

Small business owner did not show urgent, compelling, and necessitous reasons for closing his business and putting himself out of work. Only after he decided to layoff workers and sell all of the assets did the company show lost income and profits. There was also no evidence that the claimant's various medical conditions created an urgent need to end his employment.

**Board of Review
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Issue ID: 0018 6978 04

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Heidi Saraiva, 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 separated from his position with the employer on April 30, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 16, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 31, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 obtain further evidence about the claimant's reason(s) for closing his business and ending his employment. Only the claimant 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 decision to close his own business was not for urgent, compelling, and necessitous financial or health reasons is supported by substantial and credible evidence and is free from error of law.

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 full time as a manager for the employer, a masonry and landscape supply store, from 1970 until April 30, 2016.
2. The claimant's father started the business.
3. The claimant was the corporation president, treasurer, secretary and director of the employer's business.
4. The claimant held 51% of the shares in the corporation.
5. The claimant's sister held 49% of the shares in the corporation.
6. The land that the business was situated on was owned by a trust. The claimant, his sister and his brother were all beneficiaries of the trust. There was a house on the property. The land consisted of two parcels.
7. The claimant's business paid the trust to operate from the building.
8. The trust did not have ownership in the business.
9. The claimant's mother resided in the house on the property prior to her passing.
10. The trust paid the utility bills for the house and the business.
11. The claimant's brother has resided in Texas for many years.
12. The claimant's sister resided with her children at a home she owned in [Town A], Massachusetts.
13. The claimant's sister's son (the son) worked for the business. Sometime around the year 2010 or 2011, the son stole money and inventory from the business due to a drug problem. The son admitted to the theft and went to rehab. After rehab, the son returned to work for the business.
14. In approximately the year 2014, the son stole money and inventory from the business. The son admitted to the theft, but denied having a drug problem. The claimant's sister suggested her son continue to work for the business. The son continued to work for the business for approximately one to two months. The claimant fired the son.
15. The son's termination of employment caused conflict between the claimant and his sister.
16. After their mother passed, the claimant's sister and her children moved into the house on the property and refused to pay rent.

17. The claimant objected to his sister moving into the house and not paying rent because it was a financial loss to the trust.
18. The claimant's sister's refusal to pay rent caused conflict between the claimant and his sister.
19. The business's office was located in the living room in the house.
20. The claimant's sister would not allow the claimant access to the house.
21. The claimant's sister physically assaulted the claimant.
22. The claimant obtained a restraining order against his sister.
23. The claimant had to move the business's office into the flag store portion of the building.
24. The claimant's lawyer advised him it could take 6 months to have his sister evicted from the house.
25. The claimant contemplated moving the business to another location, but the cost to move the materials was exorbitant.
26. The claimant inquired of a loan from his Banker.
27. The Banker told the claimant he would not be a "good candidate" for a business loan because he had been behind in payments to creditors.
28. Sometime between the years 2014 and 2015, the claimant's accountant told him the business was in financial trouble.
29. The increase of large store chain locations which sold masonry supplies reduced the business's customer base.
30. Over the last few years the business was operational, the claimant laid off several employees due to a lack of work. Prior to the years 2011 & 2012, the business employed a maximum of eight employees.
31. As of early spring 2015, the claimant laid off all but one employee.
32. Each time the claimant laid off an employee, he was required to perform his/her work duties. The employees swept, stocked inventory, unloaded trucks, manufactured bird baths, installed flagpoles, worked as customer service associates, etc.
33. The claimant worked 7 days a week.

34. The claimant has a prescription for a steroid inhaler due to excessive exposure to cement dust.
35. Approximately 10 years ago, the claimant underwent hydro seal surgery to remove pockets of water in his testicle which was caused from heavy lifting.
36. Several years ago, the claimant was diagnosed with gout. Gout causes swelling and massive pain in the big toe. The claimant is unable to walk for a couple of days when he has a flare up once or twice a year.
37. In the year 2009 or 2010, the claimant was diagnosed with varicose veins and cellulitis which became acute in 2014. The condition is caused from heavy lifting and walking on cement. In 2015, the claimant was instructed to use a compression sock which provided him relief for approximately 6 months. The claimant requires surgery which was scheduled for late May 2017. The condition causes the legs to swell due to a lack of circulation in the lower extremities.
38. In the year 2012, the claimant was diagnosed with umbilical hernia caused by heavy lifting. This condition causes the intestinal walls to push through the muscle. The claimant underwent surgery to patch the muscle tissue. The physician instructed the claimant to refrain from any heavy lifting in the future.
39. For years the claimant has had chest strains, muscle strains and back problems from heavy lifting.
40. The claimant started having an issue with his rotator cuff in the year 2012. The claimant experienced pain in his shoulder. In the year 2013, the claimant's condition exacerbated. The claimant was unable to lift his arm past his shoulder. The claimant's physician suggested the claimant attend physical therapy. The claimant was unable to attend therapy until after he stopped work because he worked 7 days a week. The claimant's first scheduled day of physical therapy was on January [8], 2016, when he had stroke.
41. On January 8, 2016, the claimant had a stroke. The claimant's neurologist told the claimant he had several strokes in the past. The stroke caused memory loss, loss of concentration, an inability to pronounce words and headaches. The claimant has experienced these symptoms since the year 2014 or 2015.
42. During the 2nd quarter of the year 2015 (April 1, 2015-June 30, 2015), the claimant was paid gross wages in the amount of \$18,167.77. During the 3rd quarter of the year 2015 (July 1, 2015-September 30, 2015), the claimant was paid gross wages in the amount of \$22,549.77. During the 4th quarter of the year 2015 (October 1, 2015-December 31, 2015), the claimant was paid gross wages in the amount of \$13,737.50. During the 1st quarter of the year 2016

- (January 1, 2016–March 31, 2016), the claimant was paid gross wages in the amount of \$9,000.00.
43. The employer's Profit & Loss statement for the period of October 2012 through September 2013 reflects a net income of \$2,140.00.
 44. The employer's Profit & Loss statement for the period of October 2013 through September 2014 reflects a net income of \$24,119.45.
 45. The employer's Profit & Loss statement for the period of October 2014 through September 2015 reflects a net income of \$39,478.90.
 46. The employer's U.S. Corporation Income Tax Return for the period of October 1, 2012 through September 30, 2013 reflects a net profit of \$6,632.00.
 47. The employer's U.S. Corporation Income Tax Return for the period of October 1, 2013 through September 30, 2014 reflects a net profit of \$24,892.00.
 48. The employer's U.S. Corporation Income Tax Return for the period of October 1, 2014 through September 30, 2015 reflects a net profit of \$39,908.00.
 49. The claimant's accountant created a two year comparison of the financial status of the business between the tax years 2013–2014 and 2014–2015. The document reflected the business had a net taxable income (profit) of \$39,908.00 in the 2013-2014 tax year and a net taxable loss in the amount of \$133,753.00 in the 2014-[2015] tax year.
 50. The employer's 8879-C form filed with the IRS for the tax period of October 1, 2015 to September 30, 2016 reflects a total income loss of \$44,947.00 and a total taxable loss of income of \$133,753.00.
 51. The business was scheduled to be dissolved at the end of the year 2016 when the accounting is complete.
 52. The claimant decided to close the business in November 2014 because of conflict between himself and his sister, medical reasons and financial reasons.
 53. The claimant's attorney advised him [that] he had the legal right to close the business and liquidate its assets without permission from the claimant's sister because the claimant was the majority shareholder.
 54. The claimant closed the business on September 28, 2015.

55. The two parcels of land were sold. One was sold in June 2015 and the other on September 28, 2015. One parcel of land was sold for approximately \$270,000 and the other parcel was sold for approximately \$200,000.
56. The claimant liquidated all of the assets of the business between November 2014 and September 2015. The claimant sold the assets for approximately \$70,000.00 to \$80,000.00.
57. The claimant paid his creditors with the proceeds from the sale of the assets of the business.
58. As of the date the business closed, the claimant still owed approximately \$2,000.00 to creditors.
59. Subsequent to the close of the business, the claimant has incurred legal expenses in the approximate amount of \$8,000.00.
60. The claimant was the only employee who worked for the business between September 29, 2015 and April 30, 2016. The claimant performed tasks in preparation of dissolving the corporation.
61. The claimant received a weekly paycheck from the business in the amount of \$1,000.00 through April 30, 2016.
62. The claimant received a weekly paycheck from the business since he began work for the corporation.

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 original 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 note that the portions of Consolidated Findings ## 40 and 41, which provide that on January 8, 2016, the claimant had a stroke, appear to be based upon the claimant's description of his medical episode and is not specifically supported by the medical records that he produced for the hearing.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

¹ Remand Exhibit # 11e-i, a hospital discharge summary for January 8, 2016, provides a diagnosis of "Facial droop," states, "NIH stroke scale is 0," and further states, "Patient suspected to have had a TIA." This medical record, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. 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).

The findings show that the claimant was employed by a closely held corporation in which he was the majority owner, the sole officer, and that it was his decision to close the business. Consolidated Findings ## 3, 4, and 52. Since he ended the company's operations, the claimant caused his own unemployment. His eligibility for benefits is governed by the following provisions under G.L. c. 151A, § 25(e)²:

[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.

Under this section of law, the burden is upon the claimant to show that he is entitled to benefits.

The purpose of the unemployment statute is to provide temporary relief to “persons who are out of work and unable to secure work through no fault of their own.” Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted). The Supreme Judicial Court's decision in Jahn v. Dir. of Division of Employment Security, 397 Mass. 61 (1986), is right on point. “Where a controlling shareholder of a closely held corporation voluntarily sells the very business in which he is employed, he has created his own unemployment and resulting disqualification.” Id. at 63. In Jahn, the court considered whether, notwithstanding the claimant's decision to end his employment, there were compelling personal reasons that may have rendered his departure involuntary. Id. (citations omitted). Specifically, the court considered whether the claimant had been compelled to sell the business for financial reasons. It concluded that he had not. Id. We note that because the court in Jahn found no compelling circumstances, there was no reason to consider whether the circumstances also created an urgent need for the claimant to end his employment.

In the present case, the claimant argues that the dual circumstances of the business losing money and his health problems created urgent, compelling, and necessitous reasons for ending his employment. We disagree.

The review examiner found that the claimant's decision to stop doing business was driven by three factors — financial, medical, and because of a conflict with his sister. Consolidated Finding # 52. The claimant had fired his nephew because he was stealing money, his sister moved into the premises where the company's office was located, she refused to pay rent, physically assaulted the claimant, and would not allow the claimant access to the premises until he obtained a restraining order. *See* Consolidated Findings ## 14–22. Meanwhile, large box stores were eating into his customer base and the claimant's accountant told him that the

² The original determination disqualified the claimant under G.L. c. 151A, §§ 29 and 1(r). The review examiner added G.L. c. 151A, § 25(e), during the original hearing. Any due process concerns raised in the claimant's appeal to the Board about the failure to provide the claimant with proper notice that this case would decide his eligibility under G.L. c. 151A, § 25(e), was cured through the remand process. Both the remand hearing notice and the content of the Board's remand questions provided such notice. We also note that during the remand hearing, the claimant was represented by counsel and afforded a full opportunity to present testimony and evidence.

business was in financial trouble. Consolidated Findings ## 28–29. The findings also indicate that the claimant had been experiencing numerous health ailments over the years due the nature of the work, which required heavy lifting. *See* Consolidated Findings ## 34–41. We do not doubt that the claimant had problems on a number of fronts. Nor do we question the wisdom of his decision to shut down the business. However, the evidence does not meet the standard for awarding benefits for urgent, compelling, and necessitous reasons.

The claimant made his decision to close the business in 2014. Consolidated Finding # 52. He then proceeded to do so gradually. In the spring of 2015, he laid off most of his workforce. Consolidated Findings ## 30 and 31. Between November, 2014 and September, 2015, he liquidated all of the assets. Consolidated Findings # 56. On September 28, 2015, he closed the doors and laid off his last other employee. Consolidated Findings ## 54 and 60. Over the next few months, the claimant performed only managerial tasks by winding down the business until he stopped working on April 30, 2015. Consolidated Findings ## 60 and 61. *See also* Remand Exhibit # 11b. Since he had laid off the workforce and sold all the assets, it is not surprising that the company experienced a net taxable loss during the 2014–2015 tax year (a period running from October, 2014 through September, 2015). Consolidated Finding # 49; *see also* Remand Exhibit # 4d.

Before the claimant made his decision to close the business, the company had been generating income and making a profit. *See* Consolidated Findings ## 43–48. Moreover, throughout this period, including after the company shut its doors on September 28, 2015, the business continued to pay the claimant a healthy salary of \$1,000 per week until April 30, 2016. Consolidated Findings ## 42, 61 and 62. It makes no difference that competing big box stores were reducing his customer base. The evidence shows that the company “remained both profitable and a source of significant personal compensation to [the claimant] . . . up to the time when he ended it.” Shuman v. Dir. of Division of Unemployment Assistance, No. 11-P-1498, 1012 WL 3154548 (Mass. App. Ct. Aug. 6, 2012), *summary decision pursuant to rule 1:28* (although there was evidence of adverse market conditions eroding his profit margin and suggesting a bleak future, evidence did not show that the business had reached a level of unprofitability to render claimant’s shut-down decision involuntary).

We do not believe the sister’s actions created an urgent or compelling reason to sell the business. Even if it took six months to evict her, the claimant was, apparently, still able to conduct business out of the flag store portion of the premises.

The claimant has further failed to show that any of his medical conditions created an urgent, compelling, or necessitous reason to leave work. Most of the health problems had arisen years before the claimant separated from work. *See* Consolidated Findings ## 34–40. There is no suggestion that any medical provider told him that he had to stop working, including following his most recent treatment for what the claimant described as a stroke. *See* Consolidated Finding # 41; *see also* Remand Exhibits # 11a–t. Moreover, the fact that he continued working for the employer over the years, despite these health problems, including the several months after the January stroke incident, belies the assertion that medical issues created a sudden urgency to end his employment.

In sum, this was a voluntary dissolution of the claimant's business made for financial and personal reasons, but not under urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e).

We, therefore, conclude as a matter of law that there was nothing compelling about the company's finances or urgent about the claimant's health condition to warrant awarding benefits under the urgent, compelling, and necessitous exception of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning May 1, 2016, 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 - August 31, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, 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.

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