Where an auto mechanic stopped working due to an injury sustained outside of work, and he asked the employer for suitable work but was none was available, he is eligible to receive unemployment benefits, pursuant to the urgent, compelling, and necessitous provisions of G.L. c. 151A, § 25(e).

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 we affirm the allowance of benefits, but for reasons which differ from those articulated by the review examiner in his original decision.

The claimant separated from his position with the employer after he last worked on May 2, 2017. He filed a claim for unemployment benefits, and the claim is effective September 10, 2017. On October 11, 2017, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not eligible to receive unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1). 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 December 16, 2017.

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 or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 accepted the employer's application for review and remanded the case to the review examiner to take additional evidence from the parties regarding the circumstances surrounding when and how the claimant stopped working for the employer. Both parties attended the remand hearing. 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 is eligible to receive unemployment benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant was unable to do his job as an automotive technician after a car accident, the employer had no other work for him to do, and the claimant never returned to work or informed the employer that he could do the automotive technician work again.

Findings of Fact

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

1. The claimant worked for the employer, a car dealership, from February of 2017 to May 8, 2017 as an Automotive Technician.

2. On May 2, 2017, while commuting home, the claimant was in a car accident. The claimant injured his right arm.

3. The claimant attempted to call his supervisor to no avail. The claimant then took a picture and sent it to his supervisor explaining the situation and that he may be out.

4. The claimant received medical care and a note excusing him from work until May 8, 2017.

5. On May 8, 2017, the claimant arrived at work and informed his supervisor that he was unable to perform the duties of a mechanic, but could do other things around the dealership. The supervisor directed the claimant to go home and come back when he was capable.

6. The claimant continued receiving medical care and provided medical documentation to the employer, which his wife delivered on his behalf two or [three] times. The medical documentation typically stated, "… until further notice." The Service Director eventually informed the claimant's wife that he did not want any more medical documentation until his status changed.

7. On May 16, 2017, the Service Director messaged the claimant that he wanted the claimant to retrieve his newly purchased tool box, which arrived at the work place while the claimant was absent. The Service Director stated that he did not want to be responsible for it. The Service Director was concerned because it was a valuable item and brand new. The claimant asked if he could get his tools transferred into the new tool box and leave it there until he returns to work. The Service Director asked when he will return and the claimant stated that he had no idea. The Service Director stated that he could transfer his tools over to his new tool box and take it then.

8. On May 19, 2017, the claimant and Service Director arranged the location in the work place where the claimant's items will be located for retrieval that weekend.

9. The Service Director did not hear from the claimant after May 19, 2017.

10. On May 20 or 21, 2017, the claimant rented a U-Haul and got help to retrieve his belongings located in a particular bay as communicated to the claimant earlier that week.

11. On May 22, 2017, the employer sent the claimant COBRA information. The health insurance provided through the employer required a 50% contribution on premiums from employees. The claimant had no knowledge of how he received health insurance benefits through his employment.

12. The claimant did not return the COBRA information to the employer.

13. In late July of 2017, the claimant learned that his medical insurance was cancelled by the employer effective May 8, 2017 initially from his provider due to his PIP benefits exhausting, which he confirmed with the insurance carrier.

14. The claimant did not contact the employer due to his belief that the employment relationship already ended because he was asked to retrieve his belongings and because his health insurance was cancelled.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. In Consolidated Finding of Fact # 1, the review examiner found that the claimant worked for the employer through May 8, 2017. However, Consolidated Finding of Fact # 2 indicates that the claimant last performed services for the employer on May 2, 2017. It appears that the "May 8" date in Consolidated Finding of Fact # 1 was a typographical error. We interpret the findings together to mean that the claimant performed services for the employer from February of 2017 through May 2, 2017. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner that the claimant is eligible to receive unemployment benefits. However, we conclude that the claimant was separated involuntarily for urgent, compelling, and necessitous reasons.

As an initial matter, we must decide which section of law applies to the claimant's separation from employment. The DUA initially applied G.L. c. 151A, § 25(e)(1), the statute relating to voluntary resignations, or quit situations. The review examiner applied G.L. c. 151A, § 25(e)(2), based on the claimant's assertions that he thought that he had been discharged. Following our review of the entire record, we conclude that the evidence does not support a conclusion that the claimant was discharged or that he could have reasonably thought that he was discharged.

The review examiner found that the claimant thought his employment had ended for two reasons: his retrieval of the new toolbox and the health insurance cancellation. As to the text messages regarding the toolbox, there was no indication from the employer that his job was over or that he

was being discharged. The Service Manager specifically told the claimant that the claimant should pick up the new toolbox, because the employer did not want to be responsible for it. The Service Manager then inquired as to when the claimant was returning to work, but the claimant did not have a return to work date yet. There is nothing in the Service Manager's messages which would indicate that the claimant's employment was being ended by the employer. The claimant and his wife testified that, in their experiences, when an employer asks an employee to take his tools, it generally means that he is being discharged. The review examiner did not find that they actually believed this or thought this at the time.

The cancellation of the health insurance also does not indicate that the claimant was discharged. The claimant's health insurance was paid in part by the employer and in part by the claimant. When the claimant stopped working, he still needed to pay for the insurance in order for him to maintain it. Although he professed no knowledge of how he paid for health insurance, *see* Consolidated Finding of Fact # 11, the employer sent the claimant COBRA information several weeks after his car accident. The claimant had the opportunity to contact the employer to inquire about the health insurance and what the letter meant. No finding indicates that he did so. Therefore, the cancellation due to the claimant's failure to pay for the insurance does not render the separation a discharge.[1]

Rather than a discharge, the facts of this case suggest that the claimant was responsible for his separation. The claimant was hired to be an automotive technician. Following a car accident, he could no longer do that type of work. Thus, he stopped performing services for the employer. Although he told the employer that he could do other work until he could be an automotive technician again, the employer was not obligated to offer him a different job. The cessation of work, therefore, was attributable to the claimant's injury, not to the employer. The employer told the claimant to bring in documentation when he was able to return to work, the implication being that the claimant's job remained available to him when he was able to work. Because the claimant was out of work with the prospect of returning when he was able to do automotive technician work again, it appears that the claimant was on an implied leave of absence. However, he never returned to work at all. According to the consolidated findings of fact, he made no contact with the employer even when he received information about his health insurance. The claimant's failure to return to work, following his injury, led to the severance of the employment relationship. Consequently, G.L. c. 151A, § 25(e)(2), which pertains to discharges, does not apply. We therefore analyze his separation under different provisions of G.L. c. 151A, § 25(e), which state, 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

[1] We further note that, on the COBRA notice, the space next to "Reduction in hours of employment" is marked as the reason for the end of the insurance coverage, not the space next to "End of employment." While this is not dispositive, it is another indication that the employer was not discharging the claimant. *See* Remand Exhibit # 8.

Under these statutory provisions, the claimant has the burden to show that he is eligible to receive unemployment benefits.

We first conclude that the claimant has not shown that his employment ended for good cause attributable to the employer. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). As noted above, the claimant stopped working due to an injury to his arm. This personal circumstance had nothing to do with any employer action or inaction.[2] Therefore, this provision is inapplicable to the facts of this case.

The more appropriate statutory provision is the one allowing benefits where a claimant shows that his separation was involuntary for urgent, compelling, and necessitous reasons. "[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under" G.L. c. 151A, § 25(e), "which may render involuntary a claimant's departure from work." Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Medical conditions are recognized as one such reason. *See* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 335–336 (1979). The claimant provided documentary evidence to show that he was injured and that his treating physicians had advised him to remain out of work. *See* Exhibits ## 9–14. This injury caused him to stop working as an automotive technician and is a circumstance covered by the urgent, compelling, and necessitous standard.

However, even if the claimant has established a reason which prevented him from continuing to work, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve [his] employment' as would indicate the claimant's 'desire and willingness to continue [his] employment.'" Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). Here, after he learned that he could not do the technician work, the claimant asked the employer for other, more suitable work. The employer had none to offer him. Then, when the claimant submitted medical documentation to the employer to show that he needed to remain out of work, the Service Manager indicated that he "did not want any more medical documentation until [the claimant's] status changed." Consolidated Finding of Fact # 6. Thus, the claimant ceased contact with the employer. Because he tried to remain employed, and because the employer indicated that it no longer needed medical updates from the claimant, we conclude that the claimant acted reasonably in trying to maintain his employment status. Although no separation date is immediately apparent from the findings, the fact that the claimant has filed a claim for unemployment benefits, there has been no contact with the employer, and the last time he worked for the employer was almost one year ago from now, leads us to believe that there was a

[2] Again, we note that the employer was not required to find other work for the claimant to do. Given the medical documentation in the record, *see* Exhibits ## 9–14, the employer may also have been concerned with the claimant doing any work while he had a known injury.

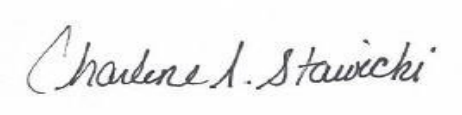
severance of the employment relationship due to circumstances beyond the claimant's control (his injury).[3]

We, therefore, conclude as a matter of law that the review examiner's decision to award unemployment benefits is supported by the record and free from error of law, because the claimant's separation was involuntary for urgent, compelling, and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning September 10, 2017,[4] and for subsequent weeks if otherwise eligible. Pursuant to G.L. c. 151A, § 14(d)(3), because the separation was for urgent, compelling, and necessitous reasons, charges associated with this claim may be removed from the employer's account.[5]

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 20, 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

[3] Even if we were to conclude that no separation has occurred, and that the claimant remained on some sort of indefinite implied leave of absence, it appears that he would still be eligible for benefits. *See* Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she requested such suitable work from her employer).

[4] We note again that there is no date of separation indicated in the findings of fact. However, since it must have reasonably occurred prior to the filing of the claimant's unemployment claim, it is sufficient for us to conclude that he is eligible for benefits beginning at the start of his claim, which is September 10, 2017.

[5] Inquiries regarding the charges may be made to the DUA's Employer Customer Service line at (617) 626-5075.

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.

SF/rh