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Issue ID: 0002 1706 42

BOARD OF REVIEW DECISION

0002 1706 42 (Oct. 8, 2013) – Permitting a non-party's legal representative to introduce additional testimony and evidence was improper, but harmless, where it consumed less than two minutes in a 40-minute hearing and did not elicit any new material evidence.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on March 25, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 23, 2013. 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 May 23, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's discharge was attributable to deliberate misconduct, and therefore he 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 to make subsidiary findings of fact on the claimant's state of mind. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based upon our review of the entire record.

The claimant has challenged the reviews examiner's decision on both procedural and substantive grounds. Consequently, the issues on appeal are whether: (1) the review examiner engaged in improper procedure by allowing Counsel to directly examine an employer with "witness only" status; (2) the review examiner displayed bias towards the claimant in resolving matters of factual dispute; and, (3) the review examiner's conclusion – that the claimant is disqualified from benefits because he was discharged for deliberate misconduct by engaging in impermissible horseplay – is supported by substantial and credible evidence and free from error of law. We address these procedural and substantive issues in turn in the discussion that follows the Findings.

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 as a full-time Warehouseman with the employer's storage and loading business from April 28, 2012 until discharged from employment on March 25, 2013.

2. The claimant was discharged from employment for engaging in horseplay endangering a co-worker.

3. The employer has a published rule against horseplay endangering anyone. The claimant received the rule and signed for it on March 26, 2012. The claimant read the rule after he received it. It is not known whether prior violations occurred.

4. At the hearing of this case, the claimant testified to being aware that the employer's rule against horseplay was a safety measure, and to knowing that locking someone inside a trailer was not allowed by the employer for safety reasons.

5. On March 20, 2013 the claimant was scheduled to work from 4:00 pm to 10:30 pm. At 10:31 pm, the claimant intentionally locked a co-worker inside a trailer. At the time, the co-worker was running an electric forklift. The claimant then ran to the time clock and logged out at 10:32 p.m., leaving the co-worker locked in the trailer.

6. The claimant intentionally locked the co-worker in the trailer. At the hearing of this case, the claimant testified to telling a co-worker named Ivan to go get the claimant out of the trailer before leaving the workplace. Also, the co-worker attracted attention to his plight by ramming the inside of the trailer door with the forklift so that others, hearing the noise, might free him, damaging the employer's trailer in the process.

7. The co-worker had not provoked the claimant in any way.

8. The employer's Human Resources Manager discussed the incident with the claimant after his dismissal on March 27, 2013. The claimant got along well with the employer's Manager and Human Resources Manager. The claimant did not tell the employer's Human Resources Manager he locked the co-worker up in response to being called a "spic" by the co-worker.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact, except the references in findings 4, 5, 6, and 8 to the claimant having "locked" his co-worker in a trailer. That aspect of the findings is modified as discussed below. In adopting the remainder of the findings, we deem them to be supported by substantial and credible evidence. In accordance with our statutory

obligation, we analyze these findings to determine whether the review examiner's conclusion, that claimant is disqualified under G.L. c. 151A, § 25(e)(2), is free from error of law.

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 . . . [T]he 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 . . . .

We first address the matter identified by the claimant as an unlawful procedure. The employer had been designated "witness only" by virtue of a late submission of the DUA's request for wage and separation information. The "witness only" status at DUA hearings derives from the statutory provision that an employer who fails to return the wage and separation form within ten days loses its standing as an interested party to the dispute.[1] Only interested parties are afforded the standard due process rights to cross-examine witnesses and appeal from adverse decisions.[2] In these cases, the DUA invites the employer to participate in hearings as a witness, because the DUA recognizes that the employer has relevant information regarding the pertinent issues. The DUA's Notice of Hearing informs the parties that employers who attend with witness-only status are not sent copies of decisions, have no right of appeal, and may not object to evidence or cross-examine adverse witnesses. In this case, the review examiner articulated these restrictions at the outset of the hearing and did not permit the employer to object to evidence or cross-examine adverse witnesses. However, the review examiner invited the employer, through its attorney, to elicit additional information, including the introduction of additional exhibits, through direct examination of the employer witness. The claimant argues that this was a procedural error, and we are inclined to agree. Non-party witnesses in legal proceedings generally are not invited or permitted to introduce evidence beyond what the parties or the adjudicating officer have elicited.

In this case, however, the error was harmless, as a review of the recording by the Board members revealed that the questioning consumed less than two minutes of the approximately 40-minute hearing. It elicited no material evidence that had not been brought out in the examiner's prior questioning and/or elsewhere in the record. For example, the hearing officer had already elicited the employer's testimony that the claimant had not complained at the time of the incident or subsequently that he had closed the door on the co-worker because the co-worker had called him (the claimant) a "spic." The employer introduced an exhibit (Exhibit #16), the incident report prepared at the time of discharge, which simply replicated the witness' prior testimony in

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[1] "Failure without good cause to return said notice and information within the time provided in this section or prescribed by the commissioner shall bar the employing unit from being a party to further proceedings relating to the allowance of the claim. . ." G.L. c. 151A, §38(b).

[2] "If a hearing is so requested, the commissioner or his authorized representative, except when the alternative provided in subsection (d) is invoked, shall afford all interested parties a reasonable opportunity for a fair hearing before an impartial hearing officer designated by the commissioner." G.L. c. 151A, §39(b).

response to the examiner's questions. In addition, the claimant himself attempted to introduce the same exhibit (which reflected on its face that claimant had refused to sign it). Under these circumstances, the procedural flaw did not have any material effect on the examiner's findings or the disposition of the case.

We next address the claimant's assertion that the review examiner was biased against him in resolving disputed evidence.[3] The claimant testified that, before he was fired, he told the human resource manager and his supervisor that the co-worker called him a "spic," which provoked the claimant to close the trailer door and run away. The human resource manager denied that the claimant had made any mention of the racial slur at any time; and, if he had, the employer would have completed an investigation of the allegation prior to taking action against the claimant.

The resolution of conflicts in testimony is part of the fact-finding process in an administrative proceeding. Dowd v. Director of Division of Employment Sec., 390 Mass. 767, 770 (1984). At DUA hearings, where parties and witnesses are typically unrepresented, the review examiner is obligated to assist them in eliciting relevant testimony. In this case, the claimant argues error in the review examiner's questioning him about whether he knew of any reason that the human resources manager would lie about her conversation with the claimant after this incident. The review examiner asked the claimant about his relationships with his supervisor and the human resources manager, and the claimant indicated that he got along well with everyone. In the claimant's view, this line of questioning was grossly improper and demonstrates bias. We disagree. The claimant was unrepresented at the hearing, and the review examiner had an obligation to assist him in presenting his case, including helping the claimant by eliciting evidence on all relevant matters. When there is a direct conflict in testimony, motive to lie is relevant. In this case, the review examiner might well have elicited testimony that was helpful to the claimant. There was no error in this line of questioning.

Turning to the claimant's substantive arguments, the claimant emphasizes that the review examiner's multiple references to the claimant having "locked" the trailer door, rather than merely closing it, are not supported by the evidence. We agree with the claimant that the evidence does not support a finding that the claimant actually locked the trailer door so that it could not be opened from the inside. The employer did not testify that the door was "locked," but rather that the claimant had pulled the door down, leaving his co-worker operating a forklift in sudden darkness, and thereafter the co-worker crashed the forklift into the door, rendering it inoperable, so that other employees had to force the door open. The claimant adamantly testified that the door could have been opened from the inside, although he acknowledges that, after closing the door, he attempted to alert another co-worker to the plight of the co-worker inside the trailer. The review examiner's findings are modified to reflect that the trailer door was closed from the outside, leaving the co-worker in darkness and atop a forklift. This modification does not affect the outcome of the case, however since the employer discharged the claimant for the act of pulling the door down (Exhibit 13), the claimant admitted doing this, and we analyze the case on that basis. Closing the door on a co-worker under these circumstances violated the employer's safety-based expectations against dangerous horseplay that could harm persons or equipment, and, as discussed below, the claimant understood that at the time he engaged in the

[3] The claimant's appeal, which pre-dated the remand order, included an argument that the case should not be remanded to the same review examiner because of bias. Prior to issuing the remand order, we reviewed the record for any evidence that the review examiner harbored a bias against the claimant and we found none.

behavior. This satisfies the statutory requirements for disqualifying misconduct within the meaning of c.151A, §25(e)(2).

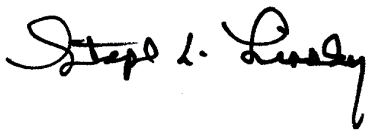
The claimant argues that the review examiner's original decision lacked adequate findings of fact on the claimant's state of mind. Although the decision touched on the claimant's state of mind, we remanded for additional findings on this point because, as the courts have repeatedly noted, the employee's state of mind at the time of the misconduct is the critical factual issue in considering whether an employee's alleged misconduct is in wilful disregard of his employer's interest. Jean v. Director of the Division of Employment Sec., 391 Mass. 206, 209 (1984), citing Torres v. Director of the Division of Employment Sec., 387 Mass. 776, 778-779 (1982). After remand, the review examiner's consolidated findings of fact leave no doubt on this point. The review examiner found that the claimant intentionally closed the trailer door while his co-worker was operating a forklift inside it, and that he knew that the employer would not tolerate this form of horseplay. The review examiner rejected the claimant's testimony that he closed the door in response to a racial slur. The review examiner's findings in these respects are supported by substantial evidence.

We, therefore, conclude as a matter of law that the claimant is not entitled to benefits, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending March 30, 2013, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 8, 2013

Paul T. Fitzgerald, Esq.
Chairman



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

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

LH/rh