Affirm denial of benefits under § 25(e)(2) where the claimant intentionally chose to remain out of work after being medically cleared to return. He did not establish any mitigating circumstances for failing to show up and at least inquire about changing the work environment, which may have caused his rash.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0016 3199 07

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Kristina Gasson, 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 May 5, 2015. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 12, 2015. 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 August 16, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that 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). 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 claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests is supported by substantial evidence and is free from error of law, where the claimant did not return to work after being medically cleared to do so, because he wanted the employer to call him about his safety concerns.

Findings of Fact

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

1. The claimant worked full-time as a machinist for the employer, a plastics manufacturer, from September 22, 2014 to May 5, 2015.

2. The claimant worked a fixed schedule of weekdays from 7:00 a.m. to 3:30 p.m. and reported to his direct supervisor, the department manager. The claimant earned $20.00 per hour at the start of his employment, and was given a wage increase to $22.00 per hour on April 27, 2015.

3. The employer has an attendance policy in its company manual. On his date of hire on September 22, 2014, the claimant received the company manual.

4. The employer's attendance policy states that "You should contact your immediate supervisor or company staff member as soon as you know you will be unable to report to work (at least by the start of your shift) . . . If you are absent for more than one day, call every day and advise your supervisor of the anticipated length of your absence. If you are ill for three or more consecutive days, verify this with a doctor's statement or your absence will be counted as unexcused. An above average (two or more times in any given 180 day period) accumulation of unexcused absences will be cause for termination."

5. The employer has an expectation that employees should report to work as scheduled.

6. The purpose of this expectation is to ensure that the employer's staffing levels are met.

7. The claimant was informed by the employer that regular attendance at work was expected when he received the employer's attendance policy and when speaking with the VP about his absences from work.

8. The claimant was absent from work due to a family emergency in mid-to-late April.

9. When the claimant [came] to work on April 27, 2015, the VP met with the claimant to give him a six-month performance review. The VP increased the claimant's rate of pay and informed him that regular attendance at work was expected as a condition of his employment.

10. From the beginning of his employment until approximately April 2015, the claimant worked as a manual machinist on a conventional machine. On or about April 2015, the claimant was transferred to the employer's frame department to work on a computer numerical control (CNC) machine. The claimant used a computer to control the employer's lathes and other machinery while using the CNC machine.

11. In the frame department, the claimant worked on a CNC machine which required a continuous flow of metalworking fluid to operate effectively. The claimant was in constant contact with the CIMSTAR 60C-HFP metalworking

fluid (coolant). The claimant did not have regular contact with coolants or metalworking fluids when operating the manual machine.

12. On Monday, May 4, 2015, the claimant began to develop a rash on his wrists and hands.

13. On Tuesday, May 5, 2015, the claimant completed his last physical day of work for the employer. On this date, the claimant noticed that the rash on his wrists and hands had worsened.

14. On Wednesday, May 6, 2015 at 6:40 a.m., the claimant called the employer's Vice President of Business Development (VP) and reported that would not be able to report to work as scheduled that day and planned to seek medical attention. The claimant told the VP that he had developed a rash on his hands and that he believed the coolant in the CNC machine could have caused the rash.

15. On May 6, 2015, the VP instructed the frame department manager to check the concentration of the levels of the coolant in the machine and to provide him with the material safety data sheets (MSDS) for the coolant. An MSDS listing the chemical components of the coolant and possible health risks is available at the employer's place of business.

16. Around this time, a sample of the coolant was tested and found to be within the product's recommended concentration levels.

17. It is unknown if the coolant caused the claimant's rash on his wrists and hands. Skin irritation is a listed side effect on the MDMS for the coolant.

18. On Thursday, May 7, 2015, the claimant visited a physician for medical treatment for the rash. The claimant was diagnosed with contact dermatitis and was prescribed a topical corticosteroid cream in order to manage the symptoms of the rash, which included itchiness and puffiness. The claimant was also prescribed steroid pills in order to treat the rash.

19. After his first doctor's appointment on May 7, 2015, the claimant called the employer and reported that he would not be able to return to work until he was medically cleared to return.

20. On Monday, May 11, 2015, the claimant called the VP at 6:15 a.m. to report that he would not be able to return to work until Wednesday, May 13, 2015.

21. On Wednesday, May 13, 2015, the claimant called the VP at 6:10 a.m. to report that he was planning to see a physician for a follow-up appointment for his contact dermatitis and would be unable to report to work. During this conversation, the claimant informed the VP that the rash had healed and that he needed to take precautions to protect his hands from coolants. The VP

informed the claimant that he needed to get a doctor's note to excuse his recent absences from work and that he was expected to return to work if his rash healed.

22. On May 13, 2015, the claimant visited the physician for a follow-up appointment for his contact dermatitis. At this time, the symptoms of the contact dermatitis had subsided as the puffiness of the rash disappeared and the itching stopped. The claimant was medically cleared to return to work as of this date. The claimant faxed the doctor's note to the employer.

23. During the week ending May 9, 2015, the claimant was absent on May 6, 7, and 8 due to his ongoing medical condition (contact dermatitis).

24. During the week ending May 16, 2015, the claimant was absent on May 11 and 12 due to his ongoing medical condition (contact dermatitis) and on May 13 due to a follow-up medical appointment. Despite being medically cleared to return to work after his doctor's appointment on May 13, 2015, the claimant remained out of work on both May 14 and 15.

25. On Thursday, May 14, 2015, the claimant called the VP and left a voicemail message stating that he would not report to work that day. The claimant did not want to come into work because he was concerned about working with the coolant and developing another rash.

26. On Friday, May 15, 2015, the claimant called the VP and left a voicemail message stating that he would not report to work that day. The claimant was considering quitting his position but did not inform the employer that he was thinking about leaving work due to his belief that the coolant caused his rash or about workplace safety conditions. The claimant did not mind if the employer terminated his employment after this date because he was unsure if he wanted to return to work for the employer.

27. The claimant was upset that the employer had not contacted him to discuss the MDMS for the coolant and decided not to report to work for that reason. The claimant was physically able to report to work on both May 14 and 15, and knew that he was expected to report to work on these dates.

28. On Monday, May 18, 2015, the VP called the claimant and notified him that he was discharged from his employment. The VP discharged the claimant for unexcused absenteeism for failing to report to work as scheduled on May 14 and 15 after he was cleared to return to work by his physician as of May 13.

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 findings of fact, with the exception of findings of fact # 21, which refers to a "conversation" between the claimant and the employer regarding the claimant's attendance and states that, in such conversation, the employer informed the claimant that he needed a doctor's note to return to work and that he was expected to return to work if his rash healed. This finding is not supported by the record, as both parties testified that no such conversation had occurred. Both the claimant and the employer testified that they never spoke directly with each other during the period of the claimant's absence from work, until May 18, 2015, when the employer called the claimant and discharged him. There is no evidence in the record that the purported conversation ever happened. In adopting the remaining findings, we deem 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 disqualified from receiving unemployment benefits, under G.L. c. 151A, § 25(e)(2).

The review examiner analyzed the claimant's qualification for benefits under G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 . . . .

Under the foregoing statute, it is the employer's burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

In this case, the findings of fact establish that, after several months of working on a particular machine, the employer transferred the claimant to a different machine that required constant contact with a metal working chemical cooling fluid. After a few weeks, the claimant noticed a rash on his hands and wrists, which he attributed to his contact with the chemical coolant, which he suspected to be a hazardous substance. On May 6, after two days of the rash, the claimant called in absent, indicating that he was seeking medical attention for the rash. After his medical appointment on May 7, the claimant advised the employer that he could not return to work until he was medically cleared to do so. The claimant remained out of work, calling the employer and leaving messages that he would be absent. On May 13, 2015, after a follow-up appointment with his physician, the claimant faxed the employer a doctor's note which cleared him to return to work. The employer has an expectation that employees should report to work as scheduled, and the claimant was aware that the employer expected him to return to work after he was medically cleared to do so. Nonetheless, the claimant did not return to work on May 14 or 15. Instead, he called the employer, leaving messages that he would not report to work because he had concerns about the coolant and the employer had not responded to his messages about those concerns or his messages requesting the material safety data sheets (MSDS) for the chemical coolant.

There is no question that the claimant intentionally refused to comply with the employer's reasonable expectation that he return to work after being cleared for duty, and that he thus committed deliberate misconduct. However, it must also be shown that the claimant engaged in this misconduct with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97

(1979). In order to evaluate whether the claimant had the required state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id. In some circumstances, a reasonable safety concern may mitigate an employee's refusal to comply with an employer's expectation. Here, the claimant's concerns were reasonable, and, as the review examiner noted, those concerns may have been sufficient mitigation if the claimant had refused a direct order to work with the coolant without assurances that it was safe. However, the claimant had not spoken directly with the employer during his absence and had received no directive to work with the coolant. He had not requested a different assignment, such as a return to his previous machine, nor had the employer refused to discuss the safety issue with the claimant. Thus, there was no imminent safety issue, because the claimant was not being compelled to perform potentially unsafe work. Instead, the claimant refused to come to work. Merely showing up at the factory even if only to discuss and potentially resolve his safety concerns would not have endangered the claimant. The claimant's misconduct, therefore, was an unreasonable insistence that the employer address his concerns before the claimant would return to work, and the record suggests no mitigating circumstances for such a refusal to return to work.

We, therefore, conclude as a matter of law that the claimant's discharge is attributable to deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending May 21, 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 - February 23, 2017

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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.

SPE/rh