Employer did not meet its burden to prove materials handler was working under the influence of marijuana where the claimant denied using marijuana and the employer's drug test procedure was flawed. Since there was no evidence that the individual, collection facility, or lab was certified to administer drug tests, we do not know if they were qualified to do so. Since we do not know how the urine sample was shipped from the collection facility to the lab, we have no assurance that it was the claimant's urine that was tested.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

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BOARD OF REVIEW DECISION

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MEMBER

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to deny the claimant benefits following his separation from work. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant discharged from his position with the employer on February 18, 2009. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on April 16, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 1, 2009.

Benefits were denied after the review examiner determined that, based on a positive drug test result, the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified under G.L. c. 151A,
§ 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner for further subsidiary findings of fact from the record pertaining to the drug test procedures, chain of custody, and results. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the reported positive drug test result for the claimant was sufficient to prove that the claimant either violated the employer's drug policy or that the claimant engaged in deliberate misconduct in wilful disregard of the last chance agreement between the claimant and the employer.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked full-time for the employer from August 19, 1987 to February 18, 2009 as a Material Handler.

2. The employer is a paper product manufacturer/converter.

3. The employer discharged the claimant.

4. The employer had a policy since at least 1994, which stated, "Working [for the employer] under the influence of alcohol or other drugs other than those prescribed by your physician" is strictly forbidden and is grounds for immediate discharge…We also reserve the right to test at our discretion, employees involved in work related accidents or in other work place incidents for the presence of drugs or alcohol…If you report to work under the influence of alcoholic beverages or illegal drugs or substances, or use or distribute them while on the premises, you will be subject to immediate discharge... "If you are using medication under a doctor's orders, you must advise the company nurse and your immediate supervisor prior to reporting to work."

5. The purpose of the employer's policy was to ensure safety in the workplace.

6. The claimant most recently received the employer's policy on March 2, 1998.

7. The employer also had a specific expectation, the terms of which were stated in a last chance agreement; the claimant entered into the agreement, which was for an indefinite time period, on September 16, 2003; the claimant agreed to the following, in relevant part: "I agree when required by the Company and its Employee Assistance Program to submit to random substance abuse screenings for an indefinite period of time. I understand that refusal or failure to submit to an alcohol or drug test or a positive finding on such test shall be cause for immediate discharge from employment for failure to meet the requirements of the Company's Substance Abuse Policy. I understand and agree to these terms and conditions of employment." What led to the last chance agreement was that the claimant fell asleep on the clock on September 9, 2003 in violation of the policy.

8. The purpose of the employer's expectation was to ensure safety and the workplace and to mitigate any risk.

9. The claimant was aware of the expectation as of September 16, 2003.

10. The employer's policy was in existence since 1994 and in 1995, the claimant was involved in an accident, after which no post-accident drug screen took place.

11. As of January 2, 2009, possession of an ounce or less of marijuana or tetra9hydrocannabinol (THC) became a civil offense in Massachusetts, punishable by a civil penalty of $100.00 and forfeiture of the marijuana.

12. On February 18, 2009, the claimant caused damage to the roof of the trailer when operating a fork-truck, which he immediately and appropriately reported to his supervisor.

13. The claimant's supervisor investigated the incident and upon its conclusion, it was determined that the claimant should be sent to a drug screen per its post accident policy, but the claimant had already left for the day.

14. On February 19, 2009, the employer sent the claimant to a collection facility (named Concentra) to submit to drug and alcohol screening at approximately 9:00 a.m.

15. The claimant submitted to a breathalyzer (albeit untimely and ultimately negative) at 9:54 a.m. and provided a urine specimen by 10:30 a.m. (however, the date-time stamp on the test report indicated that the specimen was collected on February 19, 2009 at precisely 12:00:00 p.m.).

16. The certifications of the specimen collection facility and the individual taking the specimen into custody are unknown.

17. The claimant was placed on an unpaid suspension pending the outcome of the drug screen.

18. The specimen was sent to a laboratory (named Advanced Toxicology Network), which received the specimen on February 20, 2009.

19. The method of shipment and the certification of the laboratory are unknown.

20. On February 23, 2009, the specimen tested positive for marijuana, which was verified using gas chromatography/mass spectrometry; the report does not show the level of any substances and no evidence was presented to show standard levels of substances used as a basis for reporting a positive test result or that a person is under the influence of the drug.

21. It is unknown whether the Medical Review Officer contacted the claimant.

22. The positive results (non-DOT), which indicated the claimant's name and last four digits of his Social Security Number [XXXX], were reported to the employer the same day late in the afternoon.

23. On February 24, 2009, the employer terminated the claimant's employment.

24. The claimant denies marijuana use that led to the positive test result.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for...the period of unemployment next ensuing...after the individual has left work...(2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence...

In a discharge case, the employer bears the burden of proof to show that the claimant should be disqualified from receiving benefits. We consider whether the employer has met that burden to show either that the claimant was working under the influence of marijuana on February 18, 2009, or that he had marijuana in his urine when he submitted to a drug test on February 19, 2009.

Although it was undisputed that the claimant had an accident while operating a forklift on February 18, 2009, the only suggestion that it was caused by the claimant's use of marijuana or that the claimant had marijuana in his system on February 19, 2009, is by inference from the positive drug test results produced at the hearing. Therefore, we turn to the employer's drug test evidence.

Since there was no information provided to show that the individual, the collection facility, or the laboratory administering the claimant's drug test was certified, we do not know whether those responsible for administering the test were trained or qualified to do so. In fact, the collection facility recorded the wrong time that the claimant's urine specimen was provided. Because the employer did not show how the claimant's sample was shipped from the collection facility to the testing laboratory, we also have no assurance that this was his or someone else's

urine that was tested by mistake. When coupled with the claimant's outright denial of marijuana use, such unreliable evidence from a procedurally flawed drug test does not provide a sufficient basis upon which we can conclude that the claimant had marijuana in his system on February 19, 2009. *See* BR-109252-A (February 24, 2011) (procedurally deficient drug test results, standing alone, cannot prevail over claimant's denial of drug use).

Finally, even if we accepted the proposition, *arguendo*, that the drug testing procedures followed in this case were such that they resulted in reliable evidence of the presence of marijuana in the claimant's system, the employer did not show the level of marijuana substance present in the sample would cause the claimant to be under the influence at work on February 18, 2009. For this reason, the employer's drug test evidence is also insufficient to prove that the claimant was under the influence of marijuana on the date of his forklift accident.

Therefore, we conclude as a matter of law that the employer did not meet its burden to show that the claimant either violated its drug use policy or that he engaged in misconduct in wilful disregard of the last chance agreement, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 21, 2009, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - June 3, 2011

/s/

John A. King, Esq.
Chairman

/s/

Sandor J. Zapolin
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – July 5, 2011

AB/rh

Last Updated (Wednesday, 20 July 2011)