

Claimant, who refused a breathalyzer test and had his license revoked, was fired from his job, because it required a driver's license. Board held he was ineligible for benefits under G.L. c. 151A, § 25(e)(1). Because he was not treating or trying to control his alcoholism at the time of the incident that caused him to lose his job, he voluntarily caused his own unemployment.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 8076 12

BOARD OF REVIEW DECISION
CORRECTED

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 affirm.

The claimant separated from his position with the employer on February 22, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 8, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 3, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant, whose driver's license was revoked for refusing to take a breathalyzer test, left his employment voluntarily and without good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, the [Employer Name], as a soil conservationist, from June 13, 2006 until February 22, 2018. The claimant was paid \$40.00 per hour.
2. The claimant was discharged for failing to possess a valid Class D Driver's License.
3. Possessing a valid Class D Driver's License was a condition of the claimant's employment:

Required to operate a motor vehicle incident in carrying out assigned duties. Requirement pertains to driving a sedan, van, or pickup truck during the day or night hours on public highways for the performance of official duties. The number of driving hours is dependent on overall needs of this position.

A valid driver's license and [Agency Name] Employee Identification Card, are required. (Exhibit 5, Page 13)

4. The claimant was aware possessing a valid Class D Driver's License was a condition of his employment.
5. On October 20, 2017, the claimant was arrested for operating a motor vehicle while under the influence of alcohol.
6. The claimant refused to undergo a breathalyzer test.
7. The claimant requested a blood test.
8. A blood test was not administered.
9. The claimant's license was revoked as a result of refusing to undergo a breathalyzer test.
10. The length of the license revocation was for the claimant's lifetime, having 3 prior operating under the influence offenses, 1989, 1990 and 2000.
11. The claimant informed the employer of his arrest and loss of license.
12. The claimant requested a Reasonable Accommodation seeking reassignment to a position which does not require operation of a motor vehicle due to loss of a valid state driver's license.
13. Other staff, such as interns, drove the claimant to field sites pending a Reasonable Accommodation decision.
14. The claimant's request was denied as an "Accommodation would require removal of an Essential Function". (Exhibit 5, Page 10)

15. On February 22, 2018, the claimant was terminated for failing to possess a valid Class D Driver's License.
16. The claimant is an admitted alcoholic.
17. On November 7, 2017, the claimant began a rehabilitation program which he completed on December 7, 2017.
18. The claimant has since been attending Alcoholics Anonymous meetings as many as 10 times each week. The claimant has a sponsor.
19. The claimant is receiving individual therapy for treatment of alcohol dependency.
20. The claimant's court case is pending.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe that the review examiner's findings of fact sustain the conclusion that the claimant is ineligible for benefits.

Although, technically, the employer discharged the claimant, we believe the review examiner correctly analyzed the claimant's separation under G.L. c. 151A, § 25(e)(1), 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 (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.

The basis for the review examiner's decision to deny benefits was that the claimant brought about his own unemployment. The record before us establishes that the claimant was required to operate a motor vehicle in order to carry out his job duties. Possession of a valid Class D license was a mandatory condition of the claimant's employment. In October of 2017, the claimant was arrested for operating a motor vehicle while under the influence of alcohol. Because of this arrest, the claimant was required to take a breathalyzer test, which the claimant refused to take. This refusal resulted in a lifetime revocation of his license because the claimant had three prior convictions for operating under the influence. After losing his license, the claimant sought a

reassignment to a position not requiring operation of a motor vehicle. The employer ultimately denied the request because granting said request would require removal of an “essential function” of the claimant’s job. Subsequently, the employer discharged the claimant for failing to maintain a condition of his employment. In short, the claimant’s own action in refusing the breathalyzer test directly resulted the lifetime revocation of his driver’s license and the loss of his job.

Two Supreme Judicial Court (SJC) decisions are important to our analysis. In Rivard v. Dir. of Division of Employment Security, the SJC stated, “a person who causes the statutory impediment that bars his employment leaves his employment “voluntarily” within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment.” 387 Mass. 528, 529 (1982). In that case, the claimant withdrew accumulated retirement monies knowing that the statute proscribed rehiring unless he repaid the funds back into the retirement system. After he was rehired, the employer had to discharge him because he could not repay the funds. *Id.* at 530. Here, the claimant refused a breathalyzer test. This resulted in the imposition of the statutory mandatory license revocation, which then impeded his ability to continue working for the employer.

Several years later, in Olmeda v. Dir. of Division of Employment Security, the SJC upheld the denial of unemployment benefits to a claimant who was unable to get to work, because his driver’s license was suspended following a conviction for driving while intoxicated. 394 Mass. 1002 (1985) (rescript opinion). The Court rejected the claimant’s contention that he did not leave work voluntarily. In so doing, the Court noted that the word “voluntarily,” as used in § 25(e)(1), “is a term of art that must be read in light of the statutory purpose of providing compensation for those who are thrown out of work through no fault of their own.” *Id.* at 1003 (citations, brackets and internal quotes omitted). The SJC further opined that, in determining whether an employee left work “voluntarily” for purposes of G.L. c. 151A, § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, but whether the employee brought his unemployment on himself. *Id.*, *citing Rivard*, 387 Mass. at 530. By refusing the breathalyzer test, the claimant brought his unemployment on himself.

Pursuant to Rivard and Olmeda, which decided the claimants’ separations under G.L. c. 151A, § 25(e)(1), regardless of whether the claimant resigned or was terminated, the review examiner properly analyzed the claimant’s eligibility under G.L. c. 151A, § 25(e)(1).¹ We next consider whether his analysis was correct. At the outset, we note that the explicit language of G.L. c. 151A, § 25(e)(1), places the burden of persuasion on the claimant. Cantres v. Dir of Division of Employment Security, 396 Mass. 226, 230 (1985).

This Board has had numerous opportunities in the past to consider the application of Rivard and Olmeda to separations under G.L. c. 151A, § 25(e)(1). Our consideration has centered on

¹ We are aware of one prior Board decision, BR-110099 (Feb. 25, 2011), where the Board referenced Olmeda, but analyzed the case under G.L. c. 151A, § 25(e)(2), because the employer had discharged the claimant after she lost her license for refusing an alcohol test. However, in reaching its decision, we believe that the Board overlooked Rivard, and the significance of the role the claimant’s own actions played in causing the statutory impediment to her continued employment. BR-110099 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

whether the claimants were out of work through no fault of their own. The Board’s analysis in these cases has focused on whether the circumstances, which created an impediment to the claimants’ continued employment, were within their control and, therefore, voluntary. *See, e.g.*, Board of Review Decision 0018 1730 94 (Dec. 30, 2016) (claimant denied benefits where he chose not to become certified as a home health aide); Board of Review Decision 0015 7052 69 (Sept. 8, 2015) (claimant denied benefits where she made only token efforts to meet new state dental licensure requirements); and Board of Review Decision 81022-A (Feb. 27, 2001) (claimant denied benefits where his incarceration resulted from his conscious decision not to appear in court, which resulted in claimant’s arrest and detention). *Compare* Board of Review Decision 0019 7562 62 (Mar. 29, 2017) (claimant entitled to benefits where his failure to secure required state license was due to scheduling error made by a certified test center); and Board of Review Decision 0002 3706 54 (Feb. 4, 2014) (claimant entitled to benefits where his incarceration resulted from arrest on a false charge).²

The claimant asserts that his refusal to submit to the breathalyzer test and resultant loss of license and job were due to his alcoholism and, therefore, cannot be considered “voluntary” within the meaning of G.L. c. 151A, § 25(e)(1). We disagree.

This Board has never expressly decided whether the disease of alcoholism renders a claimant’s separation “involuntary” under *Olmeda*. However, we believe the same principle applies to “voluntary” and “involuntary” separations under § 25(e) and (e)(1) — whether the claimants were unemployed through no fault of their own. Thus, where the impediment to a claimant’s continued employment resulted from personal or other circumstances beyond a claimant’s control despite his good faith efforts, the Board has deemed the separation to have been for urgent, compelling and necessitous circumstances and thus “involuntary” within the meaning of G.L. c. 151A § 25(e)(1) (providing benefits to claimants who separate for urgent, compelling and necessitous reasons). *See, e.g.*, Board of Review Decision 0013 3020 04 (Mar. 31, 2015) (claimant legally unable to perform his job due to lack of medical clearance entitled to benefits under § 25(e)(1), because he took reasonable steps to obtain said clearance);³ *see also* Board of Review Decision 0019 7562 62, *cited above*.

Accordingly, a claimant asserting that alcoholism rendered his or her separation “involuntary” within the meaning of § 25(e)(1), must establish that at the time of the incident(s) which ultimately resulted in the separation, the claimant was making sincere efforts to control his or her alcoholism and was unable to do so in spite of such efforts. At the time of the incident that caused the claimant’s separation in the case before us, when he was arrested, he was not making sincere efforts to treat or otherwise control the disease. By his own admission, the claimant acknowledges that at the time of his loss of license, he was in denial about his alcoholism and did not seek treatment or otherwise try to control his alcohol consumption until after his license was revoked.

In his appeal to the Board, the claimant, through counsel, also asserts that the review examiner erred in not analyzing the claimant’s separation from employment as a discharge under G.L. c.

² Board of Review Decisions 0018 1730 94, 0015 7052 69, BR-81022-A, 0019 7562 62, and 0002 3706 54 are all unpublished decisions available upon request.

³ Board of Review 0013 3020 04 is also an unpublished decision available upon request.

151A, § 25(e)(2),⁴ that he ignored the SJC’s decision in Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737 (1987). Again, we disagree. Although Shepherd does involve a claimant who struggled with alcoholism, it does not support an award of benefits in the present case.

First, the claimant in Shepherd did not lose his license or otherwise cause a statutory impediment to his continued employment. He lost his job due to absenteeism. Therefore, the SJC would have no cause to invoke its earlier decision in Rivard or Olmeda.

Second, the Court focused on the claimant’s circumstances and state of mind *at the time of his misconduct*. Shepherd, 399 Mass. at 740. Specifically, the Court remanded to know whether the misconduct was attributable to the disease of alcoholism *and* whether, at the time, he “had control of his alcoholism or . . . he deliberately and willfully refused to accept help in controlling it.” Id.

As discussed above, the incident that ultimately resulted in the claimant’s separation was losing his license due to his arrest and breathalyzer refusal. The findings and record before us establish that the claimant is an alcoholic. At the time of this arrest, however, the claimant was not attempting to treat or otherwise control his alcoholism. He entered a rehabilitation program after this. Because at the time of the incident which caused his separation, the claimant was not attempting to treat or otherwise control his alcohol consumption so that it would not adversely affect his employment, the claimant would not be eligible for benefits under the analysis suggested in Shepherd.⁵

Finally, we decline to follow the holding of Carey v. King, Deputy Director of Div. of Employment and Training, Greenfield District Court, CA No. 0041-CV-0251 (June 4, 2001), as urged by the claimant. In that case, a district court judge awarded benefits to a claimant after he lost his license due to the refusal of a breathalyzer test. The judge determined that the separation was involuntary, principally because the claimant was an admitted alcoholic. We do not adopt

⁴ G.L. c. 151A, § 25(e)(2), 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

⁵ In accordance with Shepherd, this Board has consistently required that, at the time of the discharge, the claimants needed to be making sincere efforts to control their alcoholism. *See, e.g.*, Board of Review Decision 0002 3017 15 (May 21, 2014) (a claimant must be making a sincere effort to control his alcoholism before such condition may be considered a mitigating factor as to a claimant’s state of mind); Board of Review Decision 0013 1067 65 (Mar. 23, 2014) (claimant was ineligible for benefits where he did not seek to control his alcoholism despite experiencing alcohol related disciplinary incidents in the workplace prior to his discharge and only sought treatment after his discharge); BR-122588-A (Mar. 29, 2013) (claimant was ineligible for benefits where nothing in the facts suggested he was making a sincere effort to control his alcoholism); and BR-117836 (Oct. 31, 2011) (claimant was eligible for benefits where he was making sincere, although unsuccessful, efforts to control his alcoholism). Board of Review Decisions 0002 3017 15, 0013 1067 65, and BR-117836 and are all unpublished decisions available upon request. Board of Review Decision BR-122588-A is a published decision.

the result of Carey for two reasons. First, we are not bound by decisions of the district court. Second, the facts of Carey are unclear. The judge found that Carey “voluntarily entered alcohol treatment programs and attended Alcoholics Anonymous” meetings. However, it is not clear if this occurred prior to, or after, the final incident which resulted in his loss of license. It may be that our approach and decision here are entirely consistent with Carey, but we cannot say for certain.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from his employment without good cause attributable to the employer or urgent, compelling, and necessitous circumstances. He is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning February 18, 2018, 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 - February 4, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

PTF/rh