

Employer proved that the claimant falsely entered into a scanning device that he had obtained the required signature for a delivery, writing “Garage” for the name of the person signing, and left the packages without getting a signature in wilful disregard of the employer’s interest.

**Board of Review
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Issue ID: 0021 1761 88

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Meghan Orio-Dunne, 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 January 13, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 13, 2017. 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 June 17, 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 provide the claimant with an opportunity to present evidence. 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 deliberately falsified an entry into his delivery scanning device in wilful disregard of the employer’s interest, 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 as a full-time delivery driver for the employer, a contractor for a large national delivery service, from August, 2016, until January 13, 2017.
2. Drivers were required to document all deliveries using a handheld scanner via a multistep process. The claimant was trained on the use of the scanner by the president of the business.
3. The scanner notified the driver whether or not each delivery required a signature.
4. Customers paid an additional fee for the security of requiring a signature, and deliveries requiring a signature were typically of greater monetary value. Failure of drivers to obtain signatures when required may result in financial loss to the customer or termination of the employer's contract with the national delivery service.
5. If a customer was not present to provide a required signature, it was expected that the package to be delivered would be returned to the employer's vehicle.
6. The employer had an expectation that all deliveries were accurately documented via the scanner to protect its own financial interests as well as those of its customers.
7. The claimant was aware of the employer's reasonable expectations.
8. In order to deliver a package requiring a signature, the driver must enter that a signature has been obtained, hit accept, and then manually type the name of the person who has signed for the delivery.
9. The process for documenting a delivery not requiring a signature differed in the number and type of beeps made by the scanner and the fields that must be entered by the driver. When scanning a delivery requiring a signature, a pop up window in which to obtain that signature appeared on the scanner.
10. On January 11, 2017, the claimant made a delivery of 2 packages to a commercial customer to whom he had delivered multiple packages on prior occasions.
11. All deliveries to this customer required a signature, including the January 11, 2017 delivery.
12. The claimant utilized the scanner to represent that a signature had been obtained by entering "yes" in the Signature Obtained field, and he manually typed "Garage" as the name of the person signing for the delivery.
13. No signature was obtained when the claimant delivered the packages.

14. On January 13, 2017, the nationwide delivery company requested that the employer verify the signature in question.
15. The company provided the employer with a report containing the date of the delivery in question, the ID of the driver who made the delivery, the service type (indicating signature was required), and confirmation that the driver indicated they had obtained a signature from Garage for each package.
16. The president visited the business to whom the delivery was addressed and was informed that no one had signed for a delivery on January 11, 2017.
17. The multistep process required to document a delivery either requiring or not requiring a signature, including the need to manually enter information, makes it nearly impossible [to] enter erroneous documentation unintentionally.
18. On January 13, 2017, the claimant was discharged for falsely representing that he had obtained a required signature on January 11, 2017.

CREDIBILITY ASSESSMENT:

The claimant did not dispute the employer's description of the manner in which the handheld scanner worked for deliveries requiring and not requiring signatures, and he acknowledged that all deliveries to the customer in question required a signature. He testified that he always obtained the necessary signature from this customer and did not falsify any such confirmations; however, the claimant could not recall making the delivery in question. The employer provided a report (Exhibit 5) documenting that, when making the delivery in question, the claimant indicated that he received a signature from Garage. He additionally testified that the customer denied signing for a delivery on January 11, 2017. Given the process for utilizing the scanner, it is unlikely that a driver could unknowingly indicate receiving a signature which they had not obtained, and it is also unlikely that the January 11, 2017 delivery was signed for by a G. Arage. The evidence and testimony presented by the employer is deemed more credible than that of the claimant.

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. 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 also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from his employment, his 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

Specifically, the review examiner based her decision upon the portion of G.L. c. 151A, § 25(e)(2), which disqualifies a claimant from receiving benefits where he has been fired for engaging in deliberate misconduct in wilful disregard of the employer's interest. The employer has the burden of proof. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In this case, the employer fired the claimant for falsifying a required signature that was needed for the delivery of two packages to a commercial establishment on January 11, 2017. Consolidated Finding # 18. In order to determine whether an employee's actions constitute deliberate misconduct under G.L. c. 151A, § 25(e)(2), 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). In order to evaluate the claimant's 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

The employer proved that the claimant was aware of the employer's expectation for delivering packages. He knew that, for certain types of deliveries, he had to obtain a signature when prompted by the scanner, and that if he could not get a signature, he was to return the package to the delivery truck. *See* Consolidated Findings ## 2, 3, and 5. It has also established that its expectation for the claimant to follow this procedure was reasonably related to requirements imposed by the national delivery service, with whom the employer had a contract.¹

At the hearing, the claimant denied falsifying any information and, as noted in the review examiner's credibility assessment, testified that he did not remember the delivery in question. The review examiner's consolidated findings show that she believed the employer's accusations. "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

¹ During the hearing, the employer explained that the national delivery company mandated the process for delivery of packages that required a signature and provided the scanning software. While not explicitly incorporated into the review examiner's findings, this testimony 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).

Employment Security, 382 Mass. 26, 31–32 (1980). Instead of obtaining a signature for the two packages on January 11, 2017, she found that the claimant falsely entered “yes” into the scanning device and typed “Garage” as the name of the individual who had signed for the delivery. Consolidated Findings # 12 and 13. These findings are supported by Exhibit # 5, a computer printout of the claimant’s delivery entries for the address and date in question, as well as the employer’s follow up with the business confirming that it had not signed for the packages. See Consolidated Finding # 16. Her credibility assessment is reasonable in relation to the record before her and is supported by substantial evidence. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

Because the claimant denied engaging in the alleged misconduct, he has not presented any evidence suggesting that there were mitigating circumstances that caused him to bypass the required signature.

We, therefore, conclude as a matter of law that the employer has met its burden to prove that the claimant engaged in 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 beginning January 21, 2017, 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 - November 22, 2017



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.

AB/rh