Claimant, who took prescribed marijuana for a medical condition, was fired after a random drug test. Because the employer failed to prove that the claimant was in a federally designated safety-sensitive position that required termination upon failing a random drug test, it did not satisfy its burden to disqualify the claimant from receiving benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 his position with the employer on June 20, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 1, 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 November 14, 2017. We accepted the claimant's application for review.

Benefits were denied pursuant to G.L. c. 151A, § 25(e)(2), after the review examiner determined that the claimant violated the employer's policies by testing positive for marijuana, as a federally regulated employee in a safety-sensitive position. 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 clarify the nature and scope of the claimant's position with the employer. 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 decision, which concluded that the claimant is disqualified pursuant to G.L. c. 151A, § 25(e)(2), because he tested positive for marijuana while employed as a federally regulated employee in a safety sensitive position, 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 are set forth below in their entirety:

1. The claimant worked as a full-time "Technician T2" for the employer, a truck rental and maintenance company, between 04/29/2014 and 06/20/2017, when he separated.

2. The employer believed the claimant's position to be safety-sensitive and that the claimant was a "regulated employee" regulated by the Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA).

3. Per the employer, the claimant's DOT, FMCSA and Federal Transit Administration (FTA) job titles were "Technician T2."

4. The employer believed that regulations 49 C.F.R. Part 40, 49 C.F.R. Part 382, and 49 C.F.R. Part 665 stated the claimant's job was a safety sensitive position.

5. The claimant does not have a commercial driver's license.

6. Per the employer, the claimant was subject to a DOT annual physical for a minimal health profile with respect to hearing, vision, lifting, and diabetes. The claimant obtained a DOT medical card and maintained it on an annual basis.

7. The employer believed the claimant to be subject to random drug tests as a regulated employee.

8. The claimant participated in prior random drug tests for the employer. In approximately June or August 2014, the claimant informed his former senior service manager that he was using opiates for his medical conditions. Specifically, the claimant has a prescription for Percocet.

9. The claimant was using Percocet upon hire to help him manage his pain particularly when getting to sleep. The claimant was not using marijuana upon hire.

10. As an opiate, Percocet is addictive. Chronic use of Percocet can result in liver and heart damage. The claimant's doctor ("doctor") recommended the claimant eliminate any reliance on Percocet. The doctor recommended the claimant use alternatives to Percocet including marijuana.

11. The claimant used marijuana to try to sleep. This reduced the claimant's Percocet use from approximately forty (40) pills per month to nine (9) pills in three (3) months.

12. The claimant used marijuana one (1) to three (3) weeks before 06/15/2017.

13. Per the employer, the specific DOT, FMCSA and/or FTA regulations that state the claimant's job subject him to mandatory random drug testing is unknown.

14. The employer had an employee handbook ("handbook").

15. Page 72 of the handbook identifies the employer's "Drug and Alcohol Abuse" policy which applies to all employees at all locations in the United States. This policy identifies that "Employees subject to the [DOT] rules on drug and alcohol abuse (through regulations enforced by the [FMCSA] and/or the [FTA] must also comply with [the employer's] DOT-Regulated Workers' Drug and Alcohol Policy (No. 8.46)." This policy states the employer "will company [sic] fully with federal, state and local regulations on drug abuse and alcohol misuse. All candidates for employment must successfully complete drug screening, as a condition of employment with [the employer]. The illegal manufacture, distribution, dispensing, possession, sale or purchase of a controlled substance is prohibited at all times. Being under the influence of alcohol or having an illegal drug in your system, while on company property or while performing any work for [the employer] is prohibited. The unauthorized use or possession of prescription drugs or over-the-counter drugs on company property is also prohibited. A positive drug or alcohol test will be considered proof of a policy violation…. Employees who violate this policy are subject to disciplinary action, up to and including termination. Except where prohibited by law, termination is the presumed consequence of violating this policy."

16. The employer did not present a copy of the portion of its "Drug and Alcohol Abuse" policy stating the circumstances under which drug testing could be performed.

17. Per the employer, drug testing can be performed randomly or under reasonable suspicion of intoxication. At no point during the claimant's employment did the senior service manager have any suspicion of intoxication by the claimant in the workplace.

18. Page 81 of the handbook identifies that the employer's "Drug and Alcohol Abuse – Regulated Employees" policy "applies to any covered employee who performs what the FMCSA or [Federal Transit Administration] FTA have defined as safety-sensitive work on a commercial motor vehicle (FMCSA) or who operate or service a revenue service vehicle (FTA)…."

19. Page 81 of the handbook identifies the scope of the employer's "Drug and Alcohol Abuse – Regulated Employees" policy as "apply[ing] to all employees who perform safety sensitive functions as defined by the DOT, FMCSA and FTA. The regulations describing the DOT, FMCSA, and FTA drug and alcohol rules in detail are found at 49 C.F.R. Part 40, 49 C.F.R. Part 382, and 49 C.F.R. Part 665."

20. Page 81 and page 82 of the handbook identifies the employer's "Drug and Alcohol Abuse – Regulated Employees" policy stating, "The U.S. Department of Transportation…has adopted regulations requiring [the employer] to implement a drug and alcohol policy for the regulated workers it employs. The regulations include prohibitions on the use of drugs…[and] the prohibited use, sale, or possession of drugs…. In addition to the dot (sic) regulations [the employer] strictly prohibits the illegal possession…of controlled substances or intoxicants, in any amount, at any time, or in any manner, regardless of whether the individual is working on [the employer's] premises."

21. Page 82 of the handbook further states, "Please note that illegal drug use includes the use of prescription medicines not prescribed for the individual or not used as prescribed. Employees taking medication that impairs their ability to perform safety sensitive functions must notify their supervisor immediately. FMCSA regulated drivers must not use any drug, even by prescription, unless a physician has determined such use will not affect the driver's ability to perform work safely. Please note that the use of marijuana, including 'medical marijuana' violates both the FMCSA and FTA regulations and that the use of marijuana disqualifies an individual from holding a dot-regulated (sic) safety-sensitive position."

22. The penalty for violating the "Drug and Alcohol Abuse – Regulated Employees" policy is identified on page 82. Specifically, "Any covered employee who violates the DOT's regulations governing drug…use and testing will also be considered to be in violation of this policy…. Regulated employees in violation of this policy will be terminated from employment with [the employer] in addition to, and independent of, any sanction imposed by the DOT rules, except as may be limited by law or contract."

23. Page 121 of the handbook states, "The use of 'medical marijuana' and synthetic marijuana is prohibited by federal law and is also prohibited by this policy. [The employer] will not accommodate medical marijuana use unless affirmatively obligated to do so by law…. The use of prescription medication is prohibited when…the employee is a driver or operates machinery and the directions on the medication warn the user to avoid driving or operating machinery; and/or the medication is not approved in accordance with DOT regulations for use while on duty. For example, the use of methadone or marijuana always disqualifies a driver from performing DOT-regulated safety sensitive work. Prohibited use or distribution of prescription drugs will result in disciplinary action, up to and including termination."

24. The claimant electronically acknowledged receipt of the handbook on 04/22/2014. The claimant signed an acknowledgement of receipt of the handbook on 01/28/2016.

25. The claimant did not participate in the employer's training relating to drug use in the workplace. The claimant had access to the handbook.

26. The employer maintained a HR Operations policy number "HR 05.30.02 POL" relating to "Drug and Alcohol Abuse Regulated Employees" accessible on the employer's intranet site. This policy was effective 01/01/2018. Page 3 stated, "Any violation of this policy will result in: immediate removal from safety-sensitive functions, referral to a Substance Abuse Professional (SAP), possible disqualification from performing DOT regulated functions for any regulated employer; and/or disciplinary action, up to and including termination from…employment." Page 3 further stated, "employees are prohibited from using illegal drugs whether on duty or off duty. The use or possession of illegal drugs by any … employee will result in immediate termination from employment." Page 4 of this policy stated, "Remember that the use of marijuana for medical reasons, even as permitted by state law, is always prohibited by the FTA and FMCSA regulations and will disqualify an employee from performing any regulated safety-sensitive function."

27. The purpose of all of the employer's policies relating to drug possession was to ensure safety in the workplace.

28. The employer believed that HR operations policy number "HR 05.30.02 POL," page 82 of the handbook, and federal regulations 49 C.F.R. Part 40, 49 C.F.R. Part 382, and 49 C.F.R. Part 665 require that the employer remove the claimant from his position if he tests positive for marijuana.

29. The employer believed that 49 C.F.R. Part 382 and 49 C.F.R. Part 655 are the FMCSA and FTA regulations that state the use of medical marijuana disqualifies the individual from holding a DOT-regulated safety sensitive position.

30. The employer expected regulated employees not to test positive for drugs including marijuana.

31. The purpose of this expectation was to ensure safety in the workplace and compliance with DOT requirements.

32. This expectation was communicated to the claimant through the handbook.

33. The claimant worked third shift for the employer at the [City A] location between 10:30 p.m. and 7:30 a.m.

34. The claimant was dissatisfied with workplace practices in the [City A] location and intended to transfer from said location. The claimant requested a transfer to the employer's [City B] location.

35. By 06/15/2017, the claimant was still working at the [City A] location.

36. On 06/15/2017, the claimant worked until 7:30 a.m. The claimant was informed that he was selected for a random drug test. The claimant went home to rest following his shift and completed his random drug test between 12:00 p.m. and 2:00 p.m. on 06/15/2017.

37. The claimant provided a urine sample. The sample was positive for marijuana. The specific level of marijuana metabolites in the claimant's urine sample was not provided and is, therefore, unknown.

38. The claimant was notified about retesting the split portion of his urine sample. The claimant did not pursue this because a retest would be an out-of-pocket cost.

39. The positive results were communicated to the employer. The employer terminated the claimant on 06/20/2017 for violating the employer's policies by testing positive for marijuana as a regulated employee in a safety-sensitive position.

40. The employer maintains a "Functional Job Description" for the technician T2 position. At the time of termination, the claimant's job duties included repairing trucks, servicing trucks, performing preventive maintenance on trucks, conducting federal annual brake inspections on trucks, performing oil changes and follow up repairs on trucks, and other minor tasks. At times on the weekend, the claimant would be on-call for the employer to perform "road calls" where he would drive to examine trucks on the road, making repairs to said trucks as needed.

41. The employer maintains a document identifying on page 85 that "FMCSA Safety-Sensitive functions shall include: … All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle." This document further identifies FTA safety sensitive functions as "any time when an employee is performing or could be called upon to perform any of the following duties:… maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service."

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. However, as discussed more fully below, we disagree with the examiner's conclusion that the claimant is disqualified from receiving unemployment benefits pursuant to G.L. c. 151A, § 25(e)(2).

Because the claimant was discharged from employment, we analyze his eligibility for benefits under 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). In analyzing the claimant's eligibility for benefits under G.L. c. 151A, § 25(e)(2), the issue before us is not whether the employer was justified in terminating the claimant's employment, but whether the claimant's positive marijuana test is grounds for denying him unemployment benefits.

The federal government is steadfast in its position that all personnel that are subject to federal law may be mandated to remove employees from safety-sensitive positions upon a verified positive drug test. Thus, in regulations promulgated by the DOT, FMCSA and the FTA, such as the employer has alleged here, personnel who are defined as holding safety-sensitive positions with the employer may be subject to drug screens and removal from their position if the drug screen returns a positive result. Consequently, in the matter before us, the employer bears the evidentiary burden of establishing that relevant federal drug testing regulations apply to the claimant on the basis of the position he held with the employer.

At the initial hearing, the employer testified that, although the claimant did not possess a commercial driver's license (CDL), as a mechanic, he was in a safety-sensitive position that was regulated by the DOT, FMCSA and the Federal Transit Administration (FTA). The review examiner originally concluded that the claimant was disqualified under both the knowing violation and the deliberate misconduct prongs of G.L. c. 151A, § 25(e)(2), because the evidence showed that the claimant tested positive for marijuana after a random drug test was conducted pursuant to federal regulations governing his safety-sensitive position with the employer. Upon review, the Board remanded the case back to the review examiner to clarify the nature and scope of the claimant's position with the employer. In its remand order, the Board requested the employer produce evidence (including copies of the specific DOT, FMCSA and/or FTA regulations) establishing the following: 1) the claimant's position was safety-sensitive; 2) the claimant was subject to mandatory random drug screens; and, 3) if the drug screen came back positive, the employer was federally mandated to remove the claimant from his position. Following remand, the employer failed to make such a showing.

The record before us does not establish the claimant was in a safety-sensitive position or a regulated employee governed by DOT, FMCSA or FTA. The record indicates the claimant was

subject to random drug screens based solely on the employer's "belief" that he was a regulated employee, with nothing more to support its position. *See* Consolidated Findings ## 2–4, 6–7, 28–29. "Per the employer, the specific DOT, FMCSA and/or FTA regulations that state the claimant's job subject him to mandatory random drug testing is unknown." Consolidated Finding # 13. On this record, the employer has not shown that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of an employer rule or policy. Without any supporting evidence or findings that the claimant's job was governed by federal regulations, we are bound by the statutory enforcement of G.L. c. 94C, § 32L.

In 2008, the Legislature enacted G.L. c. 94C, § 32L, which provides, in pertinent part, as follows:

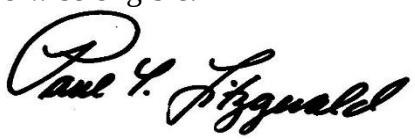
> Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense . . . .
>
> Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance *including unemployment benefits* . . . . (Emphasis added.)
>
> As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid [sic] metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana . . . .

Under G.L. c. 94C, § 32L, an employee is eligible for benefits if he has merely tested positive for marijuana. We note that this statute provides no such safe haven if the individual is discharged for violating a law or personnel policy that prohibits employees from working while "under the influence" of marijuana.[1] Here, this was never alleged by the employer. In fact, the review examiner found that "[a]t no point during the claimant's employment did the senior service manager have any suspicion of intoxication by the claimant in the workplace." Consolidated Finding # 17. Thus, to the extent that the claimant was terminated merely for failing a drug test and having marijuana metabolites in his system, G.L. c. 94C, § 32L, permits him to receive benefits.

[1] *See* Board of Review Decision 0012 0048 01 (Aug. 4, 2014) (a positive marijuana test following a forklift accident was not disqualifying in light of G.L. c. 94C, § 32L, and because there was no indication that the claimant was impaired at work).

We, therefore, conclude as a matter of law the employer has not established that the claimant engaged either a knowing policy violation or deliberate and wilful misconduct 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 beginning 06/18/2017 and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
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.

CAS/rh