

The review examiner's consolidated findings of fact do not support disqualification pursuant to § 25(e)(2), where they indicate that each medical error allegedly made by the claimant did not occur at all or was an unintentional oversight.

**Board of Review
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Issue ID: 0020 0657 37

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 reverse.

The claimant was discharged from her position with the employer on October 28, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 26, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 19, 2017. 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). 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 allow the claimant an opportunity to testify and offer evidence. Both parties participated in the remand hearing, which was held over two dates. 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 discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law where, after remand, the consolidated findings of fact indicate that each instance of alleged misconduct either did not occur at all or was due to an unintentional oversight by the claimant.

Findings of Fact

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

1. The claimant worked full time as a patient care technician for the employer, an outpatient dialysis center, from September 22, 2014 until October 28, 2016, when she was discharged from employment.
2. The claimant worked a rotating schedule of day and evening shifts. She was paid \$15.31 per hour.
3. The claimant's immediate supervisor was the Clinical Manager.
4. The claimant was trained by a certified clinical chemo dialysis technician to perform her job duties.
5. On October 10, 2014, the claimant received training on initiation of treatment including assembling supplies, Heparin administration, connection of patient lines, adjusting the patient's blood flow rate to his/her prescription, calculating ultrafiltration rate and calculating saline replacement.
6. On January 9, 2015, the claimant received training on the proper procedure for initiation of treatment including ensuring catheter clamps are engaged prior to removal of catheter caps, saline flushing and the proper technique in drawing blood samples for the lab.
7. On January 15, 2015, the claimant received training on the proper procedure for termination of treatment including ensuring catheter clamps are engaged prior to removal of dialysis lines or saline flush syringes and the proper technique for replacing and securing caps post treatment.
8. The employer maintains a Procedure Manual in the Clinic Manager's office. The manual is used during trainings. During the beginning of the claimant's employment, she referenced the Procedure Manual when she was confused with her work. The Procedure Manual contains step by step instructions on the proper procedures for initiating treatment and terminating treatment.
9. The employer maintained an expectation the claimant would follow all safety procedures in performing her work to ensure the health and safety of its patients.
10. In May 2015, the Clinic Manager addressed concerns with the Human Resource office regarding the claimant making mistakes in her work.
11. On June 17, 2015, the employer issued the claimant a written warning for attendance reasons.
12. During the claimant's first annual review in September 2015, the employer spoke with the claimant about prescription errors.

13. During the claimant's second annual review in September 2016, the employer addressed with the claimant infection control procedures. The claimant had to be reminded to wear gloves when touching the patient(s) and to wear a face shield.
14. On October 26, 2015, the employer issued the claimant a written warning for leaving her work area without informing the Charge Nurse when three patients were ready to begin treatment.
15. On August 29, 2016, the employer issued the claimant a final written warning for refusal to perform an assigned work task.
16. The Clinic Manager gave the claimant information for the Employees' Assistance Program to discuss the claimant's personal issues that the claimant informed her of when the Clinic Manager spoke to her regarding a lack of focus when she performed her work.
17. Blood samples are not drawn for every patient. If an employee worked the morning shift, the blood sample order tubes should be hung on his/her workstation for any patients that require blood samples. If an employee worked the night shift, he/she were required to look through bins at the nurse's station to see if there were any blood sample orders for his/her patients.
18. On occasion, employees forgot to hang the blood sample order tubes on the workstations for the day staff.
19. On occasion, there would not be a blood sample order tube in the bin for a patient that needs his/her blood drawn during the evening shift.
20. The claimant drew blood samples for her patients, if there was a blood sample order tube for the patient at her workstation or in the bins at the nurse's station.
21. The claimant was trained to draw a patient's blood prior to initiation of treatment. If the blood is drawn after the initiation of treatment, the blood sample will be diluted with saline.
22. The claimant never drew a blood sample from a patient after she initiated treatment.
23. The claimant notified a Charge Nurse each time she forgot to draw a blood sample prior to initiating treatment.
24. On October 24, 2016, the claimant drew labs on two patients.
25. On a date subsequent to October 24, 2016, the Lab notified the Clinical Manager the blood samples were diluted with saline.

26. The claimant did not draw the blood samples after the initiation of treatment.
27. When the Clinic Manager discharged the claimant, she told the claimant two patients' blood samples drawn by the claimant were diluted with saline.
28. The claimant told the Clinic Manager she didn't draw blood samples after the initiation of treatment.
29. On October 20, 2016, the claimant did not perform blood draws on two patients, which had doctors' orders to draw labs.
30. The Clinic Manager did not ask the claimant the reason she didn't draw the blood.
31. Dialysis is the process of removing a patient's blood from his/her body, running the blood through a filtration system with saline and returning the cleaned blood to the patient's body.
32. The claimant is required to clamp the lines which draw the blood from the patient before she initiates treatment to prevent the saline from entering the patient's blood stream.
33. On October 24, 2016, a patient's saline line was not clamped before initiating treatment. The patient's blood was not pulled from his body. A half-liter of saline solution was put into the patient's blood stream. The dialysis sounded an alarm when the bag of saline ran dry and air was in the system. The Charge Nurse responded to the alarm and shut the system down.
34. Prior to initiating treatment of the patient on October 24, 2016, the Charge Nurse checked the patient's lines for the claimant to ensure they were connected and clamped properly.
35. After the claimant connected and clamped the lines, another employee administered medication to the patient via the patient's lines previously checked by the Charge Nurse.
36. On October 20, 2016, the claimant tended to a patient with a catheter in his chest. The catheter is a direct line to the heart. The catheter is accessed to draw blood and conduct dialysis treatment. The catheter is required to be capped at all times because it is prone to infection. There are two ports in the catheter.
37. After the claimant terminated the patient's treatment she did not cap the catheter ports.
38. The claimant took the patient's blood pressure with the ports uncapped.

39. The claimant covered the ports with gauze and walked a short distance to a cart to retrieve alcohol swabs to clean the iodine off the ports prior to capping them.
40. Other technicians have covered catheter ports with gauze while they retrieve supplies.
41. The Clinical Manager saw the patient's catheter ports uncapped and questioned the claimant about it.
42. The claimant told the Clinical Manager she was in the process of capping them.
43. The claimant capped the ports.
44. The claimant is required to clamp the dialysis lines before terminating treatment and removing the needle.
45. On October 14, 2016, the claimant forgot to clamp a patient's line before terminating her treatment. When the claimant removed the tubing, saline and the patient's blood sprayed on the patient's shirt, pants and chair she was seated in. The patient was startled and let out a yell. The claimant quickly clamped the line. The patient was saturated with saline and a mix of her blood.
46. On or about October 24, 2016, the patient made a complaint against the claimant to the Charge Nurse. The patient told the Charge Nurse her blood sprayed everywhere. The patient reported she was startled and let out a yell. She also reported the claimant told her to be quiet because she would get in trouble. The patient told the Charge Nurse she didn't feel safe being cared for by the claimant.
47. The claimant did not tell the patient to be quiet.
48. After the patient made the complaint to the Charge Nurse, the Clinic Manager began discussions with the Human Resources Department regarding discharging the claimant due to her work performance.
49. The Human Resource Representative instructed the Clinic Manager to question the claimant about the incident reported by the patient.
50. The claimant told the Clinic Manager she forgot to clamp the line and denied telling the patient to be quiet.
51. On October 24, 2016, the patient reported to the Charge Nurse that the claimant accused her of possibly getting the claimant fired. She also reported the claimant said she went home on October 14, 2016, overdosed on Xanax and punched the walls.
52. The claimant did not accuse the patient of possibly getting her fired.

53. The claimant did not tell the patient she went home overdosed on Xanax and punched walls.
54. After the Charge Nurse received the second complaint from the patient, the employer made the decision to terminate the claimant.
55. The employer did not question the claimant regarding the second complaint from the patient.
56. The employer discharged the claimant for not properly performing her job, which placed patients' health at risk.
57. The Clinic Manager told the claimant she was terminated because patients didn't feel comfortable in her care.

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 disagree with the review examiner's original conclusion that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, under G.L. c. 151A, § 25(e)(2). Rather, after remand, the consolidated findings establish that, in regards to each allegation, the misconduct did not actually occur or was not deliberate.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), 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 . . . (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 provision of the statute, the question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979). It is the employer's burden to establish that the claimant engaged in the alleged conduct, that such conduct violated either a written, uniformly enforced rule or a reasonable expectation so as to constitute misconduct, and that the claimant's actions were intentional. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996).

The employer maintained that the claimant was discharged for allegedly making five separate medical errors over the course of 10 days, as well as for allegedly making inappropriate comments to a patient after one of these errors. The claimant acknowledged knowing how to correctly perform all of the applicable procedures, but largely maintained that the events did not occur as the employer described them. The review examiner's findings of fact credit the claimant's testimony on all disputed points. While the review examiner did not explicitly prepare a separate credibility assessment, her credibility assessment is implicit in her findings of fact. *See Swansea Water District v. Dir. of Division of Unemployment Assistance*, No. 15-P-184, 2016 SL 873008 (Mass. App. Ct. Mar. 8, 2016), *summary decision pursuant to rule 1:28*. Unless the review examiner's findings are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence."). In this case, the claimant's testimony was consistent and logical, while the employer's witness was only present for one of the events in question. Thus, the review examiner's findings are eminently reasonable in relation to the record before us.

As an initial matter, the employer must establish that the misconduct in question actually occurred. The review examiner found that most of the alleged misconduct did not occur at all. The employer alleged that, on October 20, 2016, the claimant left a patient's chest catheter ports uncapped and exposed for an extended period of time, risking infection. The review examiner instead credited the claimant's testimony that she only left the ports uncapped while walking across the room to retrieve alcohol swabs in order to clean the ports, and that she left the ports covered with gauze while she did so. *See Consolidated Findings of Fact ## 39–43*. The employer alleged that, on October 24, 2016, the claimant drew blood samples from two patients after performing dialysis on the patients, which resulted in unusable blood samples that were diluted with saline. The review examiner instead credited the claimant's testimony that she never did this. *See Consolidated Finding of Fact # 22*. The employer alleged that, also on October 24, 2016, the claimant failed to clamp a line running between a patient and the dialysis machine before initiating treatment, which resulted in an excessive amount of saline entering the patient's blood stream. The review examiner instead credited the claimant's testimony that the lines were properly clamped, and that they were checked by a nurse prior to initiating treatment. *See Consolidated Finding of Fact # 34*. The review examiner also credited the claimant's suggestion that the error was likely made by a nurse who administered medication to the patient after the claimant clamped the line. *See Consolidated Finding of Fact # 35*. Finally, the employer alleged that, after making a medical error on October 14, 2016, the claimant told a patient to be quiet because she would get in trouble, and that she made further inappropriate comments to the patient after the patient complained about the claimant. The review examiner credited the claimant's testimony that she did not make any of the inappropriate comments alleged. *See Consolidated Findings of Fact ## 46–47 and 51–53*.

The review examiner's findings do indicate that two of the errors allegedly made by the claimant did in fact occur. However, the analysis does not end there. In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. *Grise v. Dir. of Division of Employment Security*, 393 Mass. 271, 275 (1984). Specifically, 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." Garfield, 377 Mass. at 97.

Specifically, the findings indicate that the claimant made an error on October 20, 2016, when the claimant did not draw blood from two patients for whom blood samples had been ordered. While the review examiner's findings do not indicate the claimant's state of mind as to this specific incident, the review examiner credited the claimant's general testimony as to the potential source of such errors. These findings indicate that the failure to obtain a blood sample could have been due to another employee failing to provide blood sample tubing, which was used to indicate that a blood sample needed to be drawn from a particular patient. *See Consolidated Findings of Fact ## 18–19*. In addition, the review examiner credited the claimant's testimony that she occasionally forgot to draw a blood sample that had been ordered but always notified the charge nurse when she discovered this. *See Consolidated Findings of Fact # 23*. It was also undisputed that, on October 24, 2016, the claimant failed to clamp a patient's line before detaching it from the dialysis machine. As a result, a mixture of saline and blood sprayed on the patient. The claimant acknowledged this error, but attributed it to momentary forgetfulness. Accordingly, the review examiner's findings state that the claimant "forgot" to clamp the line.

As the Supreme Judicial Court has stated, "[w]hen a worker is ill equipped for his job or has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield, *supra* at 97. In regards to these two errors, based on the review examiner's findings, the claimant's actions can be categorized as "a good faith lapse in judgment or attention" at worst. The employer did not suggest that the claimant intentionally failed to clamp the patient's line or that she intentionally failed to draw the ordered blood samples. The record contains no suggestion as to why the claimant would intentionally do either of these things.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending October 29, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 29, 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.

JRK/rh