Quality Control Inspector at precast concrete production plant, who asked for a respirator because he was routinely exposed to concrete dust, had good cause attributable to the employer to resign. The employer denied his requests, taking the position that the claimant's job did not entail dust exposure.

Board of Review
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Issue ID: 0019 7406 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, 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 reverse.

The claimant resigned from his position with the employer on September 9, 2016. He filed a claim for unemployment benefits with the DUA, effective September 11, 2016, which was denied in a determination issued on February 27, 2017. 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 May 12, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, he 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 make further subsidiary findings of fact pertaining to the claimant's working conditions and efforts to address his workplace complaint. Thereafter, the review examiner issued his 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 did not have good cause attributable to the employer to resign, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings show that the claimant was exposed to concrete dust as part of his regular duties and the employer denied his requests for a respirator.

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 for the employer, a precast concrete production plant, from June of 2013 to September 9, 2016 as a Quality Control Inspector.

2. In 2014 and 2015, the claimant took issue with the conditions of employment, namely that involving safety. The claimant raised concerns with Safety Officers and Management, to include observing others not wear a respirator during grinding operations, to which the employer responded that if he refused do his job, he should go home. The claimant feels that the employer did not resolve those issues satisfactorily.

3. The claimant did not file a complaint with the Occupational Safety and Health Administration at any time because he believed that a complaint to an outside agency would result in job loss.

4. The claimant believed that the employer learned of random OSHA inspections ahead of time and would temporarily come into compliance for the inspection. On one occasion, a supervisor directed scrap metal to be picked up because someone called OSHA.

5. Since 2014 and during the three months preceding the claimant's effective date of resignation, the claimant was assigned to conduct post-transport visual inspections of platforms at the [Location A], New York. The claimant had various assignments between the [Location A] and the employer's plant of differing frequencies and durations. At the [Location A], the claimant's job responsibilities included re-tapping holes, painting rebar, ensuring that trucks were loaded properly, and directing trucks.

6. The claimant also observed other employees grind concrete to ensure proper thickness.

7. The claimant inquired with a safety Officer, who opined that a vacuum or something should be used and that a report should be filed.

8. The claimant was exposed to concrete dust during grinding and sandblast operations and as trucks transporting concrete drove by.

9. The claimant was concerned with exposure to concrete dust, which he believed put him at risk of silicosis.

10. At various times, the claimant requested to be issued a respirator, which the employer denied. The employer's contention was that OSHA did not require the claimant to use a respirator because the claimant was not engaged in grinding.

11. The claimant's exposure to dust continued into August of 201[6].

12. In August of 2016, the claimant lodged no complaints with the employer.

13. At the end of August, the claimant informed his Manager that he is resigning to attend a diving and underwater welding school, after which his earnings potential will be much higher. The claimant stated that he would not be exposed to dust any more.

14. The claimant last physically worked on September 1, 2016 and took vacation time through September 9, 2016

15. The claimant began full-time training on September 6, 201[6], which lasted until March 20, 2017.

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. Consolidated Finding # 2 is misleading. The portion of the finding that refers to the claimant raising concerns about observing others not wearing a respirator is incomplete, as the claimant also raised concerns about himself not wearing a respirator. Additionally, the reference to the employer's response that the claimant could just go home if the claimant refused to do his job took place in or around the last month of the claimant's employment, not in 2014 or 2015.[1] The portion of Consolidated Finding # 3 that indicates that the claimant's fear of job loss was the reason he did not file a complaint with OSHA is unsupported. Rather, the claimant's explanation for not filing an OSHA complaint is set forth under Consolidated Finding #4. Consolidated Finding # 12 is also misleading, as the claimant provided undisputed testimony that he continued to verbally complain about not having a respirator to employer personnel in the last month of his employment. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Since the claimant resigned from his job, his eligibility for benefits is properly analyzed under G.L. c. 151A, § 25(e)(1), 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 (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 . . . .

[1] The claimant testified that the conversation, in which he was told to go home if he did not want to work without a respirator, took place around the last month of his employment. This testimony was not disputed by the employer. Since it is part of the unchallenged evidence introduced at the hearing and placed in the record, 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).

This provision of law expressly assigns the burden of proof to the claimant.

To determine if the claimant has carried his burden to show good cause under G.L. c. 151A, § 25(e)(1), we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief). The findings show that part of the claimant's regular job as a Quality Control Inspector required him to observe other employees grind concrete, and that he was exposed to concrete dust both at the employer's precast concrete production plant, as well as when he was assigned to the [Location A] during grinding and sandblast operations and when trucks transporting concrete drove by. *See* Consolidated Findings ## 6 and 8. On multiple occasions, the claimant asked for a respirator to avoid direct exposure to concrete dust, but the employer denied his request. Consolidated Finding # 10. His requests were driven by his concern about the risk of developing silicosis, a respiratory ailment, due to ongoing exposure. *See* Consolidated Finding # 9.

In rendering these findings, the review examiner implicitly rejected the testimony of the employer's senior manager in charge of safety, who suggested that the claimant was not exposed to concrete dust because, as a Quality Control Inspector, the claimant would only have to perform inspections after the grinding was completed and cleaned off. *See* Consolidated Finding # 10. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980).

General and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1). Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). However, unhealthy or unsafe working conditions do. Id. A claimant does not need to prove that the conditions actually caused a health problem, merely a reasonable belief that working conditions were putting his health at risk. *See* Carney Hospital v. Dir. of Division of Employment Security, 382 Mass. 691 (1981) (rescript opinion); *see also* Board of Review Decision 0015 9508 16 (May 24, 2016) (awarded benefits to claimant, who reasonably believed that fatigued and inexperienced crews using large volumes of chemicals at high temperatures and pressures put his well-being and that of his coworkers at risk); Board of Review Decision 0015 4034 71 (June 23, 2015) (employer, who repeatedly instructed the claimant to report for work in a coat and work in a frigid indoor retail work environment without an operable heating system, created good cause for claimant to resign). We are satisfied that the claimant's repeated exposure to concrete dust without the use of protective equipment created an unhealthy work environment and a reasonable workplace complaint.

In his original decision, the review examiner focused exclusively on the claimant's plan to attend school as his reason for leaving, because he had concluded that all of the claimant's safety issues took place in 2014 and 2015, issues that "were so far in the past that those issues are not seen as being the cause of his resignation…."[2] After carefully reviewing the evidence a second time, the review examiner found that the claimant's unprotected exposure to concrete dust took place at

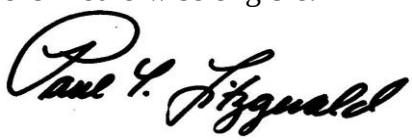
[2] *See* the Hearing Decision, entered into the record on remand as Remand Exhibit # 1.

both of his assigned job sites (see above) and that it continued into his last month of employment, August, 2016. *See* Consolidated Finding # 11. Additionally, Consolidated Finding # 13 now provides that, when the claimant told his supervisor he was resigning, he communicated that leaving meant he would not be exposed to dust anymore. Thus, the claimant's reasons for leaving his job included his ongoing health concern about the unhealthy working conditions.

The claimant also has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). The record shows that the claimant had been raising his safety concerns about his exposure to concrete dust, including asking for a respirator, on numerous occasions, to no avail. Most recently, in the final month of his employment, he was told that, if he did not like the working conditions, he could go home. *See* Consolidated Findings ## 2, 7, and 10, and note 1, *supra*. Under these circumstances, we conclude that the claimant made reasonable efforts to have his health concerns taken seriously, and that further attempts would have been futile.

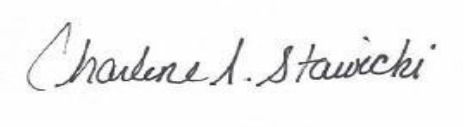
We, therefore, conclude as a matter of law that the claimant has met his burden to show that he left his employment for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 11, 2016, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - January 11, 2018

Paul T. Fitzgerald, Esq.
Chairman



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.

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