

**Claimant admittedly failed to complete his visual inspections to ensure that warehouse delivery trucks were empty before they left, but this was due to the unusually high volume of deliveries that day, and the fact that drivers just took off when he asked them to just pull forward. He tried to communicate that he had not completed the physical inspections in his reports, though his method showed poor judgment. He did not knowingly falsify reports and any failure to perform to the employer's expectation was due to mitigating circumstances.**

**Board of Review  
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**Issue ID: 0022 1121 22**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by Kathleen Della Penna, a review examiner of the Department of Unemployment Assistance (DUA), to award 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 June 11, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 14, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 4, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present evidence and to clarify the circumstances which led to the discharge. 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 did not intend to make a false entry or act in wilful disregard of the employer's interest in making a report about truck inspections 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 security officer for the instant employer, a food distribution warehouse, and he was employed from 1/14/2005 until his separation on 6/11/2017.
2. As a security officer, the claimant was trained and was aware that he was supposed to inspect each truck coming and going. The claimant had a list supplied by the instant employer informing him what the truck should contain. Typically, he was looking to ensure that only the number of boxes specified by the company were on the back of the truck and that all boxes had the company sticker.
3. On 4/5/2017, the claimant was issued a counseling for failing to properly inspect exiting carriers. At this counseling, the claimant admitted to not checking all of the carriers.
4. On the 5/30/2017, the day after Memorial Day, there were twice as many trucks than normal because the facility had been closed the day before. The trucks were backed up sitting on the railroad tracks and backed out to the highway.
5. The claimant was aware from his past experience that if the police observed the back up or the trucks on the tracks, the company would suffer a fine.
6. Back ups to the highway were a common occurrence at the facility.
7. On 5/30/2017, the claimant and one other security officer were inspecting the trucks. When the claimant's partner left for lunch, the claimant had trucks lined up waiting for inspection. While he was working on an in-bound truck, another truck rolled up to the window out-bound. The driver handed the claimant his paperwork and the claimant told the truck to pull up. The claimant could see through the guard shack window and the open back door of the truck that the truck was empty. The company paperwork also indicated the truck should be empty. The claimant let the truck go.
8. The claimant did not attempt to call the co-worker that left for lunch, because he knew he was off premises for lunch break and he never answered his phone on break.
9. When the claimant filled out his report, he did not believe that he falsified the report because he indicated that the truck was empty. He did not check off that it was verified because he believed that would be false information because he did not physically get up and go out to the truck.

10. The claimant believed that if he explained his decision to let the empty truck leave because he viewed the truck was empty that his supervisor would understand his decision based on the high rate of traffic.
11. The security manager and the facility manager reviewed a video of the claimant conducting his inspections on 5/30/2017 and viewed the claimant did not inspect 52 carriers and 32 personal vehicles during his shift.
12. On a number of occasions on 5/30/2017, the claimant failed to review the trucks because when he asked them to move forward while he did his inspection, the carrier took off. On these occasions, he would not check off that [sic] verified the back of the truck.
13. The company has an arm or gate that should be kept down until an inspection is completed to keep the vehicles from moving out before inspection. The claimant did not routinely keep the gate down because when he did he could not see into the back of the truck [sic] he would have to walk to the end of the truck to look in.
14. On 6/11/2017, the claimant's supervisor called the claimant into the office and informed him that he was being suspended because he was observed on video letting trucks pass without investigating the back of the trucks. The claimant tried to explain but he was not allowed to give an explanation.
15. While he was on suspension, he received a last check and all the personal time that he had accumulated and he knew at this point that he was terminated.

[CREDIBILITY ASSESSMENT:]

The claimant's belief that the company got rid of him in order to bring on their own security is not a reasonable belief in that the employer established there were numerous occasions on 5/30/2017 when he failed to perform the proper investigation and that is why he was terminated.

The examiner considered the employer's computer notes that state warnings were given to the claimant after the 4/5/2017 counseling, however, this was the employer's computer record [sic] no evidence was presented to establish that the claimant received the warnings. Under these circumstances the claimant's testimony, that he did not receive any warnings after the counseling, is considered credible testimony.

The employer failed to establish that a policy was violated. The information initially provided by the employer in the separation questionnaire indicated that the claimant falsified records and this was a policy in the employee handbook. The company supplied the Department of Unemployment Assistance (DUA) with pages from the Code of Conduct and marked a code which states: I will protect all of the Company's assets, including facilities and equipment, and help maintain

their value to the Company, in doing so; I will respect and honor the copyrights and other intellectual property of others, where applicable. No evidence was presented to establish a policy for falsification of records.

### 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 believe the consolidated findings after remand support the review examiner's legal conclusion that the claimant is eligible 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 . . . .

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Although there is no specific finding on point, the record as a whole establishes that the employer fired the claimant for letting trucks leave without fully inspecting them and then falsely reporting that they were empty. *See Consolidated Findings ## 9, 14, the credibility assessment, and Exhibit # 1.*<sup>1</sup> As noted by the review examiner, the employer's policy does not expressly prohibit falsifying records, though it does require employees to protect employer assets. *See Exhibit 2.* During the remand hearing, the employer presented a typewritten timeline of personal and commercial vehicles exiting the facility on May 30, 2017, which are purportedly captured in videotape in Remand Exhibit # 10A, as well as snapshots of the claimant's computer entries “Common Empty.” *See Remand Exhibit # 10.* The claimant did not dispute that he made those

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<sup>1</sup> Exhibit # 1 is the employer's completed DUA fact-finding questionnaire, which states that the claimant falsely claimed he had checked outbound trailers and entered into the computer that they were empty. During the remand hearing, the employer's Security Manager also testified that the claimant was fired for falsifying documents. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

entries or any of the video evidence showing that he did not complete inspections on a number of exiting vehicles.<sup>2</sup>

To be a knowing violation at the time of the act, the employee must have been “. . . consciously aware that the consequence of the act being committed was a violation of an employer’s reasonable rule or policy.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 813 (1996). Similarly, 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). 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 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. Id. at 95.

Arguably, failing to ensure that the exiting trucks are not driving away with the employer’s delivered goods is a failure to protect employer assets. It is self-evident that the employer would expect its employees to truthfully report whether the exiting trucks were empty. However, the claimant offered an explanation for what was shown on the video and his computer entries for that date.

As for the computer entries, Consolidated Findings ## 9 and 10 provide that the claimant did not believe at the time that he was falsifying his electronic report. The claimant reported that the truck was empty based upon a paperwork indicating that it should be and, in at least one instance, from observing the back of the truck from the guardhouse. He deliberately refrained from entering “verified empty” in order to indicate to the employer that he did not physically complete the inspection.<sup>3</sup> See Consolidated Findings ## 7 and 9. He was trying to accurately communicate what he did and did not do to the employer. The manner in which the claimant attempted to convey this message was, perhaps, not obvious. But, at most, it showed poor judgment. We cannot conclude that the claimant was consciously aware that he was violating any policy or that he was deliberately reporting false information. See Garfield, 377 Mass. at 97 (“When a worker . . . 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.”).

As for letting trucks leave without finishing his inspection, the record shows that the claimant understood that he was expected to physically ensure that each exiting truck was empty before letting it leave. He candidly acknowledged that there were times during the day on May 30,

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<sup>2</sup> The Board was unable to open and view the video recording that was shown during the remand hearing on the employer’s personal laptop computer and entered into the record as Remand Exhibit # 10A. However, the employer’s witness and the review examiner provided a narrative description of the portions of the video shown during the hearing. Since the videotape’s content was not in dispute, the Board does not consider its inability to directly review this one piece of evidence to be a material flaw in the record.

<sup>3</sup> During the remand hearing, the claimant explained that you are supposed to enter “verified empty” after a completed inspection. He further testified that he put “empty” and not “verified empty” because he believed the employer would understand this meant that he did not physically verify it.

2017, that he was unable to do so. May 30, 2017, was the day after Memorial Day and he and his coworker were very busy. There were twice as many trucks delivering goods to the employer's warehouse than normal because the employer's facility had been closed the day before, and the trucks were backed up to the highway and sitting on the railroad tracks. Consolidated Finding # 4. The claimant knew from experience that the police would fine the employer if trucks were backed up to the highway, particularly over the railroad tracks. Consolidated Findings ## 1 and 5. Under these circumstances, the claimant apparently took shortcuts in an effort to keep the trucks moving and to reduce the possibility that the police would fine the employer. In deciding to take these shortcuts, it again appears, at most, that the claimant was displaying poor judgment rather than deliberate and wilful misconduct. Id.

Thus, when his coworker left on a meal break and the claimant was by himself, he admittedly let a truck go based upon a visual inspection from the guard shack and underlying paperwork indicating it should be empty. *See* Consolidated Finding # 7. At other times during the day, a number of trucks were not physically inspected because, when the claimant asked the drivers to move forward so that he could see into the back of the truck, as they had done many times before<sup>4</sup>, they simply took off. *See* Consolidated Finding # 12. Simply put, the claimant's misconduct was neither deliberate, nor in wilful disregard of the employer's interest, but due to mitigating circumstances over which he had little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant knowingly violated its policy or 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 entitled to receive benefits for the week beginning June 11, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 29, 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)**

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<sup>4</sup> The claimant's testimony about drivers routinely moving forward at his request at other times was also part of the unchallenged evidence in the record.

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](http://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