Maryland
Department of Economic & Employment Development

*William Donald Schaefer, Governor*
*J. Randall Evans, Secretary*

*Board of Appeals*
*1100 North Eutaw Street*
*Baltimore, Maryland 21201*
*Telephone: (301) 333-5032*



## — DECISION —

Decision No.: 933-BR-89

Date: October 26, 1989

Claimant: Clee Young, Jr.

Appeal No.: 8909696

S. S. No.:

Employer: Fort Howard Cup Corp.
ATTN : Brenda Gottleib
Benefits Coordinator

L. O. No.: 1

Appellant: EMPLOYER

Issue:

Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the law.

## —NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE FLAWS 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 AT MIDNIGHT ON November 25, 1989

## — APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals reverses the decision of the Hearing Examiner.

The Hearing Examiner's decision states that the employer's written evidence was "inadmissible hearsay." This statement is inexplicable, in light of the fact that the Hearing Examiner marked this document as an employer's exhibit and put it into the record. In addition, he asked the employer's witness to read and interpret the document. If a document is not admissible, of course, it should not be admitted, nor should a witness be asked to read and interpret it. In addition, the document actually was admissible, as hearsay is admissible in these administrative proceedings. Although the Hearing Examiner may well decide to give less weight to a piece of evidence because of its hearsay nature, this does not make the evidence inadmissible.

The Board, therefore, reverses the Hearing Examiner's ruling and finds that Employer's Exhibit #1 is admissible. The Board also gives the document some weight, though its hearsay nature has led the Board to regard it with caution.

The basic factual issues in this case are whether the claimant was performing his job in an intoxicated state or was under the influence of alcohol to an extent prohibited by the company regulations. The company has every right to enforce a strict policy concerning the use of influence of alcohol, at least with respect to the claimant's job. The claimant had just been promoted to the job of forklift driver, and he was still learning all the aspects of that job.

Employer's Exhibit #1 recounts an admission made by the claimant that he had had two beers that day, that he had made a mistake, and that he was under the influence of alcohol on a certain work day. At the hearing before the Hearing Examiner, the claimant did not really retract this admission. He admitted that he had had a couple of beers prior to coming to work. He admitted that he had an odor of alcohol on his breath when he reported to work. His testimony was not certain with respect to whether he was under the influence of alcohol. He first stated that he didn't <u>think</u> that he was. Then he stated definitely that he was not under the influence of alcohol. He stated that he did not think that he was under the influence of alcohol because he was capable of performing his job. Immediately after that testimony, however, he admitted that he had a problem on that day in operating the forklift. The Board concludes from this testimony that the claimant is not certain whether he was under the influence of alcohol and that he has decided that he was not under the influence of alcohol because of a belief that he was performing his job -- but that he was not actually performing his job well. The claimant thus did not make a credible denial of the allegation even at the hearing, and his

admissions on Employer's Exhibit #1 are not really refuted. The Board finds as a fact, therefore, that he was under the influence of alcohol on the day in question.

Under close questioning from the Hearing Examiner, the claimant stated that he had drunk only two beers on the day in question and that he had drunk them around lunch time prior to reporting to work at 3:00 p.m. This testimony contradicts the claimant's original statement made when he filed for benefits, in which he stated that the odor of alcohol had come from some drinking he had done the night before. It seems apparent to the Board that the claimant is not certain either of how much he drank or how much it affected his job performance.

The claimant was under the influence of alcohol on the day in question shortly prior to his last day of work; he was fired for this event; and the termination was in accord with company policy. This action therefore constitutes a deliberate violation of standards the employer had a right to expect, showing a gross indifference to the employer's interest. This is gross misconduct within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law.

The thrust of the claimant's testimony was really that he had only made one mistake and that the company had overreacted, causing him to lose his job, the prospect of obtaining other jobs, and possibly his unemployment insurance benefits. Although it is unfortunate that this one event would cause such serious consequences, the Board concludes that the employer's action was reasonable. The claimant was not only driving a forklift truck, he was learning how to drive a forklift truck. The danger posed to himself, to other employees and to the employer's property by even one day of reporting to work under the influence of alcohol was quite serious, and the employer has the right to deal with this infraction in a serious manner.

## DECISION

The claimant was discharged for gross misconduct connected with the work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. He is disqualified from the receipt of benefits from the week beginning June 25, 1989 and until he becomes re-employed, earns at least ten times his weekly benefit amount ($1,580), and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.

Thomas W. Keech
Chairman

Donna P. Watts
Associate Member

K:DW
kbm
COPIES MAILED TO:

CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - BALTIMORE

Maryland
Department of Economic & Employment Development

William Donald Schaefer
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21201
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## — DECISION —

Date: Mailed: September 1, 1989

Claimant: Clee Young, Jr.

Decision No.: 8909696

S.S. No.:

Employer: Fort Howard Cup Corp.

Lo. No.: 01

Appellant: Claimant

Issue: Whether the claimant was discharged for gross misconduct connected with the work, within the meaning of Section 6(b) of the Law.

## – NOTICE OF RIGHT OF FURTHER APPEAL -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAYBE FILED IN ANY EMPLOYMENT SECURITY OFFICE. 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 PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON September 18, 1989

## — APPEARANCES -

FOR THE CLAIMANT:

Clee Young, Jr. - Claimant

FOR THE EMPLOYER:

Brenda Gottleib,
Benefits Coordinator

## FINDINGS OF FACT

From May 10, 1988 to June 24, 1989, the claimant worked in various capacities. In June, 1989, he was promoted to forklift operator. He was discharged for allegedly being under the influence of alcohol while on the job.

The testimony of Ms. Gottleib, the employer's representative, was purely an inadmissible hearsay. The discharge was initiated by the claimant's immediate supervisor and the safety director. Neither appeared at the hearing. There is some evidence that the claimant drank while off duty. The evidence is insufficient to support the allegations that the claimant reported to work intoxicated or drank while on duty.

## CONCLUSIONS OF LAW

Article 95A, Section 6(b) provides for a disqualification from benefits where an employee is discharged for actions which constitute (1) a deliberate and willful disregard of standards which the employer has a right to expect or (2) a series of violations of employment rules which demonstrate a regular and wanton disregard of the employee's obligations to the employer. 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 gross misconduct within the meaning of the Statute.

In gross misconduct cases, the burden of proof is on the employer. The employer failed to carry the burden in this case. The witnesses that could provide direct testimony about the circumstances did not appear. The determination of the Claims Examiner is reversed.

## DECISION

The claimant was discharged, but not for misconduct or gross misconduct, within the meaning of Sections 6(b) or 6(c) of the Law.

The determination denying benefits beginning June 25, 1989 and until he becomes re-employed, earns at least ten times his weekly benefit amount ($1580) is rescinded.
Benefits are allowed, if the claimant is otherwise qualified.

Van D. Caldwell
Hearing Examiner

Date of Hearing: August 29, 1989
bch/Specialist ID: 01067
Cassette No: 7642
Copies mailed on September 1, 1989 to:
Claimant
Employer
Unemployment Insurance - Baltimore (MABS)