

0026 2284 78 (Mar. 28, 2019) – Where the claimant lost his license for not taking a breathalyzer test, the separation is analyzed as one which was claimant-initiated. The claimant did not show that he separated from his job involuntarily due to the effects of alcoholism, as he did not show that he was making sincere efforts to control the alcoholism at the time of the incident that caused his separation. Consequently, the separation is voluntary, and he is denied benefits under G.L. c. 151A, § 25(e)(1). *[Note: the District Court affirmed the Board of Review's decision.]*

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Issue ID: 0026 2284 78

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 separated from his position with the employer on or about June 8, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 21, 2018. 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 16, 2018.

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

The issue before the Board is whether the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant, who had worked as a driver for the employer, lost his license following a traffic stop, informed the employer that he could no longer work for the employer due to a license suspension, and then entered an alcohol detoxification program.

Findings of Fact

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

1. The claimant worked full-time as a driver for the employer, a timber harvesting and land clearing company, for approximately four years. His last day of work was 6/7/18.
2. Drivers who work for the employer are subject to DOT regulations.
3. A valid CDL is required for the above position.
4. The claimant has been an alcoholic for over forty years.
5. The claimant started to consume larger quantities of alcohol after the death of his father, approximately three years ago.
6. In February 2018, the claimant was arrested and charged with operating under the influence (OUI) while driving his personal vehicle. His license was suspended for thirty days.
7. The claimant continued to consume alcohol following the February 2018 OUI arrest.
8. The claimant usually consumed two to three beers, and two to three pints of brandy each day, after work, during the last seven months of his employment.
9. The claimant's license was reinstated, and he returned to work.
10. On 6/7/18, after work, the claimant consumed a pint of brandy and two to three beers, while driving home in his personal vehicle.
11. The town police dispatcher in the claimant's town of residence reported to an officer that there was a driver operating a vehicle erratically, as the driver was all over the road, ran another driver off the road, and nearly struck a telephone pole.
12. While the officer searched for the vehicle, he encountered a state police officer and asked whether he had seen the vehicle. The state police officer had not seen this vehicle.
13. The town officer then saw the vehicle described by the dispatcher, driven by the claimant, and attempted to stop the claimant.
14. An officer raised his voice to a yell and instructed the claimant to pull over. The claimant's window was rolled down, and he drove past the officer and did not pull over.
15. The officer followed the claimant, and saw a police officer from another town, with blue lights activated, traveling toward the claimant.

16. The officer from the other town blocked the road with his vehicle, and the claimant stopped.
17. The two town police officers and the state police officer then approached the claimant's vehicle. They smelled alcohol while speaking with the claimant.
18. The claimant told the officers that he consumed several beers, after he was asked whether he had been drinking.
19. One officer asked the claimant to exit his vehicle, and the claimant did so, then started a physical altercation with the two town police officers.
20. The officers did not have the opportunity to administer a field sobriety test, as the claimant started the above altercation.
21. The claimant was then arrested, and transported to the police station in the town where the traffic stop occurred.
22. The claimant agreed to take a breathalyzer test. He did not blow into the mouthpiece, as instructed. The police officer who attempted to administer the test noted that the claimant appeared to be blowing air out of his mouth, but no air was going into the mouthpiece.
23. The police officer who attempted to administer the breathalyzer test determined that the claimant's failure to blow air into the mouthpiece was a refusal to submit to the test.
24. The police officer informed the claimant his license was suspended for 180 days.
25. On 6/8/18, the claimant told the employer that he could not work for the employer, as his license was suspended for 180 days.
26. The claimant was admitted to an alcohol detoxification program on 6/8/18. He was discharged from the program on 6/22/18.
27. The claimant attends AA meetings on a weekly basis, and has done so since he was discharged from the alcohol detoxification program.
28. The claimant filed an unemployment insurance claim on 6/29/18, and reported that he separated from employment due to lack of work.

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 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 agree with the review examiner's conclusion that the claimant is subject to disqualification.

The review examiner issued her decision pursuant to the following provisions of G.L. c. 151A, § 25(e)(1), which provide, in relevant 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

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

Under this section of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. In this case, the review examiner concluded that the claimant had not carried his burden, and we agree.

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 did not take a breathalyzer test, as requested. 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.

Rivard and Olmeda decided the claimants' separations under G.L. c. 151A, § 25(e)(1), regardless of whether the claimant resigned or had been terminated, because the claimant's actions caused the statutory impediment to continued employment. The same was the case here. The claimant's own actions initiated a series of events which caused him to leave his job, including being arrested for operating under the influence and failing to perform the breathalyzer test that triggered his loss of license. Therefore, the review examiner properly analyzed the claimant's eligibility under G.L. c. 151A, § 25(e)(1).

In this case, the claimant argues that his separation was not voluntary. That is, he did not bring his unemployment upon himself, because he is an alcoholic. The argument is that the separation is attributable to the involuntary compulsion to drink, rather than to any intentional choice made by the claimant. The issue of alcoholism was not addressed in Rivard or Olmeda. However, the SJC did have occasion to consider it in Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737 (1987) (discharge for failing to meet with employer to discuss excessive absences analyzed under G.L. c. 151A, § 25(e)(2)).

In his appeal to the Board, the claimant repeatedly cites to Shepherd for the proposition that his separation was involuntary. Although Shepherd does involve a claimant who struggled with alcoholism, it does not support an award of benefits in the present case. 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.

We agree with the claimant that the consideration shown in Shepherd for the role that alcoholism may play in causing a separation can be applied to other provisions under G.L. c. 151A, § 25(e). Just as various medical issues can mitigate misconduct in discharge cases, so can medical issues render a separation involuntary for urgent, compelling, and necessitous reasons.

However, whether we analyze these alcoholism cases under G.L. c. 151A, § 25(e)(1), § 25(e)(2), or under the separate urgent, compelling, and necessitous provision in § 25(e), the underlying principle is the same. The question is whether the claimant was responsible for his own unemployment. With regard to alcoholism, we turn to the SJC's instructions for remand in Shepherd. The Court directed the agency to focus 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 of the misconduct, he "had control of his alcoholism or . . . he deliberately and willfully refused to accept help in controlling it." Id.

Thus, in instances where the claimant's conduct caused a statutory impediment to his continued employment and alcoholism may have played a role, Rivard and Olmeda dictate that the separation be deemed a quit for purposes of eligibility for unemployment benefits, and the burden of proof falls upon the claimant. Following the guidance in Shepherd, our analysis focuses on the time of the incident that caused the separation. To render the separation involuntary due to urgent, compelling, necessitous circumstances, the claimant would have to show that *before* the incident that caused him to lose his job, he knew he was an alcoholic and had tried, but was not successful at controlling the disease. If the claimant can meet this burden, he will have shown that he lost his job due to circumstances beyond his control and may not be

disqualified under G.L. c. 151A, § 25(e)(1). On the other hand, if the evidence shows that the claimant knew he had a drinking problem and a concerted effort to address that problem did not begin until *after* the incident that lost him his job, then he is deemed to have caused his own unemployment and will be disqualified under § 25(e)(1).¹

Our reasoning here is not new. The Board has previously issued decisions in accord with the holding of Shepherd. See, e.g., Board of Review Decision 0013 1067 65 (March 23, 2014) (claimant ineligible where he did not seek help to control his alcoholism, despite alcohol-related disciplinary incidents in the workplace and only sought help after separation); Board of Review Decision BR-122588-A (March 29, 2013) (claimant ineligible where facts did not show he made sincere effort to control his alcoholism); and Board of Review Decision BR-117836 (October 31, 2011) (claimant eligible for benefits where he made sincere, but unsuccessful attempts to control his alcoholism). Our decision merely applies the reasoning of those prior cases to a claimant-initiated separation, where the claimant has the burden of persuasion.²

We return now to the facts of the case before us. There is no question that, in order to fulfill his driving duties, the claimant was required to have a valid license for his job. Findings of Fact ## 1–3. On June 7, 2018, the claimant was stopped by the police for allegedly driving while under the influence. When the claimant was requested to take a breathalyzer, he failed to blow air into the apparatus’s mouthpiece and was deemed to have refused the breathalyzer. See 501 CMR 2.16.³ Findings of Fact ## 11–23. Therefore, his license was suspended for 180 days. Finding of Fact # 24. Because he no longer had a license, the claimant told the employer that he could not perform his normal job duties. Finding of Fact # 25. Although the claimant is an admitted alcoholic, see Finding of Fact # 4, nothing in the findings indicates that he was making sincere efforts to control his alcoholism at the time of the final incident on June 7, 2018. The claimant was certainly on notice that he had a problem with alcohol. He was arrested in February of 2018 for operating under the influence and his license was suspended. Yet, he

¹ In cases where a claimant is fired for misconduct that did not create a statutory impediment to continued employment, such as the absenteeism in Shepherd, the case is analyzed under G.L. c. 151A, § 25(e)(2), and the employer has the burden to show deliberate misconduct. If the claimant presents sufficient evidence to consider whether his alcoholism constituted mitigating circumstances, the employer has the burden to show that, at the time of the misconduct, the claimant deliberately and willfully refused to accept help in controlling it. See Shepherd, 399 Mass. at 740.

² The claimant has brought to our attention two 2011 Board decisions, where an alcohol-related incident caused the statutory impediment to the claimant’s continued employment. In Board of Review Decision BR-110099 (March 11, 2011), a prior Board noted Olmeda, but shifted its analysis to Shepherd because the parties agreed the claimant had been fired. The decision omits any reference to Rivard, and, in doing so, we think incorrectly decided the case under G.L. c. 151A, § 25(e)(2). In Board of Review Decision BR-117836 (October 31, 2011), the facts and analysis are similar, where the claimant’s alcoholism caused his drunk driving and the loss of his commercial driver’s license that was needed for his job. The Board overlooked Rivard, veered away from Olmeda, and incorrectly decided the case under G.L. c. 151A, § 25(e)(2). Because the Board incorrectly decided both of these cases under G.L. c. 151A, § 25(e)(2), we decline to follow them either in the instant matter or prospectively.

³ 501 CMR 2.16 provides in pertinent part as follows:

If after being advised of his or her rights and the consequences of refusing to take a breath test, the arrestee refuses to submit to a breath test, none shall be given. The Registry of Motor Vehicles (RMV) shall be notified of such refusal in a format approved by the Registrar. If at any time following an arrestee’s initial consent to the breath test and prior to the successful completion of the test, the arrestee refuses to participate or declines to cooperate, the test shall be terminated and it shall be noted as a refusal. **If the arrestee fails to supply the required breath samples upon request, the test shall be terminated and it shall be noted as a refusal.** (Emphasis added.)

continued to consume large quantities of alcohol. Findings of Fact ## 6–7. There is no evidence that he made any effort to get his alcoholism under control. Because the record contains substantial evidence to show that, at the time of the incident that caused his separation, the claimant was not making sincere efforts to treat or otherwise control his alcohol consumption so that it would not adversely affect his employment, we cannot conclude that the separation was involuntary. Rather, we conclude, as the review examiner did, that the claimant brought his unemployment upon himself, his separation was voluntary, and that he should be denied unemployment benefits.⁴

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and free from error of law.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning June 3, 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 - March 28, 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:

⁴ We decline to follow the holding of Carey v. King, Deputy Dir. of Division of Employment and Training, Greenfield District Court, CA No. 0041-CV-0251 (June 4, 2001). 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 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.

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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