that the claimant's discharge was for disqualifying reasons. Competent evidence is generally that which is observed first-hand, or that which is provided by a disinterested third-party. Credible evidence is that which is believable and truthful. Here, although the employer witness was likely completely truthful and believable, he did not observe the things about which he testified and, therefore, was not competent.

The hearing examiner stated he: "decided the facts on the credible evidence as determined by the Hearing Examiner." However, the hearing examiner did not provide any assessment of the relative competence of the employer's evidence, nor did he state what, if any, criteria were used to determine what was credible evidence. Because the hearing examiner did not include any meaningful analysis of the evidentiary weight he apparently assigned to the conflicting evidence, and did not resolve the discrepancies, the Board will not defer to his conclusions. The Board does not find the employer's evidence to have been sufficient to meet its burden of proof in this matter.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of § 8-1003. 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 NATIONAL FIRE PROTECTION LLC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

GORDON PINDELL

NATIONAL FIRE PROTECTION LLC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

GORDON PINDELL

SSN #

**Claimant**

Vs.

NATIONAL FIRE PROTECTION LLC

**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: 1135809

Appellant: Employer

Local Office : 64 / BALTOMETRO  
CALL CENTER

November 2, 2011

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, GREG FOLLIN

**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, Gordon Pindell, filed a claim for benefits establishing a benefit year beginning August 28, 2011. He qualified for a weekly benefit amount of \$430.

The claimant began working for this employer, National Fire Protection LLC, on or about October 10, 2005. At the time of separation, the claimant was working as a sprinkler fitter. The claimant last worked for the employer on or about August 22, 2011, before being terminated for poor work performance.

The claimant had been a foreman on several jobs installing fire safety equipment for the employer and had many years of experience in the industry. The claimant was asked to work under another foreman because the employer did not have enough jobs for all of its foremen. The claimant agreed. After a week and a half,

the foreman of the second job site came to the employer because he was having significant problems with the claimant and his work. Much of the claimant's work was incomplete or incorrect and needed to be repaired or redone.

The claimant did not measure where he was drilling holes in walls and ceilings, requiring the holes to be patched and new holes to be drilled. Employer Exhibit # 2 page 5. Additionally, the claimant caused damage to walls several times while drilling holes. Employer Exhibit # 2 page 6. On one occasion, the claimant refused to drill several holes because he said there was steel rebar in the way. The foreman was able to drill the holes the following day without a problem.

The claimant was told to test two fire suppression sprinkler systems. He told the foreman that the test was successful. The next day, the foreman learned that the test was not successful and that the pipes were not holding pressure as required. The coupling holding the cap on the pipe was not seated properly which could have caused a dangerous accident. These errors required that a mason remove part of a cinder block wall to be repaired.

The claimant was asked to run a drain pipe in an area that needed to be sealed off behind a cinder block wall. The claimant was told to use galvanized fittings and couplings. He did not do so. Additionally, he did not properly seal the top of the pipe and did not anchor it correctly. The pipe had to be torn out. The foreman found multiple couplings installed by the claimant or under his supervisor which were not tightened correctly. These had to be tightened and all the couplings installed by the claimant or under his supervisor had to be inspected and tightened. Employer Exhibit # 2 pages 4, 7 and 8. When asked why he didn't properly install the couplings, the claimant told the foreman that he did not think it mattered if they were tightened.

On the final day of work, the claimant called the foreman and told the foreman to bring him a new power cord. The foreman asked why and the claimant said the cord he was using was bad and that fire had shot out the end of the cord. The foreman told the claimant to get a power cord himself. The claimant refused and did not work for approximately one hour. The claimant cut the end off the cord he was using and threw it away. Another employee, an electrician, retrieved the end of the cord and gave it to the foreman. There was no evidence of any burn marks on the socket at the end of the cord. Employer Exhibit # 2 page 9.

The foreman took his concerns to his employer, who then discharged the claimant.

## 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).

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The claimant was a competent medical laboratory technician who was trained in the use of the computer and the procedures of his job. The claimant made a number of errors which clearly could have resulted in serious injury to patients for whom the testing was performed. The errors were the result of negligence in entering data into the computer. The claimant was warned several times about his error rate, but the errors increased. When a claimant's work involves critical risks to the life and health of other persons, a higher degree of care is required. The claimant was discharged for gross misconduct. Roberts v. Maryland Medical Lab, Inc., 1215-BR-88.

### EVALUATION OF THE 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 his negligence in the performance of his job duties. The claimant had been a foreman on several jobs installing fire safety equipment for the employer and had many years of experience in the industry. The claimant was transferred to a new job site when a job he had been running was completed. The claimant was not the foreman of the new job site. However the work he did at that point was unacceptable and. This required the employer to have the work the claimant did or oversaw rechecked and often redone. Often, the employer would have to remove block walls to fix the claimant's careless work. This not only cost the employer time and money, it put people at risk, not just those working on the site, but also the people who the fire suppression system would one day protect. The claimant's many years of experience and his prior position as a foreman shows that he was well aware of the requirements of the job and was fully capable of doing an acceptable job. His response when the foreman brought this to his attention was to act surprised that he would care. The claimant's negligence borders on a willful attempt to cause damage to the employer's business. The claimant worked in a field that involves critical risks to the life and health of other persons and a higher degree of care is required. See Roberts supra. The claimant showed a deliberate and willful disregard to that risk and to the employer's interest. The claimant was discharged for gross misconduct.

### 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 August 21, 2011 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*

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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 November 17, 2011. 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: October 25, 2011

AEH/Specialist ID: RAB9D

Seq No: 001

Copies mailed on November 2, 2011 to:

GORDON PINDELL

NATIONAL FIRE PROTECTION LLC

LOCAL OFFICE #64