0013 5701 21 (Apr. 27, 2015) – It was error for the review examiner to conclude that by the claimant accepting a Workers' Compensation lump sum settlement, it precluded the claimant from continuing to work for the employer as a matter of law, or that by signing the agreement, the claimant voluntarily ended the employment relationship. This is because the Massachusetts Appeals Court has ruled that the statutory presumption under G.L. c. 152, § 48(4) – that such employee is incapable of returning to work for the employer – is rebuttable.

**Board of Review**
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**Issue ID: 0013 5701 21**
**Claimant ID: 10248423**

# BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award 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 May 3, 2014. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 16, 2014. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial award of benefits in a decision rendered on October 20, 2014. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was precluded from returning to work for the employer pursuant to a settlement agreement with the employer's workers' compensation insurance company; therefore, he was not subject to disqualification, under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant was entitled to benefits, under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant's employment ended when the employer sent him a termination letter based upon his alleged failure to provide medical documentation to support a request for a leave of absence.

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 palletier for the employer, a manufacturer, from September 29, 2005 until May 5, 2014, earning $22.28 per hour.

2. The Wrapping Superintendent acted as the claimant's supervisor.

3. On February 11, 2012, the claimant broke his rib while working for the employer.

4. On February 12, 2012, the claimant and the employer's Vice President of Human Resources agreed the claimant would take medical leave as a result of his rib injury.

5. The claimant and the Vice President did not agree on a return to work date.

6. On February 14, 201[2], the Vice President sent the claimant Family Medical Leave Act ("FMLA") paperwork for his completion.

7. On February 28, 201[2], the claimant's physician completed the FMLA paperwork.

8. On February 29, 201[2], the claimant's FMLA paperwork was faxed to the employer.

9. From February 12, 201[2] through May 5, 2014, the claimant did not work for the employer due to his rib fracture.

10. By accepting a lump sum settlement it is presumed the claimant cannot return to work for the same employer from which the claimant received the settlement for a period of one month for each $1,500.00 of the settlement.

11. On May 5, 2014, the claimant and the employer's workers compensation insurer agreed to the claimant's receipt of a lump sum settlement payout of $62,500.00.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject the May 5, 2014 date as the claimant's end date of employment in finding of fact # 1. Based upon our analysis of the facts in this case, we conclude that the claimant's employment ended on May 3, 2014 with a termination letter. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979)

("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). We have also corrected a typographical error in findings of fact ## 6–9 to reflect the 2012 dates contained in the underlying documentary exhibits. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. While the review examiner's findings of fact support the conclusion that the claimant is eligible for benefits, we believe that his eligibility derives from G.L. c. 151A, § 25(e)(2), because he was discharged.

In light of the record before us, we analyze the claimant's separation under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . . (e) 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 . . . .

The review examiner concluded that the claimant was precluded from returning to work for the employer due to signing a Workers' Compensation Lump Sum Settlement Agreement ("lump sum agreement"). Exhibit 13 is the employer's one-page consent to the execution of an attached lump sum agreement between the employer's workers' compensation insurance carrier and the claimant. The attachment is not in evidence. Nonetheless, the existence of the underlying, executed lump sum agreement is corroborated by the claimant's answers to the DUA fact questionnaire. (See Exhibit 4, question 4a)[1]. Therefore, the reference to the lump sum agreement in finding of fact # 11 is supported.

In finding of fact # 10, the examiner refers to a legal presumption created when an employee accepts a lump sum agreement under the Workers' Compensation statute. G.L. c. 152, § 48(4) states, in relevant part, as follows:

> [T]he acceptance of any amount in return for the right to claim future weekly benefits shall create a presumption that the employee is physically incapable of returning to work with the employer where the alleged injury occurred. . . .

Based upon the presumption expressed in the above statutory provision, the examiner concluded that the lump sum agreement triggered the claimant's separation and that such a separation was voluntarily. This was an error. The statutory presumption that the employee is physically incapable of returning to work with the employer is not an absolute bar to the claimant's continued employment. In 2011, the Massachusetts Appeals Court held that the presumption, under G.L. c. 152, § 48(4), that an individual is unable to work for the employer in any capacity is rebuttable. Scott v. Encore Images, Inc. 80 Mass. App. Ct. 661, 667 (2011). Since the

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

existence of the lump sum agreement did not, as a matter of law, absolutely preclude the claimant from returning to work for the employer, it was wrong to conclude that signing the agreement, in and of itself, ended the employment relationship.

Notwithstanding this legal error, the record reveals that the claimant was discharged due to his purported failure to submit FMLA documentation. The employment relationship was severed by Exhibit 6, the employer's May 2, 2014 letter notifying the claimant that he had failed to submit any documents to support his 2012 request for a leave under the FMLA and further stating, "This is to inform you that you are being terminated from [Employer] as of May 3, 2014." However, the review examiner found that the claimant's physician had submitted the FMLA paperwork to the employer on February 29, 2012. See Exhibit 11.[2] From these facts, it is apparent that the claimant was discharged for misconduct, which he did not commit.

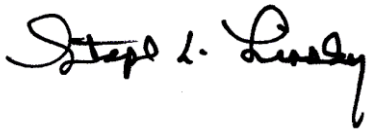
We, therefore, conclude as a matter of law that the claimant may not be disqualified from receiving unemployment benefits, under G.L. c. 151A, § 25(e)(2), because he was discharged without evidence of misconduct.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning May 3, 2014, and for subsequent weeks if otherwise eligible. Because the record raises a question as to whether the claimant was able to work, an issue shall be opened for the DUA UI Policy and Performance Unit to determine whether the claimant has satisfied the eligibility requirements of G.L. c. 151A, § 24(b).



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - April 27, 2015**

Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

[2] Copies of the employer's termination letter and the FMLA paperwork, Exhibits 6 and 11, respectively, are also part of the unchallenged evidence in the record. *See* Bleich, 447 Mass. at 40, and Allen of Michigan, 64 Mass. App. Ct. at 371.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

AB/rh