CASE NO. 94018024

Part ____ of ____ Parts

In The Circuit Court for Baltimore City

CIVIL

02/28/7/14

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175061

In the Matter of
JOHN H EDWARDS
VS
APEX BOTTLE CO INC., ET AL

JOHN H. EDWARDS **Appellant**	*	**IN THE**
	*	**CIRCUIT COURT**
v.	*	**FOR**
APEX BOTTLE CO., INC. AND DEP'T OF ECON. & EMPLOYMENT DEVELOPMENT **Appellees**	*	**BALTIMORE CITY** **CASE NO. 94018024/CL175061**

* * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Hollander, J.

John H. Edwards ("Edwards" or "Appellant") has appealed from the decision of the Board of Appeals ("the Board") of the Department of Economic and Employment Development ("the Department"), dated December 20, 1993. The Board summarily affirmed the decision of the Hearing Examiner (R.66)[1] finding that Edwards was discharged for gross misconduct in connection with his work, within the meaning of Maryland Code, Labor and Employment Article, Title 8, § 1002.[2] Initially, the claims examiner found misconduct rather than gross misconduct, and only disqualified Edwards for 10 weeks. R.2,17. Thereafter, the employer appealed the decision of the claims examiner (R.25-26) and, upon review, the Hearing Examiner reversed, finding gross misconduct. R.61. Edwards then appealed, and the Board determined that because of gross misconduct, Edwards was disqualified from receiving benefits.

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[1]The record of the hearing before the Hearing Examiner has been sequentially numbered. References to the record shall be abbreviated by the letter "R.", followed by the transcript page or item page number.

[2]Unless otherwise indicated all statutory references are to Md. Lab. & Empl. Art. Code Ann. (1991 & Supp. 1993).

Factual Summary

Edwards was employed as a truck driver and warehouse laborer by Apex Bottle Co., Inc.("Apex" or "Employer"), from June 3, 1991 until June 8, 1993. R.28,60. He was discharged on June 8, 1993 for excessive tardiness.[3] The Hearing Examiner determined that there were multiple incidents of tardiness in March and April, 1993, in which Edwards failed to report to work on time, and later called to notify the employer of his tardiness. R.30,60.[4] According to Apex, it was important that Edwards report to work each day at 8 a.m., as scheduled. R.30,60. Apex claimed Edwards was its only truck driver, and the Hearing Examiner so found. R.33. On each of the occasions when he was late, Edwards received and signed written notices of his tardiness, which warned of possible repercussions. R.61.

The proverbial "straw that broke the camel's back" occurred on June 8, 1993. On that day, Edwards called his employer, between 10:00 a.m. and 1:10 p.m. (R.61), and said: "I guess I'm not going to make it in today." R.33,61. Accordingly, Edwards was immediately discharged. The Examiner also found that Edwards offered no credible evidence at the hearing concerning the reason for his tardiness or his absence. R.61. Rather, the Examiner found that Appellant "lost motivation" to come to work on time after the company changed its policy regarding bonuses. R.61.

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[3] Ironically, at the hearing held by this Court with respect to Edwards' petition, Edwards arrived late!

[4]The dates and times of these calls were as follows: March 11, 1993 at 11:00 a.m., March 18, 1993 at 12:15 p.m., April 5, 1993 at 10:30 a.m., and April 6, 1993 at 11:30 a.m. R.60-61.

Scope of Review

The scope of review of a decision of the Board is statutorily governed by § 8-512(d), which provides in pertinent part:

> In a judicial proceeding [concerning a claim for benefits], findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if: (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and (2) there is no fraud.

See also, Bd. of Educ. v. Paynter, 303 Md. 22 (1985); MEMCO v. Md. Empl. Sec. Admin., 280 Md. 536 (1977); Bethlehem Steel Co. v. Bd. of Appeals, 219 Md. 146 (1959); Bd. of Appeals v. Baltimore, 72 Md. App. 427-431-2 (1987); Adams v. Cambridge Wire Cloth Co., 68 Md. App. 666, 673 (1986).

Section 8-512(d), and case law interpreting it, make clear that "findings of fact made by the Board are binding upon the reviewing court, if supported by substantial evidence in the record." Baltimore, 72 Md. App. at 431. See also, Allen v. Core Target City Youth Program, 275 Md. 69 (1975). The resolution of conflicting evidence is the province of the agency, and "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inference." Baltimore Lutheran High School Ass'n, Inc. v. Md. Empl. Security Admin., 302 Md. 649, 663 (1985). On review, this court may only determine "if, from the facts and permissible inferences in the record before the court, reasoning minds could reach the same result." Id.

Decisions of administrative agencies are prima facie correct. On appeal, the agency's decision must be viewed in the light most favorable to the agency. Paynter, 303 Md. at 35-

36. Accordingly, "the reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken." Id. (emphasis in original).

Discussion

The Board's decision denying unemployment benefits is supported by substantial evidence and is correct as a matter of law. "Gross misconduct" is defined in § 8-1002(a)(1) as:

> [C]onduct of an employee that is (i) a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows great indifference to the interests of the employing unit; or (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

There is no bright line test to determine what constitutes deliberate and willful misconduct within the meaning of § 8-1002. Employment Security Board of Maryland v. LeCates, 218 Md. 202 (1959). In LeCates, the Court noted that such a determination will vary with each particular case. What is required is

> an utter disregard for the employee's duties and obligations to his employer and [conduct] calculated to disrupt the discipline and order requisite to the proper management and control of the company.

Id. at 210; Watkins v. Employment Security Administration, 266 Md. 223 (1972).

The Hearing Examiner concluded that Edwards' conduct met the standard for gross misconduct within the meaning of § 8-1002(a)(1)(ii). While the Hearing Examiner did not make findings as to the specific conduct on which she relied, a review of the record shows that the Hearing Examiner's decision was based on substantial evidence. A consideration of

the totality of Edwards' conduct from June 3, 1991 through the date of discharge on June 8, 1993 supports the decision.

The record demonstrates that Edwards was significantly late to work on four occasions. Edwards received and signed written notices of tardiness on each of these occasions; each such notice warned of the possibility of "further action" if the problem was not resolved. R.61. Appellant argues that his lateness was for reasons that would constitute a legitimate excuse and thus did not constitute gross misconduct. In fact, there was only one occasion when Edwards provided a reason for his being late; he wrote his excuse on the bottom of the warning slip given to him by his employer. R.43. Because the behavior was virtually without excuse, and continued in the face of warnings, Edwards' conduct amounted to a wanton disregard of his obligations to his employer.

Edwards' claim that another employee was available to perform in his absence is also without merit. The Court of Appeals has held that chronic absenteeism in the face of warnings constitutes gross misconduct within the meaning of Md. Code Ann., Art. 95A, § 6(b) (1957, 1991 Repl. Vol.), the predecessor to § 8-1002. In Watkins v. Employment Security Administration, the Court found the employee to be guilty of misconduct and noted:

> Absenteeism or tardiness is directly connected with an employee's work. *Whether an employer may be able to have the absent employee's duties performed by others is simply not relevant to the issue whether, in the language of the act, there has been a 'deliberate and willful disregard of standards of behavior.'* A disregard which is disruptive of discipline or destructive of morale may, in some circumstances, be as damaging as that which may be solely directed at interference with performance.

226 Md. at 228.(Italics added).

In sum, Edwards was given numerous warnings regarding his misconduct and was

offered an opportunity to correct his conduct. In light of all the facts, the record clearly supports the determination that Edwards committed gross misconduct within the meaning of §8-1002. The Board's finding that Edwards' conduct amounted to gross misconduct is supported by the record and applicable case law, and accordingly Edwards was lawfully denied unemployment benefits.

Based on the foregoing, it is this 13th day of July, 1994 by the Circuit Court for Baltimore City, ORDERED that the decision of the Board be, and the same hereby is, AFFIRMED.

Ellen L. Hollander, Judge

cc: Mr. John Edwards
Michele McDonald, Esq., Staff Attorney
for the Attorney General

JUL 18 1994

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

CCURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR: Monday June 20, 1994

CASE NUMBER - 94018024
CASE TITLE - Edward vs Apex Bottle Co. Inc N75061
CATEGORY - Admin Appeal
PROCEEDING - Court Trial

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (__✓__ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEMENT ABSOLUTE (____ ORDER/DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUE CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE Allen Hollander DATE 7/13/94

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR: Monday June 20, 1994

CASE NUMBER: 94018024
CASE TITLE: Edward vs Aspen Bottle Co. Inc 475061
CATEGORY: Admin Appeal
PROCEEDING: Court Trial

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (__✓ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

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(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE Ellen Hollander DATE 7/13/94

CIRCUIT COURT DATE PRINTED / /

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COURTROOM .....

STENOGRAPHER .....

ASSIGNMENT FOR: Monday June 20, 1994

CASE NUMBER - 9401802Y
CASE TITLE - Edward vs Upper Bottle Co Inc 1175061
CATEGORY - Admin Appeal
PE and Trial

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ S[illegible]) (____ [illegible]) (____ [illegible])

(____ VERDICT) (____ REMANDED) (____ [illegible])

(____ JUDGEMENT NISI) (____ ORDER/DECREE SIGNED) (____ OTHER)

(____ J[illegible]) (____ [illegible])

(____ POSTPONED) (____ MOTION [illegible])

(____ CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE Allen Hollander DATE 7/13/94

CIRCUIT COURT — LTIMORE CITY — PRINTED / /

[illegible] ....

COURTRO[illegible] ....

STENOGRAPHER ....

ASSIGNMENT FOR: Monday June 2 '94

CASE - 94018024
CASE TITLE [illegible] vs Upper Bottle Co Inc 1175061
CATEGORY [illegible] Appeal
PROCEEDING [illegible] and Trial

DEFT [illegible]NEY -
PLAINT TORNEY -

TYPE OF PROC (____ JURY) (___ [illegible]RY)

DISPOSITION: (CHECK ONE)

(____ S[illegible]) (____ CA[illegible]) (____[illegible])

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT) (___ [illegible]ER/DECR[illegible]) (____ [illegible]THER) PLEASE EXPL[illegible])

(____ J[illegible]) (____[illegible])

(____ PLEA[illegible]) (____ [illegible]ETIO[illegible])

(____ [illegible]IA) (____)

IGNAT[illegible] DATE

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR: Monday June 2 '*4

CASE NUMBER - 7401/6024
CASE TITLE - Edward vs Piper Battle & one #175061
CATEGORY - Crimes Appeal
PROCEEDING - Court Trial

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (__✓ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGMENT ABSOLUTE (____ /DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE _____ DATE _____

6/20/94

Edwards

Watkins =
gross misconduct
for excessive absenteeism &
tardiness

Bd of Ap. has wide
berth to det. misconduct

See R. 52-54
30-32

He says he informed
E when he'd be late;
deaths in fam.; no crim record
but arrested;

I was told it was ok -

I'd never been ~~told~~ this before -

Face that I was the only driver

6 cm

JOHN H. EDWARDS,	*	IN THE
Appellant,	*	CIRCUIT COURT
v.	*	FOR
APEX BOTTLE CO., INC.	*	BALTIMORE CITY
and	*	#94018024/CL175061
BOARD OF APPEALS, DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT,	*	
Appellees.	*	

* * * * *

MEMORANDUM IN SUPPORT OF THE BOARD OF APPEALS

1. Introduction

The Board of Appeals (the "Board"), Department of Economic and Employment Development ("DEED"), an Appellee herein, files this Memorandum in support of its decision.

The Board found that John H. Edwards, Appellant, was not entitled to unemployment insurance benefits because he was discharged for gross misconduct connected with his employment within the meaning of the Maryland Labor and Employment Article, §8-1002.[1] Mr. Edwards appealed that decision to this Court.

The factual findings made by the Board are supported by substantial evidence in the administrative record, the Board made no errors of law, and therefore, the Board's decision should be affirmed.

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[1]Unless otherwise indicated, all statutory references are to Title 8 of the Labor and Employment Article of the Maryland Annotated Code. (1991 Vol., 1993 Cum. Supp.).

II. Scope of Review

Judicial review of the administrative adjudication of unemployment insurance appeals is governed by §8-512. Findings of fact made by the Board are binding upon this court if there is substantial evidence in the record to support them. Section 8-512; Board of Educ. of Montgomery County v. Paynter, 303 Md. 22, 491 A.2d 1186 (1985); Allen v. Core Target City Youth Program, 275 Md. 68, 338 A.2d 237 (1975). The scope of this court's review is limited to a determination of whether reasoning minds could have reached the same conclusion as the Board based on the facts and permissible inferences in the record. Baltimore Lutheran High School Ass'n, Inc. v. Employment Sec. Admin., 302 Md. 649, 490 A.2d 701 (1985). If the Board's conclusions could be reached by reasoning minds and the decision is based upon substantial evidence, this court has no power to reject that conclusion. Paynter, 303 Md. at 35, 491 A.2d at 1193; Baltimore Lutheran, 302 Md. at 662, 490 A.2d at 707-08. "[T]he reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken." Paynter, 303 Md. at 35-36, 491 A.2d at 1193.

The question for the circuit court to decide is whether the evidence supports the agency's findings. A remand for further factfinding is appropriate only after the circuit court reviews the record for substantial evidence and finds it lacking. Department of Econ. & Empl. Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993); Department of Econ. & Empl. Dev. v. Jones, 79 Md. App. 531, 558

A.2d 739 (1989); Juiliano v. Lion's Manor Nursing Home, 62 Md. App. 145, 488 A.2d 538 (1985).

Any legal argument that was not raised in the administrative process is foreclosed from appellate review. Department of Econ. & Empl. Dev. v. Owens, 75 Md. App. 472, 541 A.2d 1324 (1988); Chertkof v. Department of Natural Resources, 43 Md. App. 10, 402 A.2d 1315 (1979).

When faced with conflicting inferences, ". . .it is for the referee to draw the inference, not the reviewing court." Paynter, 303 Md. at 36, 491 A.2d at 1195. "Furthermore, not only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inference." Baltimore Lutheran, 302 Md. at 663, 490 A.2d at 708.

The administrative findings in this case are supported by competent, material and substantial evidence contained in the record submitted by the Board. Because no fraud has been alleged, the findings of fact are conclusive, and this court's jurisdiction is confined to questions of law. Section 8-512(d); Paynter, 303 Md. at 35, 491 A.2d at 1192.

III. Facts

John H. Edwards (the "claimant") was employed by Apex Bottle Company, Inc. as a truck driver and a warehouseman from June 3, 1991

until his discharge on June 8, 1993. (R. 28, 52).[2] As a truck driver, claimant earned $7.25 per hour. Mr. Edwards was discharged from his employment on June 8, 1993 for excessive absenteeism and lateness.

Mr. Edwards spent 80% of his working time performing the duties of a truck driver and 20% of his time working as a warehouseman. (R. 34). Because Mr. Edwards was the company's only truck driver, it was important for him to report to work on schedule at 8:00 a.m. every morning. (R. 33, 30). Throughout March and April of 1993, claimant was repeatedly and excessively late. (R. 52-56). Generally, Mr. Edwards would report to work within one hour of the time he telephoned his employer to inform him that he would be late. On March 11, 1993, he failed to inform his employer that he would be late until 11:00 a.m.; on March 18, 1993, he failed to inform his employer that he would be late until 12:15 p.m.; on April 5, 1993, he failed to inform his employer of his lateness until 10:30 a.m.; and on April 6, 1993, he failed to inform his employer of his lateness until 10:30 a.m. (R. 30-32, 52-56).

On each of these occasions, claimant received and signed a written notice of his lateness that warned of the possibility of further action should his attendance not improve. (R. 52-56). Claimant indicated that his lateness was caused by a variety of reasons, but was unable to recall a specific reason for each lateness. Claimant also indicated that

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[2]The letter "R" refers to the handwritten page numbers on the lower right corner of each page in the administrative record.

he lost motivation to perform well when the company changed its operational rules. (R. 46-47).

On June 8, 1993, the claimant called his employer between 10:00 a.m. and 1:10 p.m., saying "I guess I'm not gonna make it in today." (R. 33). Claimant was immediately discharged. Mr. Edwards testified he was late because he had been arrested the previous evening and not released from jail until 9:30 and 10:00 a.m. (R. 40-41). The hearing examiner specifically found that "[n]o credible evidence regarding the claimant's reasons for this anticipated absence was offered at the hearing." (R. 61).

Upon his termination, claimant applied for unemployment compensation and a DEED claims specialist found that he was discharged as a disciplinary measure by the Apex Bottle Company, Inc. The specialist also determined that although claimant was repeatedly late for work, his actions constituted only simple misconduct. Claimant was disqualified from receiving benefits for nine weeks. (R. 17). The employer appealed and a full evidentiary hearing was held before the hearing examiner on October 29, 1993. (R. 24). The hearing examiner concluded that because claimant was the employer's only truck driver, the employer had a right to expect claimant to appear for work on time. (R. 51).

After examining the evidence, the hearing examiner made determinations of credibility and found that during March and April of 1993, claimant was significantly late on four occasions. (R. 61). The hearing examiner further found:

> Such behavior was without excuse and continued in the face of warnings, demonstrating a regular and wanton disregard of the claimant's obligations to the employer. The claimant's testimony that he "lost motivation" to appear for work on time was further evidence of the claimant's wanton attitude towards his obligation to this employer. On June 8, 1993, in the face of the claimant missing yet more hours of work, the employer was unwilling or unable to offer the claimant another chance.

(R. 61). The hearing examiner concluded that claimant was discharged for gross misconduct within the meaning of § 8-1002(a)(1)(ii). Claimant appealed to the Board of Appeals, who adopted the findings of fact and conclusions of law of the hearing examiner. The Board found that claimant was discharged for gross misconduct within the meaning of § 8-1002. (R. 66-67). Pursuant to Maryland Rule 7-202 and § 8-512, claimant filed a timely appeal to the Circuit Court for Baltimore City.

IV. The Board's decision denying Mr. Edwards unemployment compensation is supported by substantial evidence in the administrative record and is correct as a matter of law.

The Board found that the claimant's excessive lateness and absenteeism constituted gross misconduct pursuant to § 8-1002 that provides, in pertinent part:

> (a) "Gross misconduct" defined. - In this section "gross misconduct":
>
> (1) means conduct of an employee that is:
>
> (i) 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
>
> (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations . . .

The Board found that claimant's conduct met this definition of gross misconduct. (R. 67). We believe this is a correct application of

the law and ask this honorable court to affirm the decision of the Board.

The Maryland Court of Appeals has stated that there is no hard and fast rule to determine what constitutes deliberate and willful misconduct. Employment Sec. Bd. v. LeCates, 218 Md. 202, 210, 145 A.2d 840, 844 (1959); Watkins v. Employment Sec. Admin., 266 Md. 223, 292 A.2d 653 (1972).

In LeCates, the Court quotes favorably from 81 C.J.S. Social Security and Public Welfare §162, where "deliberate" and "willful" misconduct is defined as:

> Deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee constitutes misconduct. . . . [W]illfulness exists where the injury to the employer, although realized, is so recklessly disregarded that, even though there is no actual intent, there is at least a willingness to inflict harm, or a conscience indifference to the perpetration of the wrong; in such a case constructive intention is imputable to the employee. LeCates, supra, 145 A.2d at 844. (emphasis added)

The Court in LeCates also quotes with approval from a Pennsylvania case, Philadelphia Transp. Co. v. Unemployment Compensation Bd. of Review, 186 Pa. Super. 142, 141 A.2d 410 at 413 (1958):

> "Willful misconduct" is not defined in the statute [nor is it in the Maryland statute], but this court has held it to comprehend an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

What constitutes "gross misconduct" as used in § 8-1002 is not solely a question of law. Sections 8-1002 and 8-512(d) indicate the

clear legislative intent to commit to the Department of Economic and Employment Development the administrative function of deciding, on the facts of each case, what constitutes gross misconduct in light of its expertise in the field. See, e.g., Department of Empl. & Training v. Mayor of Baltimore, 72 Md. App. 427, 530 A.2d 763, 766 (1987) ("the Legislature created the Board as the ultimate fact finder for the agency"). The disqualification is for "behavior that the Secretary finds is gross misconduct." Section 8-1002(b), emphasis added. See also Paynter, supra.

It is not for the parties nor for this Court to determine on the facts of this case whether claimant's specific conduct falls within the statutory definition of gross misconduct. The Board has been designated by the General Assembly to apply the Maryland Unemployment Insurance Law to the facts of each case. The appellate courts in Maryland have repeatedly held that it is within the province of the Board to resolve conflicting evidence, and, where inconsistent inferences from the same evidence can be drawn, it is for the Board to draw the appropriate inference. Baltimore Lutheran, 302 Md. at 663, 490 A.2d at 708. A question of fact exists where conflicting inferences can be drawn from undisputed facts. Id. Even if the conflicting inferences go to the "ultimate question" (i.e., whether there was "gross misconduct"), that does not make the question before the reviewing court a question of law. Paynter, 303 Md. at 39, 491 A.2d at 1194-95.

What conduct rises to the level of disqualifying gross misconduct is a mixed question of law and fact. The issue of the what constitute repeated violations of employment rules, and of the type of conduct that

shows a "regular and wanton disregard" of the employee's obligations are all factual, labor-related issues within the expertise of the Board.

What conduct rises to the level of disqualifying gross misconduct is a mixed question of law and fact. The issue of what constitutes repeated violations of employment rules and of the type of conduct that shows a "regular and wanton disregard" of the employee's obligations are factual, labor-related issues within the expertise of the Board.

As recently noted by the Court of Special Appeals in Department of Econ. & Empl. Dev. v. Hager, 96 Md. App. 362, 371, 625 A.2d 342, 347 (1993), the determination of whether a claimant's action was accompanied by the requisite state of mind is a factual issue for the Board:

> "The state of man's mind is as much a matter of fact as the state of his digestion." Noffsinger v. Noffsinger, 95 Md. App. 265, 275, 620 A.2d 415 (1993) (quoting Lord Bowen in Edgington v. Fitzmaurice, 29 Ch.D. 459, 483 (1885)). It is a fact that cannot be proven directly. The matter is determined by drawing reasonable inferences from admitted conduct.

Hager, 96 Md. App. at 371, 625 A.2d at 347.

In the instant case, the Board found that claimant's repeated and excessive lateness constituted repeated violations of his employer's rules that proved a regular and wanton disregard of his obligations as an employee. (R. 60-62, 66-67). Because the issue of intent is a factual

issue, the Board's finding of intent may only reviewed for substantial evidence.[3]

The hearing examiner and the Board reasonably inferred a wanton state of mind from Mr. Edwards' repeated and excessive lateness. (R. 61, 67). Despite numerous verbal warnings and seven written warnings, claimant repeatedly continued to call the employer one to five hours after he was to report for work. (R. 53-59, 30-34). Mr. Edwards knew that he was the only truck driver employed by the company, and that the company relied upon him to be reliable and prompt. (R. 33-34). Claimant blatantly disregarded his obligations to his employer by his repeated and excessive lateness.

Reviewing courts are generally reluctant to second guess administrators in areas

> . . . especially within the expertise of the administrative officials administering the unemployment insurance law, involving as it does many subtle considerations and nuances of fact which need evaluation by those trained to make the evaluation. It would be the rare case indeed which would justify a court disturbing that administrative determination . . . .

Barley v. Department of Employment Security, 242 Md. 102, 106, 218 A.2d 24, 27 (1966).

The reviewing court may substitute its judgment on the law for that of the agency if and only if the factual findings made by the

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[3] If supported by substantial evidence, findings of fact made by the agency are binding upon the reviewing court. Baltimore Lutheran High School Ass'n v. Employment Sec. Bd., 302 Md. 649,490 A.2d 701 (1985).

agency and supported by substantial evidence are susceptible of but one legal conclusion, and the Board failed to reach that one conclusion. Ramsay, Scarlett & Co., Inc. v. Comptroller of the Treasury, 302 Md. 825, 490 A.2d 1296 (1985).[4] Where there may be differing views - not as to the law governing the case, but rather as to its proper application to the established evidence of record - the reviewing court must defer to the agency's view. Id. at 937, 490 A.2d at 1302. Because the facts of this case are susceptible of more than one legal conclusion and because the conclusion reached by the hearing examiner is reasonable, the reviewing court must yield to the expertise of the agency in applying the law to the facts and to the agency's interpretation of its own statute.

Under the analysis of Hager, Paynter and Ramsay, Scarlett, the Board made no error of law in the instant case. The Board approached the issue in the light of the applicable statute, § 8-1002, recognized the relevant criteria prescribed in the statute and the correctly applied the law. The conduct revealed by the record is precisely within the terms of § 8-1002(a)(1)(ii). Mr. Edwards repeatedly failed to come to work on time. (R. 51-57). During March and April of 1993, claimant failed to inform his employer of his lateness until several hours after he was

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[4]Although Ramsay, Scarlett involved an accounting issue in a tax case under Maryland Annotated Code, Art. 81, the standard of judicial review is §229(o) of decision of the the Tax Court is the same as that in unemployment insurance cases. Even the technical tax issue in Ramsay, Scarlett was held not to be solely a question of law that involved no agency expertise and that would justify a substitution of judgment standard of appellate review.

to have reported for work. (R. 30-33). On March 11, 1993, Mr. Edwards failed to notify his employer that he would be late until 11:00 a.m.; on March 18, 1993, he failed to call until 12:15 p.m.; on April 5, 1993, he failed to call until 10:30 a.m.; and on April 6, 1993 claimant again failed to call until 10:30 a.m. (R. 30-32). Mr. Edwards was ultimately terminated on June 8, 1993 when he called his employer at 1:10 p.m. to inform him "I guess I'm not going to make it today." (R. 33). The employer's testimony and written warnings amply support the Board's finding of gross misconduct.

Although Mr. Edwards did testify that the was unable to call his employer or report to work on June 8, 1993 because he was in jail, the hearing examiner specifically found that this testimony was incredible: "No credible evidence regarding the claimant's reasons for this anticipated absence was offered at the hearing." (R. 40-41, 61). The agency's determination of the credibility of witnesses' testimony is binding on the reviewing court. Department of Empl. & Training v. Mayor of Baltimore, 72 Md. App. 427, 530 A.2d 763 (1987).

The reviewing court, honoring the expertise of the agency, must review the Board's determination in the light most favorable to the agency (the agency's decision is prima facie correct and carries the presumption of validity), and the decision of the Board must be left undisturbed absent an error of law. Baltimore Lutheran, 302 Md. at 663-64, 490 A.2d at 708.

V. Conclusion

Unemployment insurance benefits are intended for those who are not responsible for their own unemployment. Section 8-102. Under the

Maryland Unemployment Insurance Law, a former employer, through its tax contributions or reimbursements, is asked to bear the financial burden of a former employee's unemployment when the employer bears some responsibility for creating the unemployment. Benefits are provided for who quit their jobs due to intolerable conditions or those who are laid off due to lack of work. In the instant case, the employer bears no responsibility for claimant's unemployment. Because claimant was excessively late and disregarded his obligations as an employee, he engaged in gross misconduct. Thus, claimant is not within the protective ambit of the compensation statute. The Board acted properly in disqualifying the claimant from receiving benefits.

Based upon the aforegoing and the record as a whole, it is respectfully requested that the decision of the Board of Appeals be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN. JR.
Attorney General of Maryland

MICHELE J. McDONALD
Staff Attorney
217 E. Redwood Street, Room 1101
Baltimore, Maryland 21202
(410) 333-4813

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of May, 1994, a copy of the aforegoing Memorandum in Support of the Board of Appeals was mailed, postage prepaid, to John H. Edwards, 532 E. 23rd Street, Baltimore, MD 21218.

MICHELE J. McDONALD

CERTIFICATION OF MAILING

I, hereby, certify that an exact copy of the above response was mailed to ~~JOHN~~ LYNN WEISKITTEL, at 217 EAST REDWOOD ST. SUITE 1101 11TH Floor 21202, on the 18 day of April, 19 94.

name

address

4/18/94

(5)
A.S.

John H. EDWARDS
532 EAST 23rd STREET
BALTI, Maryland 21218

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 APR 18 PM 3:13
CIVIL DIVISION

VS

APEX BOTTLE CO. INC AND BOARD OF APPEALS DEED

94018024/CL175061

Ms. SAUNDRA. E. BANKS
CLERK
COURTHOUSE WEST
CALVERT AND LEXINGTON STREET
BALTIMORE, Maryland 21202

DEAR. MS BANKS

I HAVE BEEN INFORMED TO SUBMIT A LETTER OF MEMORANDOM TO your OFFICE, I FEEL THAT MY CASE # 94018024 THE INFOMATION WAS NOT TAKEN UNDER CONSIDERATION. AND FALSE ALLIGATION WERE USED AGAINST ME, I AGREE FOR signing WRITTEN WARNINGS, AT THE TIME I CALLED I WAS INFORMED IT WAS OK BUT when I RETURNED From my ROUTE. I WAS TOLD TO sign. THESE WRITTEN NOTICES. THIS is THE FIRST JOB I HAVE EVER BEEN TERMINATED From. SENSE being TERMINATED I HAVE FOUND IT VERY DIFICULT TO FIND EMPLOYMENT. AND when FORMER EMPLOYERS CALLED FOR REFERENCE I HAVE been given BAD REFERENCE From APEX BTTLE Co. I HAVE BEEN ~~unemployed~~ UNEMPLOYED FOR 10 monTHS. AND LOST A PLACE TO LIVE, AND SO FAR BEHIND on BILLS. I WOULD LIKE A CHANCE TO PRESENT my CASE. PLAINTIFF. JOHN H. EDWARDS

NOTICE SENT IN ACCORDANCE WITH MARYLAND RULE 7-207

John H. Edwards

vs.

Apex Bottle Co. Inc. etal

Docket:

Folio:

File: 94018024/CL175061

Date of Notice: 3-22-94

STATE OF MARYLAND, ss:

I HEREBY CERTIFY, That on the 18th day of March Nineteen Hundred and ninety-four, I received from the Administrative Agency, the record, in the above captioned case.

SAUNDRA E. BANKS, Clerk
Circuit Court for Baltimore City

CC-39 **MARYLAND RELAY SERVICE VOICE 1-800-735-2258**

NOTICE SENT IN ACCORDANCE WITH MARYLAND RULE 7-207

John H. Edwards

vs.

Apex Bottle Co. Inc., etal

Docket:

Folio:

File: 94018024/CL175061

Date of Notice: 3-22-94

STATE OF MARYLAND, ss:

I HEREBY CERTIFY, That on the 18th day of March Nineteen Hundred and ninety-four, I received from the Administrative Agency, the record, in the above captioned case.

SAUNDRA E. BANKS, Clerk
Circuit Court for Baltimore City

CC-39 **MARYLAND RELAY SERVICE VOICE 1-800-735-2258**

Circuit Court for Balto. City
111 N. Calvert St. Rm. 462
21202

Lynn M. Weiskittel
Asst. Atty. General
Michele McDonald, Staff Atty.
217 E. Redwood St. - 11th Fl.
Baltimore, Maryland 21202

Circuit Court for Balto. City
111 N. Calvert St. Rm. 462
21202

John H. Edwards
532 E. 23rd Street
Baltimore, Maryland 21215

(2)

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1994 FEB 23 A 8:30
CIVIL DIVISION

JOHN H. EDWARDS
Appellant,

v.

APEX BOTTLE CO INC

and

BOARD OF APPEALS,
Department of Economic and
Employment Development,
Appellees.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* Civil Action No.
94018024/CL175061
*
*

RESPONSE TO PETITION

The Board of Appeals (the "Board"), Department of Economic and Employment Development, in response to Appellant's Petition states:

1. The Board intends to participate in the action for judicial review.

2. The Board denies the allegations in the Petition.

3. Section 8-512(d) of the Labor and Employment Article, Maryland Code, confines the jurisdiction of the court to questions of law, and this is not a trial de novo.

4. The findings of the Board are conclusive because they are supported by substantial evidence, and there is no error of law.

WHEREFORE, the Board requests its decision be AFFIRMED.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Lynn M. Weiskittel, Asst, Atty. General
Rachel Nunn, Staff Attorney
Michele McDonald, Staff Attorney
217 E. Redwood St. - 11th Floor
Baltimore, MD 21202
(410) 333-4813

9/1960

CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 1994, a written notice of this appeal and a copy of this Response were mailed to John H. Edwards, 532 E 23rd Street, Balto, MD 21218 and to Apex Bottle Co Inc, 4200 Amos Ave, Balto, MD 21215.

Attorney

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 JAN 18 PM 1:19
CIVIL DIVISION

PETITION OF JOHN H EDWARDS *
(name and address)
532 EAST 23rd St, BALTO, MD 21218 *

FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS, DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, 1100 N. Eutaw St., Baltimore, MD. 21201 *

CIVIL ACTION NO. 94018024

IN THE CASE OF JOHN HENRY EDWARDS
532 EAST 23rd St, BALTIMORE MARYLAND 21218 *
(petitioner)

v. APEX BOTTLE CO, INC, 4200 AMOS AVE BALTO, MARYLAND 21215 *
(name of employer)

and BOARD OF APPEALS, DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, APPEAL NO. 9318652 . *

PETITION

1. Petitioner requests judicial review of decision no. 2131-BR-93 dated DEC. 20, 1993 of the Board of Appeals denying Petitioner unemployment insurance benefits.

2. Petitioner was a party to the above agency proceeding.

Respectfully submitted,

JOHN H EDWARDS (410) 467-2356

Petitioner
Telephone No.:

(SSN)
216-78-5796

532 E. 23rd St
Dec. 2/2/18

John Edwards *

v. * **Case No.** **94018024**
CL175061

DEED &
Apex Bottle Co., Inc. *

* * * * * * * * * * * * *

FAST TRACK: DEED
WORKSHEET
June 19, 1994

Attorneys:

PL: Pro Se
DF (DEED): Lynn Weiskittel
DF (Apex): Michele McDonald

Background Facts

DEED: Edwards was a truck driver and a warehouse worker (80% driving, 20% warehouse) for Apex between June 3, 1991, through June 8, 1993, paid at $7.25/hr. He was fired for excessive absenteeism. Because he was Apex's only driver, he had to be at work by 8:00 am each day. In March and April of 1993, he often would not appear at 8:00, later call in to report his tardiness, and would arrive within an hour of his call. He received written warnings of "further action" after each such morning. Claimant never presented evidence justifying the tardiness; to the contrary, he indicated that he "lost motivation" to come in on time when the company changed its bonus policies. He was fired on June 8, 1993, when he called in to say, "I guess I'm not going to make it in today," without presenting a credible reason. Edwards' conduct constitutes gross misconduct. The claims examiner's decision is therefore reversed.

Edwards: Every time I phoned in, I was told it was OK for me to come in late, so I did not pay much attention to the written warnings. This is the first job from which I have been fired, and I have had a hard time getting a job in the 10 months since being fired. I have lost my home and am behind on the bills; I want a chance to present my case.

Board: The Hearing Examiner's decision was supported by substantial credible evidence that Edwards' absenteeism constituted gross misconduct.

Sounds like simple misconduct; I have an opinion on gross misconduct.

MSAREF.NET, MSA SC 5458
An Archives of Maryland Publication

MSA SC 5458-82-150 -2

Dates: 1989-1994
Description: Circuit Court for Baltimore City, Cases # 94004032; 94018024

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Tracking No.: T -0

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System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
Programmed in *Microsoft SQL Server* and *Cold Fusion 7.0* by Nancy Bramucci.
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
Version 2.8.1