Employer discharged the claimant bus driver for damaging a bus in what the review examiner found to be an unintentional accident. Given this finding, the employer did not prove that the incident was deliberate and in wilful disregard of the employer's interest. The claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0026 2561 69

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 July 12, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 9, 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 January 19, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he 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 hear testimony and other evidence from the claimant. 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 original decision, which concluded that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2), when he had an accident while driving his bus, 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 school charter bus driver for the employer, a school bus transportation company, from August 2017 until July 12, 2018.

2. The employer maintains an "Accident Procedure" policy prohibiting employees from being involved in a second chargeable accident within a 24 month period. Violators of this policy are punished at the employer's discretion based upon the circumstances of the violation.

3. On August 30, 2017, the claimant provided a signed acknowledgment to the employer indicating that the claimant received a copy of the policy.

4. The employer maintained an expectation that drivers not get into accidents. The employer maintained the expectation to ensure passenger safety and employee safety. The claimant was aware of the expectation as a matter of common sense and through work experience.

5. The employer determined when an accident was classified as "chargeable, avoidable or preventable" on a case by case basis.

6. On December 18, 2017, the claimant was involved in an accident when he backed into a fence while driving the employer's school bus. The claimant received a warning for being involved in an "avoidable accident".

7. On July 12, 2018, the claimant was the part of an envoy of two buses chartered by the employer's client in [Town A], Massachusetts to take its students on a trip to a college in [Town B], Massachusetts.

8. When the claimant arrived at the client's location, he pulled close to a curb to allow room for the second bus to park behind him.

9. When the second bus arrived, the second driver parked behind the claimant, not next to the claimant.

10. When the passengers were seated on the buses and they were ready to leave, the second driver beeped his horn at the claimant and waved to the claimant.

11. The claimant believed the second driver beeped and waved at him to indicate he was ready to leave.

12. When the claimant pulled away, he hit a pole with his bus, causing damage to the bus.

13. After the claimant hit the pole, he attempted to move the bus forward and hit the pole a second time.

14. After the claimant hit the pole the second time, he stopped the bus, got out of the bus, and took a picture of it.

15. The claimant sent the CM [charter manager] a text message stating he hit a pole leaving the client and damaged the bus with a picture of the damaged bus.

16. After the CM received the text message, she called the claimant and told him to meet her in her office when he returned to the bus terminal.

17. When the claimant returned to the terminal, the CM directed him to bring the bus to the mechanic lot.

18. On July 12, 2018, the claimant met with the CM and she discharged him for having a second accident in 24 months.

19. On an unknown date prior to the hearing, the second driver quit his employment.

Credibility Assessment:

The CM offered the second driver's hearsay testimony at the remand hearing that the claimant's accident was avoidable. However, the CM admitted she did not witness the claimant actually hit the pole. The CM believed the claimant's accident was avoidable because the second driver told her he got out of his bus to assist the claimant with maneuvering the bus. The second driver was no longer employed by the employer at the time of the initial hearing or the remand hearing, preventing him from giving first hand testimony at either hearing. The CM did not have any first-hand knowledge regarding the claimant hitting the bollard with the bus on July 12, 2018.

The claimant directly disputed the CM's testimony. The claimant offered direct testimony that although he hit the pole with the bus, it was an accident and he did not intend to hit the pole with the bus. He further offered direct, unrefuted testimony that the second driver did not leave his bus at any time before or after the accident. Although the claimant had received a previous warning for having an "avoidable accident", he denied that the accident was avoidable on July 12, 2018.

Based on the CM's hearsay testimony that relied on what the second driver stated and the claimant's direct rebuttal of that testimony, it is concluded the claimant's testimony is more credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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.[1] We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from his employment, his qualification for benefits is governed by 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).

The employer discharged the claimant after he brushed his bus against a pole on July 12, 2018, causing damage to the bus while pulling away from a curb. According to the employer, this was a violation of its policy, which stated that "any driver involved in a second chargeable accident[2] within a 24-month period shall be subject to immediate dismissal." *See* Consolidated Finding # 2; Exhibit 4, p. 2.[3] Whether or not the employer actually disciplines an employee for violating this policy is discretionary, based upon the circumstances. *See* Consolidated Findings ## 2 and 5. Given that enforcement is discretionary, and that the employer has not shown that other drivers were discharged for similar accidents, we conclude that the employer has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer can meet its burden under G.L. c. 151A, § 25(e)(2), if it can show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. There is no question that the employer expected its drivers not to get into accidents, and the claimant was well aware of this. *See* Consolidated Finding # 4. It is also undisputed that, on July 12, 2018, the claimant had an accident while driving the bus. *See* Consolidated Finding # 12. However, in order to determine whether an employee's actions constitute deliberate

[1] We do so with the minor notation that Consolidated Finding # 8 states that the claimant pulled up close to the curb to afford the other driver room to park behind him, when, in fact, the claimant testified that he was trying to make room for the second bus to park next to him. This error is not material to our decision today.

[2] During the hearing, the employer's charter manager used the terms "chargeable," "avoidable," and "preventable" interchangeably. *See* Consolidated Finding # 5.

[3] The employer's written policy, entered as Exhibit 4, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

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).

Following the initial hearing, where only the employer testified, the review examiner found that another driver had radioed the claimant to stop before he hit the pole with the bus.[4] If true, this would suggest that, in ignoring the warning, the claimant acted deliberately and in wilful disregard of the employer's interest to ensure safety and prevent avoidable accidents. After remand, the review examiner has now found that the other driver did no more than beep and wave to the claimant from inside his own bus, which the claimant took to be a signal that he was ready to leave. *See* Consolidated Findings ## 10 and 11. She further found that the claimant did not intend to hit the pole.[5] These new findings are based upon a credibility assessment, which accepts the claimant's first-hand testimony as being more credible than the employer's hearsay evidence. 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). We believe her assessment and the corresponding findings are reasonable in relation to the evidence presented.

We form no opinion about whether the employer made the appropriate decision to end the claimant's employment. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979) (the issue is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances). But, because the consolidated findings provide that the employer discharged the claimant for conduct that was neither deliberate and in wilful disregard of the employer's interest nor a knowing violation of a uniformly enforced policy, we conclude as a matter of law that he may not be disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).

[4] *See* Finding of Fact # 10 in the original hearing decision, entered into evidence as Remand Exhibit 1.
[5] This finding is stated within the credibility assessment.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 8, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 20, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

AB/rh