0017 2240 72 (Sept. 28, 2016) – Notwithstanding the provisions of G.L. c. 94C, § 32L, the claimant commercial truck driver is disqualified from benefits under Olmeda, because he ingested marijuana even though he knew he was subject to random DOT drug testing and would lose his CDL and ability to perform his job if he failed such test. He was at fault for his own separation.

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Issue ID: 0017 2240 72
Claimant ID: 1486308

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 reverse.

The claimant was separated from his position with the employer on October 29, 2015. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 11, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 25, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged from his employment, but did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence about whether the claimant's job required a commercial driver's license (CDL) and whether he lost that license as a result of failing the drug test. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant's separation was not for disqualifying reasons is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand reflect that, as a result of having tested positive for marijuana during a random drug test required by the United States Department of Transportation (DOT), the claimant lost his CDL and the employer was required to remove him from his driving duty.

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 Commercial Vehicle Driver, for the employer, a Transportation Company, from February 17, 2015 until October 29, 2015, when he was discharged.

2. The claimant worked a full-time schedule.

3. The employer has a written policy pertaining to drug testing. The policy dictates that any employee who has a positive drug test on any controlled substances or refuses to take a drug test will result in automatic termination, without review.

4. The claimant received a copy of the policy at hire.

5. The employer requires all employees to pass a pre-employment drug test.

6. The employer also has in place random drug testing, post-accident drug testing, reasonable suspicion drug testing, as well as others.

7. The random drug testing is administered according to Department of Transportation ("DOT") regulations.

8. The claimant's job required him to have a Commercial Driver's License ("CDL").

9. DOT regulations require random drug testing, but do not require all employees with positive test results to be *terminated*.

10. DOT regulations require the employer to *remove* the claimant from his driving *duties* upon receiving a positive result from a drug test.

11. The claimant took several drug tests for the employer, including a pre-employment drug test and multiple randomly selected drug tests.

12. Prior to October 2015, all results from the claimant's drug tests were negative.

13. The claimant was informed by the employer on October 13, 2015, that he was randomly selected to take a drug test.

14. The claimant was not asked to take the drug test because of any type of reasonable suspicion that he was at work under the influence of alcohol or drugs.

15. The claimant complied with all employer requirements and took a drug test by providing a urine sample on October 13, 2015.

16. The claimant had a CDL at the time of the random drug test.

17. The results of the October 13, 2015 drug test were inconclusive.

18. The claimant was informed on October 23, 2015 that he was required to provide the employer with another urine sample because the results of the first drug test were too diluted.

19. On October 23, 2015, the claimant reported to Quest Diagnostics, a federally certified drug testing lab. The claimant provided the facility with a urine sample.

20. The claimant did not feel himself to be impaired in any way on October 23, 2015.

21. A federal drug testing custody and control form was generated for the claimant's drug test. The last time the claimant saw his urine sample was when he gave it to the lab's technician. The claimant signed the chain of custody form.

22. The employer provided the federal drug testing custody and control form to the review examiner and the claimant, which was subsequently entered as exhibit # 13 in the record.

23. The copy of the drug testing custody form provided for the hearing was very poor and mostly illegible.

24. The Medical Review Officer Report was completed on October 29, 2015 by the Medical Review Officer ("MRO"). The report indicated that the claimant tested positive for marijuana. The actual numeral result of the drug test is not known.

25. The MRO contacted the claimant and informed him that his drug test taken on October 23, 2015, came back positive for marijuana. The claimant denied consuming, smoking, or otherwise exposing himself to marijuana.

26. On October 29, 2015, the employer was notified of the claimant's positive drug test.

27. The claimant lost his CDL as a result of the positive drug test.

28. There are conditions by which the claimant's CDL could have been restored, but the employer is not sure what those conditions are.

29. On October 29, 2015, the employer called the claimant and informed him that he was being terminated for having a positive drug test for marijuana.

30. The claimant filed for unemployment benefits and received an effective date of October 18, 2015.

31. The claimant subsequently had a split test done on his urine sample from October 23, 2015, which came back positive for marijuana.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the claimant effectively caused his own unemployment and is, therefore, not entitled to benefits.

Before we can analyze the claimant's eligibility for benefits, we must first decide whether the claimant's separation was a discharge, as the review examiner viewed it, or instead a quit. Based upon longstanding precedent, we conclude, contrary to the review examiner, that this separation should be analyzed as a quit.

The claimant lost his job because he failed a random drug test required by federal DOT regulations, which automatically resulted in a suspension of the claimant's CDL, without which the employer could not permit him to perform commercial driving duties. Such duties were the claimant's principal responsibilities in this job. It is true, as the review examiner found (*see* Consolidated Findings ## 9 and 10), that the DOT regulations (49 C.F.R. Part 40 Section 40.23) do not require the employer to discharge the claimant in this situation, but those regulations do require the employer to remove the claimant from driving duties. Thus, once the claimant failed this federally mandated random drug test by testing positive for marijuana, it was not possible for the employer to assign him his normal duties[1] until such time as the claimant completed his CDL reinstatement requirements.

An employer in this situation is not required to find alternative duties for the employee, at least absent a collective bargaining agreement to that effect or a demonstrated practice of doing so. *See*, *e.g.*, Board of Review Decision 0002 4333 21 (September 12, 2014) (employer not required to accommodate the claimant's loss of his driver's license by assigning him to a truck driven by other employees or by reassigning him to office duties).[2] Nor is the employer required to maintain the employee on a leave of absence, paid or unpaid, at least without evidence that the

[1] In this case, essentially all of the claimant's normal duties required a CDL license. We are, therefore, not confronted with the issues that might arise if only a relatively small or infrequent portion of the claimant's duties required a CDL.

[2] Board of Review Decision 0002 4333 21 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

employer has done so for other employees in similar situations. Such accommodations may be laudable, but, for purposes of unemployment compensation liability, they are within the employer's discretion. In this case, it appears, there was no contract or practice constraining the employer's discretion, and the employer severed the claimant's employment once he was no longer legally able to perform his duties.

It is well settled that, where a claimant is separated after he loses a credential or status that is necessary for his job, his separation is analyzed as a quit pursuant to G.L. c. 151A, § 25(e) and (e)(1). *See* Rivard v. Dir. of Division of Employment Security, 387 Mass. 528, 528–29 (1982) ("[A] person who causes the statutory impediment that bars his employment leaves his employment 'voluntarily,' within the meaning of Section 25(e)(1) …."). In Rivard, the claimant was ineligible for benefits because he had failed to timely reimburse the employer's pension fund, which was a statutory prerequisite to his continued employment. *See also* Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985) (rescript opinion) (the claimant was ineligible because he had caused his own inability to get to work when he lost his driver's license); Board of Review Decision BR-124015 (January 28, 2013) (the claimant police matron was deemed to have quit when she became the subject of a restraining order, because the law enforcement employer could not permit her to work during the pendency of such an order); Board of Review Decision 0002 1450 85 (January 21, 2014) (the claimant, an Emergency Medical Technician (EMT), caused his own unemployment when he lost EMT privileges at 90% of the hospitals with which his employer contracted); Board of Review Decision 0014 6838 97 (February 23, 2015) (the claimant effectively quit his job when he refused to pay union dues, which were a lawful contractually-mandated condition of his employment); Board of Review Decision 0015 7052 69 (September 8, 2015) (the claimant dental assistant was responsible for her own unemployment when she failed to obtain a state-mandated license); Board of Review Decision 0002 4333 21 (September 12, 2014) (the claimant HVAC service technician deemed to have quit his job when he lost his driver's license, because his job required him to drive the employer's truck to job sites).[3]

Here, under the foregoing precedent, the claimant effectively caused his own separation when he lost the CDL that is required by state and federal law for him to perform his duties. Therefore, his qualification for benefits is governed by G.L. c. 151A, §§ 25(e) and (e)(1), which provide, in pertinent part:

> [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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The explicit language of the foregoing provision places the burden upon the claimant to establish that he left his job either for good cause attributable to the employer or for urgent, compelling,

[3] The above-cited Board of Review decisions are also unpublished, available upon request.

and necessitous reasons. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985). In this case, there is no suggestion that the employer did or failed to do something that gave the claimant a valid reason to quit his job. The focus, instead, is on whether the claimant can be said to have left his job for urgent, compelling, and necessitous reasons. In a case such as this one, where a claimant has become separated because he lost his license, the inquiry under this prong of the statute is whether the claimant can establish that he lost his license through no genuine fault of his own. *See, e.g.*, Board of Review Decision 0013 3020 04 (March 30, 2015) (the claimant truck driver was allowed benefits even though he lost his driver's license, because, owing to an eye injury, he was unable to obtain the necessary medical certificate to renew his license).[4]

Here, the claimant asserts that he did not ingest marijuana either actively or passively, and therefore, he implicitly argues that he was not at fault for failing the drug test. The review examiner found that the claimant denied ingesting the drug (Finding # 25), but she did not affirmatively find that, in fact, he had not ingested it. In her "conclusions and reasoning" section the review examiner commented, "[N]o evidence was presented that the claimant consciously engaged in behavior that he knew would result in … a positive drug test…." To the extent this comment implies that the employer was required to present evidence of marijuana use beyond the drug test results, the review examiner's reasoning is inconsistent with prior Board precedent. *See* Board of Review decision BR-109252 (February 24, 2011) (the employer meets its burden to establish the presence of prohibited drugs if it has followed DOT drug testing procedures and the test is positive). In this case, the employer followed DOT guidelines and protocols in subjecting the claimant to the drug test, and even the second "split" portion of the claimant's sample also tested positive for marijuana (Finding # 31). The claimant has not proffered any scientific or medical evidence that might explain a false positive on the test. Without any basis to question the results of the drug test in this case, which reflected the presence of marijuana in the claimant's system, we do not accept the claimant's assertion that he did not ingest marijuana.

The review examiner's analysis raises another issue of somewhat wider importance regarding the extent to which the claimant can be denied benefits. She found that the claimant believed himself to be unimpaired in any way at work on the date he was required to submit to the random drug test. (Finding # 20). She also concludes that "the claimant was not, in fact, affected by marijuana on October 23, 2015" and, therefore, did not engage in deliberate misconduct in wilful disregard of the employer's interests, within the meaning of G.L. c. 151A, § 25(e)(2). She notes that this outcome is "consistent with" G.L. c. 94C, § 32L (§ 32L), the relevant portion of which provides as follows:

> Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense . . . .
>
> Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for

[4] Board of Review Decision 0013 3020 04 is also unpublished, available upon request.

> possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance *including unemployment benefits* . . . .
>
> As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol *and having cannabinoids or cannabinoid metabolites in the urine*, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana . . . .

(Emphases added.)

Thus, the review examiner, viewing the claimant's separation as a discharge, concluded that §32L prevented the agency from disqualifying him, because his misconduct consisted solely of having marijuana metabolites in his urine, without any evidence of on-the-job impairment or use. Although we have determined that the claimant's separation is more appropriately analyzed as a quit, § 32L raises a similar question about whether DUA may deny benefits to a claimant whose "fault" in losing his CDL rests upon the presence of metabolites in his urine, rather than any evidence of actual on-the-job use or impairment. Upon careful consideration, we do not think § 32L reaches that far.

Generally speaking, the "The provisions of [§ 32L] essentially make 'possession of one ounce or less of marijuana' not misconduct, for purposes of subsection 25(e)(2)." Board of Review Decision 0018 3168 60 (June 29, 2016) (a truck driver, who was discharged after testing positive for marijuana as part of the employer's routine protocol following work-related accidents, was allowed benefits, because there was no evidence that she was under the influence at work or that she had lost her driver's license). *See also* Board of Review Decision 0012 0048 01 (August 4, 2014) (forklift driver, who tested positive for marijuana after a work-related accident, was allowed benefits, because there was no evidence he was under the influence or impaired at the time of the accident and no evidence that he lost his license).[5] Thus, § 32L provides a safe haven for claimants who lose their jobs solely because they fail a drug test for marijuana. However, § 32L provides no such safe haven if the individual is discharged for violating a law or personnel policy that prohibits actions at work while "under the influence" of marijuana. This careful distinction between "possession" of marijuana in the form of metabolites and being "under the

[5] This general rule may have exceptions, as there could be jobs in which the mere possession at work or private use of marijuana is antithetical to the employer's fundamental interests. *See, e.g.*, Board of Review Decision 0014 7712 70 (May 12, 2016), at 7 n. 1, which discusses the possibility that § 32L might not provide a safe harbor for a claimant who has been discharged for possessing marijuana from a job at a homeless shelter serving many clients with drug abuse issues. The cited Board of Review decisions are also unpublished, available upon request.

influence" implicitly recognizes that an individual may test positive for marijuana without actually being impaired by the substance at the time of the test.[6]

In the present case, the record contains no evidence that the claimant was actually impaired or engaged in any other on-the-job misconduct related to his ingestion of marijuana. Nonetheless, we conclude that he was at fault for his own separation, despite the safe haven in § 32L for mere "possession" of marijuana. We note that, even though a positive test result does not necessarily indicate that a driver is under the influence of marijuana at the moment of the testing, the DOT's random drug testing protocols presumably are the most feasible currently available medical technology for assessing whether DOT-regulated drivers are clear-minded while on duty. The claimant was aware that the DOT required his employer to subject him to such random drug tests, that a positive result for marijuana in such a test would cost him his CDL, and that his employer could not lawfully allow him to perform his truck driving job without a CDL. Nonetheless, the unrefuted scientific evidence is that the claimant ingested marijuana, even though it cannot be known whether or not he did so while on duty. Such ingestion is presumably voluntary and deliberate, and nothing in this record would defeat that presumption here. Thus the claimant was not separated solely because he possessed marijuana (in metabolite form), within the meaning of § 32L, but because federal law prohibited such "possession," which, when discovered through mandated random drug testing, automatically cost him his license and his ability to perform his job. Nothing in the language of § 32L suggests a legislative intent to limit the regulatory authority of the federal government over interstate transportation. Thus, notwithstanding § 32L, we conclude that the claimant was at fault for his own separation.

We, therefore, conclude as a matter of law that the claimant voluntary separated from his job, without good cause attributable to the employer or urgent, compelling, or necessitous reasons, within the meaning of G.L. c. 151A. §§ 25(e) and (e)(1), by losing his CDL after failing a federally mandated random drug test, which required his employer to remove him from his duties.

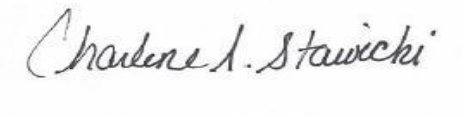
[6] Tests such as that administered to the claimant are well-known to detect metabolites of cannabis for days, if not weeks, after consumption. *See* National Drug Court Institute, The Marijuana Detection Window, http://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 18, 2015, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

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.

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.

JN/rh