Claimant LPN observed a patient three times exhibiting symptoms categorized as "urgent," which required an MD to be called. Her call after the 3rd time was too late. Claimant's assertion that the patient's condition showed signs of improvement was inconsistent with her own nursing notes. Held the claimant's conduct was deliberate misconduct and not merely poor judgment.

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: 0025 6045 06

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 affirm.

The claimant was discharged from her position with the employer on May 17, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 24, 2018. 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 September 25, 2018. 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 allow the claimant to provide testimony and evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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's discharge for failing to contact a physician after observing a patient in respiratory distress constituted deliberate misconduct 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 assessment are set forth below in their entirety:

1. The claimant worked part-time as a licensed practical nurse (LPN) at the employer's nursing home business from 5/22/2000 until 5/17/2018. The claimant worked a regular schedule of 24 hours per week. The claimant worked from 11:00 p.m. until 7:00 a.m. on Tuesday, Wednesday, and alternating weekend nights. The claimant's weekly net pay was approximately $400.

2. The employer maintains a written policy that details the protocol it expects employees to follow for the urgent and non-urgent needs of its patients. The policy reads in part: "In the event of a medical emergency, all attempts to contact the attending provider/alternate shall be made." The policy contains a list of specific problems and descriptions of symptoms that the employer considers urgent and non-urgent. The policy is intended to provide employees with an understanding of when a change in a patient's condition requires a call to the patient's physician. In the area of the written policy where urgent symptoms are explained, the policy reads: "Urgent Notify the attending or on-call Physician/NP/PA as soon as possible." The policy distinguishes a patient's O2 saturation as "urgent" under the following conditions: "If a resident's O2 Sat falls below 92 percent and doesn't return to 92 percent after the use of Oxygen." The policy distinguishes shortness of breath/dyspnea as "urgent" under the following conditions: "Acute episode with wheezing and/or chest pain, respiratory distress, change in vital signs." The policy does not contain a specific consequence that will result if an employee fails to comply with the policy.

3. The employer expects that employees provide life-sustaining measures to patients who are considered "full code", *i.e.* they have not provided a legal directive to not provide such measures. The employer expects that employees perform CPR, provide a feeding tube, send a patient to a hospital, or take any other measures necessary to preserve a patient's life if the patient exhibits symptoms of needing such urgent care. The employer expects employees to provide life-sustaining measures to any patient where it is unclear whether the patient is a "full code". The claimant was aware that a patient who was a "full code" should be provided life-sustaining measures.

4. The claimant was trained on the employer's policy through in-service training held during the term of her employment. The claimant held a valid license on 5/17/18. The employer was aware that while in nursing school, the claimant received training on life sustaining measures.

5. On 5/17/18 [sic], the claimant was responsible for providing care for a patient who the employer considered a "full code". The patient did not have a Massachusetts Order for Life Sustaining Treatments (MOLST) form on record with the employer. The patient's brother was her court-appointed guardian. The brother had a general guardianship; he did not have the level of

guardianship necessary to make life decisions for the patient. The brother did not have the authority to decline medical treatment for the patient.

6. On 5/17/18 [sic], at midnight, the claimant determined that the patient was suffering a shortness of breath and was in respiratory distress. The claimant recorded in her nursing notes that the patient was awake with signs of respiratory distress, shortness of breath, and lung sounds with congestion. The claimant recorded that the patient's heart rate was 160 and her oxygen saturation was 92% [sic] while on 6 liters of oxygen. The claimant administered a dose of morphine; she did not contact the patient's physician. The claimant noted that she would continue to monitor the patient.

7. On 5/17/18 [sic], at 2:00 a.m., the claimant observed the patient awake and making facial grimaces; the patient's heart rate dropped to 48 and her oxygen saturation was 92% while on 6 liters of oxygen. The claimant flushed the patient's G-tube and medicated her. The claimant did not contact the patient's physician, despite the change in her heart rate.

8. On 5/17/18 [sic], at 5:00 a.m., the claimant observed the patient as having her eyes open and fixed. At 5:20 a.m., the claimant telephoned the on-call physician, who was also the patient's physician. The physician told the claimant to call the patient's brother to see what he would like to do. The claimant told the physician that a note on the patient's medical record indicated that the brother needed to obtain a court order. The physician advised the claimant to contact the brother. The claimant called the brother; he told the claimant that he had not obtained a court order because it was hard for him to get. The brother told the claimant to keep the patient at the nursing home. The claimant did not call the physician back to inform her that the brother had not obtained a court order. The claimant did not call the physician back because she was busy.

9. At approximately 6:05 a.m., a nursing assistant told the claimant that the patient exhibited no sign of life and asked that the claimant check on the patient. The claimant observed that the patient was pale and mottled; the claimant was unable to obtain vital signs on the patient. The claimant did not perform CPR or make any other attempt to preserve the patient's life. The claimant later told the employer that she did not contact the physician or call 911 prior to 5:20 a.m. because the resident's condition was improving after she administered pain medication.

10. The employer determined that the claimant violated its protocol by failing to contact the on-call physician at midnight, when she observed the patient in respiratory distress. The employer determined that the claimant violated its protocol by failing to call the on-call physician or 911 when the patient's heart rate dropped to 48 and the patient exhibited minimal blinking.

11. The employer's administrative team determined that the claimant would be discharged because she violated the employer's protocol by failing to contact the on-call physician when she noted a change in the resident's condition, specifically that the patient was in respiratory distress with shortness of breath, and that her heart rate plummeted. The administrative team also determined the claimant violated the employer's protocol by failing to perform CPR on a patient with full-code status when the patient failed to exhibit any sign of life. The claimant was discharged on 5/17/18.

12. The claimant filed an initial unemployment claim, effective 5/20/18. On 8/12/18, the claimant completed a DUA fact finding questionnaire in which she wrote: "Management believed I should have called the doctor as soon as the patient was getting sick and I disagreed because resident was improving with prescribed pain medicine…"

Credibility Assessment:

The claimant testified during the hearing that she did not contact the on-call physician prior to 5:20 a.m. on 5/17/18 [sic] because she believed the patient's condition was improving. The claimant's testimony was not credible and was given no weight based upon the evidence in the record. The claimant's nursing notes indicate that at midnight the patient exhibited signs of respiratory distress and shortness of breath. The patient's condition was urgent and warranted a call to a physician at that time. The claimant had no reason to conclude at that time that the patient's condition was improving. Further, the claimant contended that her nursing notes, which show the patient's heart rate dropping from 160 at midnight, to 48 at 2:00 a.m., were inaccurate. The claimant failed to provide any evidence to support this testimony. The fact that the patient's condition worsened during the claimant's shift makes it more likely than not that the notes are an accurate representation of the patient's deteriorating condition.

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 except as follows. Finding # 6 indicates the patient's oxygen saturation was 92% at midnight, but the claimant's entry in the Nurses Notes in evidence reflects a 93% oxygen saturation at that time. *Compare* Remand Exhibit # 5.[1] We also note that, in Findings ## 5 through 8, the review examiner cited May 17, 2018, as the night of the incident that led to the claimant's discharge.

[1] 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).

Review of the Nurses Notes and the employer's summary of events (Hearings Exhibit # 2) shows the night at issue was actually May 13–14, 2018, rather than May 17.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The review examiner denied benefits after analyzing the claimant's separation 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 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 . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

Based on the employer's undisputed testimony at the initial hearing, the review examiner concluded that the claimant was discharged for failing to follow protocols by not contacting a physician when a patient exhibited respiratory distress and a change in vital signs, rejecting a contention in the claimant's written statement to the DUA that the patient's condition "was improving with prescribed pain medicine." *See* Hearings Exhibit # 4.

Where the evidence showed that the claimant was aware of the employer's protocols, yet delayed contacting a physician for over five hours despite evidence that the patient was in distress and her condition was deteriorating, the review examiner concluded that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest without mitigating circumstances. We remanded the case to take the claimant's testimony. After remand, we also conclude that the employer has met its burden.

Pursuant to G.L. c. 151A, § 25(e)(2), a claimant will be disqualified from benefits if her separation was attributable to either a knowing violation of a reasonable and uniformly enforced policy or deliberate and wilful misconduct. We note at the outset that the review examiner ultimately concluded that the employer had not shown that the policy protocol at issue was uniformly enforced. We concur and thus conclude the employer has not met its evidentiary burden under the "knowing policy violation" prong of G.L. c. 151A, § 25(e)(2). We now consider whether the employer has established that the claimant was discharged for deliberate and wilful misconduct within the meaning of § 25(e)(2).

The Supreme Judicial Court has held that "[d]eliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). Thus, 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).

After remand, the consolidated findings establish that the employer has a written policy setting forth guidelines and protocols it expects employees to follow in determining the urgent and non-urgent needs of its patients. *See* Consolidated Finding # 2. The claimant was trained on the employer's policy. *See* Consolidated Finding #4. The policy distinguishes and categorizes "urgent" and "non-urgent" symptoms. For urgent symptoms, staff are directed to "Notify the attending or on-call Physician/NP/PA as soon as possible." *See* Consolidated Finding # 2. Among the list of "problems" listed in the protocol is "Shortness of Breath/Dyspnea"; symptoms manifesting an "urgent" situation include "Acute episode with wheezing and/or chest pain, respiratory distress, change in vital signs." Id.

The consolidated findings also establish that the employer expects employees to provide life-sustaining measures to patients who are considered "full code" — *i.e.*, patients who have not provided the employer with a specific, legal directive not to perform life-saving measures. *See* Consolidated Finding # 3. Absent such a legal document, the claimant was aware that the employer expected employees to perform CPR, provide a feeding tube, send a patient to the hospital, and take all other life-sustaining measures necessary to save a patient's life, if that patient exhibits symptoms that require urgent care — including the expectation that employees will provide life-sustaining measures to any patient where it is unclear whether that patient is considered "full code." Id.

The consolidated findings further establish that, on May 13, 2018, the claimant was responsible for the care of a patient who was considered to be "full code." The patient's guardian was her brother, but he lacked the level of guardianship necessary to make life decisions for the patient or the authority to decline medical treatment for the patient. *See* Consolidated Finding # 5. During the time she was responsible for this patient's care, the claimant observed that the patient displayed symptoms that were deemed "urgent" under the employer's protocols, which should have prompted the claimant to contact a physician from the first time she evaluated the patient. *See* Consolidated Findings # 6–9. The claimant subsequently told the employer that she had not contacted the physician or called 911 before 5:20 a.m., because she said the patient's condition was improving after she had administered pain medication. *See* Consolidated Finding # 9. The claimant was discharged on May 17, 2018, because the employer determined she had violated its policies and protocols by: (1) failing to contact a physician when the patient exhibited urgent symptoms of respiratory distress; and when the patient's heart rate dropped to 48; and (2) failing to perform CPR on the patient with full code status when she failed to show any signs of life. *See* Consolidated Findings # 10–11.

In rendering her consolidated findings, the review examiner issued a detailed credibility assessment, considering the contemporaneous Nurses Notes the claimant kept for the patient on the night of May 13–14, 2018 (Remand Exhibit # 5) and citing to them in her credibility assessment. The review examiner considered and rejected the claimant's testimony that she had not contacted a physician before 5:20 a.m. because she believed the patient's condition was improving, since the Notes — completed by the claimant herself during the night at issue — showed symptoms of respiratory distress, shortness of breath, and a plummeting heart rate, all of which are categorized as "urgent" in the employer's protocol, and all of which warranted contacting the physician at each of the times the claimant observed the symptoms.

Further, the review examiner specifically rejected the claimant's contention that her nursing note that showed the patient's heart rate was 48 at 2:00 a.m. was inaccurate, where the claimant failed to provide any evidence to support this testimony.[2] Taken as a whole, the review examiner credited the version of events recorded by the claimant on the night at issue in the Nurses Notes, rather than the claimant's self-serving testimony at the hearing. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

The review examiner's consolidated findings of fact and credibility assessment support the legal conclusion that the claimant was not discharged merely for non-disqualifying "poor performance," or bad judgment, but for deliberate misconduct in wilful disregard of the employer's interests. The findings and record before us establishes that the claimant knew the employer expected her to contact a physician if a patient exhibited any symptoms the employer categorized as "urgent" in nature. Further, the record shows the claimant did not fail to notice that the patient exhibited symptoms requiring urgent intervention. The Nurses Notes show the claimant herself observed actual signs of urgent symptoms throughout the night. The review examiner flatly rejected the claimant's claims that the patient's condition showed signs of improvement during the night at issue. On the contrary, the evidence shows that the claimant observed urgent symptoms that required contacting a physician three times that night — at midnight, at 2:00 a.m., and at 5:00 a.m.

Contrary to the employer's protocol, the claimant did not contact a physician at any point prior to 5:20 a.m. The claimant also did not check back with the physician after verifying that the patient's brother had not secured the legal documentation necessary to be able to make life decisions for her, and later failed to provide life-saving measures to the patient after she appeared to have expired. The only reason the claimant gave for failing to call the physician — she thought the patient's condition was improving — was rejected as not credible by the review examiner, in view of all of the evidence before her.

Our review of the entire record establishes (1) the existence of a reasonable protocol the employer expected the claimant to follow for the urgent needs of its patients; (2) the claimant's awareness of this expectation; (3) the claimant's failure to abide by this expectation; and, (4) a

[2] Although she does not reference it directly in her credibility assessment, the review examiner took into evidence a piece of scratch paper the claimant proffered as her notes from the night at issue. *See* Remand Exhibit # 6. The review examiner's failure to credit this document indicates she found the contemporaneous Nursing Notes more credible.

lack of any circumstances mitigating the claimant's failure in this regard. On this basis, we believe the employer has met its burden of establishing deliberate and wilful misconduct on the claimant's part. *See* Garfield, 377 Mass. at 97. *See also* Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984) (a person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case.).

We, therefore, conclude as a matter of law that the claimant was discharged for 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 ending May 19, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

JPC/rh