

0018 3168 60 (July 29, 2016) – Claimant, who tested positive for marijuana, is not disqualified from receiving benefits in light of G.L. c. 94C, § 32L. She was not under the influence of drugs while working, she was injured accidentally performing her job duties, and she was not subject to federal Department of Transportation rules and regulations.

Board of Review
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Issue ID: 0018 3168 60
Claimant ID: 167685

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 her position with the employer on March 15, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 30, 2016. 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 April 30, 2016.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 accepted the employer's application for review and remanded the case to the review examiner to take additional evidence as to whether the claimant's position was governed by federal regulations and whether the claimant was required to have a commercial driver's license for her position. Both parties 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 is not subject to disqualification, under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant used less than one ounce of marijuana on March 5, 2016, she was not under the influence of drugs or alcohol while working on March 7, 2016, she was asked to take a drug test after injuring herself at work on March 7, 2016, and the test came back positive for marijuana.

Findings of Fact

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

1. The claimant worked as a full-time commercial driver for the employer, an automotive parts retailer, between August 2015 and 03/15/2016, when she separated.
2. The claimant's direct supervisor was the store manager.
3. The claimant operated a Nissan Versa and a Nissan Frontier when she made parts deliveries for the employer.
4. The employer did not require the claimant to have a commercial driver's license ("CDL") to do her job duties. Though not required, the claimant had a CDL.
5. The employer had a Drug and Alcohol Policy ("the policy") requiring employees to "submit to a **breath alcohol test and urine drug screen** immediately after a work-related injury, inside or outside the store, that requires medical attention." Per the policy, "[a]n employee who tests positive is immediately terminated...." The purpose of the policy was to maintain a safe work environment. The claimant electronically acknowledged the code of conduct containing the policy on 08/10/2015.
6. It is unknown whether the employer has the policy in place, in part, to comply with the federal Department of Transportation regulations relating to the use of drugs by workers who have CDLs.
7. The employer expected employees not to test positive for drugs or alcohol when tested following a work-related injury. The purpose of this expectation was to maintain a safe work environment. This expectation was communicated to the claimant through the policy.
8. On 03/05/2016, the claimant used less than one (1) ounce of marijuana out of the workplace because it was her birthday.
9. On 03/07/2016, the claimant was working. While delivering parts to a client, an oil pump accidentally fell out of the box and hit the claimant's hand.
10. The claimant was not under the effects of marijuana during her shift on 03/07/2016.
11. After delivering the parts, the claimant returned to the employer's store and her hand was swollen.
12. At this time, the employer learned of the claimant's hand injury. A member of management instructed the claimant that she had to participate in a drug

- screen and that when she was finished at the emergency room she had to return to work and pick up paperwork necessary for the drug screen.
13. The claimant left her shift early and went to a local emergency room to seek medical treatment for her hand. The claimant's hand was sprained.
 14. After going to the emergency room, the claimant returned to work and picked up the paperwork necessary for the drug screen. The claimant then participated in a non-DOT urine drug screen on 03/07/2016 at [Medical Center A] in [City A], Massachusetts.
 15. A woman with an unknown title took the claimant's urine sample. The woman dropped the claimant's urine sample on the floor and required the claimant to provide a second sample, which she did. The claimant watched the woman seal the second sample in one container; a split sample was not taken.
 16. The employer subjected the claimant to this urine drug screen solely because she sustained a work-related injury for which she sought medical attention.
 17. On 03/10/2016, the claimant learned that the drug screen results were positive for marijuana and informed the store manager of such.
 18. The claimant was not offered a re-test and did not request a re-test.
 19. The claimant did not lose her CDL as a result of testing positive for marijuana in March 2016.
 20. The claimant worked on 03/11/2016 as a commercial driver.
 21. On 03/12/2016, the store manager informed the claimant that she could no longer work as a driver because of the drug screen results and that she could work in the store. The claimant did not want to work in the store because she had prior issues 1) assisting the public and 2) with another employee ("employee A") who worked in the store. The store manager informed the claimant that he was calling employee A into work early for coverage. The claimant said she was not working with employee A and left.
 22. The employer believed the claimant remained employed after 03/12/2016 and until her termination on 03/15/2016.
 23. On 03/15/2016, the district manager called the claimant and informed her that she was terminated for violating the policy by testing positive for marijuana.
 24. The claimant and employer completed fact finding materials for the DUA. Both the claimant and employer asserted in such materials that the claimant was discharged for the positive drug screen results.

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. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is not disqualified from receiving unemployment benefits, under G.L. c. 151A, § 25(e)(2).

There is no dispute that the claimant was discharged from her job as a driver after she tested positive for marijuana on March 7, 2016. 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 . . . (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

Under this section of law the employer has the burden to show that the claimant is not eligible to receive unemployment benefits.

Also relevant to this matter is G.L. c. 94C, § 32L, which provides, in pertinent part, 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 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* (Emphasis added.)

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 [sic] 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

In this case, the review examiner applied G.L. c. 94C, § 32L, and concluded that the claimant should not be subject to disqualification. We agree with that analysis.

The claimant was sent for a drug test on March 7, 2016, because she had been injured by an oil pump while making a delivery. The oil pump accidentally fell out of a box and hit her wrist. No evidence was presented to show that the claimant was under the influence of drugs or alcohol while working. *See* Consolidated Finding of Fact # 10. The drug test came back positive for marijuana, and the claimant admitted that she had used marijuana on March 5, 2016. *See* Consolidated Finding of Fact # 8. There is no dispute, therefore, that the claimant had some traces of marijuana in her system while she was working on March 7, 2016.

However, in order for benefits to be denied pursuant to G.L. c. 151A, § 25(e)(2), the claimant must have engaged in some misconduct. The provisions of G.L. c. 94C, § 32L essentially make “possession of one ounce or less of marijuana” not misconduct, for purposes of G.L. c. 151A, § 25(e)(2). This is so, because, under the law, possession of one ounce or less of marijuana, which is defined to include the presence of metabolites in the urine of an individual, “shall not provide a basis to deny an offender . . . unemployment benefits.”

The result would be different if the claimant was under the influence of drugs or alcohol while working.¹ The result may also have been different if the claimant’s drug screen resulted in the loss of a license she needed in order to perform her job duties. The purpose of our remand in this case was to ascertain if the claimant’s position was governed by Department of Transportation regulations under which the employer was required to relieve the claimant from duty. The review examiner has found that it was not. *See* Consolidated Findings of Fact ## 4 and 6.²

We, therefore, conclude as a matter of law that the review examiner’s decision that the claimant is not subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(2), is free from error of law and supported by substantial and credible evidence.

¹ G.L. c. 94C, §32L, provides, “[n]othing 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”

² Had the employer established that the claimant’s position was subject to a DOT regulation that required her termination from employment, we might have reached a different result, because a worker in a DOT-covered position must be removed from performing safety-sensitive work, including driving a large vehicle. *See, e.g.*, Board of Review Decision 0011 0555 53 (February 26, 2015), an unpublished decision, available upon request.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning March 14, 2016, and for subsequent weeks if otherwise eligible.



Judith M. Neumann, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – July 29, 2016



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, 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.

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.

SF/rh