

**A claimant, whose primary job duty was to drive a truck and make deliveries, is disqualified from receiving benefits, where he lost his license for three years for refusing to take a breathalyzer test following a stop for alleged OUI, notwithstanding the fact that the employer allowed him to work performing other duties for approximately three months following the loss of license.**

**Board of Review  
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**Issue ID: 0026 5949 86**

## **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 July 25, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 5, 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 28, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily separated from his 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 accept 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, which concluded that the claimant, whose primary job duty was truck driving, brought his unemployment upon himself by losing his license following an alleged OUI incident, 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 full time for the employer, a precision sheet metal company, from September 2016 until July 25, 2018.

2. The claimant's immediate supervisor was the treasurer (the Treasurer).
3. The claimant was hired to work primarily as a truck driver.
4. When the employer did not have a delivery that needed to be made, he assigned the claimant work in the shop as a burrer, sander or assembler, based on the employer's needs and the claimant's abilities.
5. The claimant's job required him to possess a valid driver's license and commercial driver's license (CDL) because he was required to drive company vehicles. The employer informed the claimant of this requirement by providing him with his job description at the time he was hired, and by providing orientation and safety training at the time he was hired. The employer paid for the claimant's yearly Department of Transportation (DOT) physicals in order for the claimant to maintain his CDL.
6. On April 21, 2018, the claimant was pulled over for allegedly drinking and driving. The police officer requested the claimant take a breathalyzer test. The claimant was aware based on previous experience if he refused the breathalyzer test his license would be suspended.
7. The claimant refused the breathalyzer test and his license was suspended for allegedly operating under the influence (OUI).
8. The April 21, 2018 stop was the claimant's second OUI offense and his license was suspended for three (3) years.
9. On or about April 21, 2018, the claimant told the treasurer his license was suspended, and he had a court date in July 2018, at which time he believed his license would be reinstated.
10. The Treasurer allowed the claimant to remain employed after his license was suspended because he believed his license would be reinstated in July 2018.
11. The Treasurer created jobs in the shop for the claimant based on the employer's needs and his abilities.
12. Between April 21, 2018 and July 25, 2018, the claimant worked in the shop and the Treasurer completed the claimant's driving duties.
13. The claimant did not have a court date in July 2018.
14. The claimant's license was not reinstated in July 25, 2018.
15. As of July 25, 2018, the employer did not have work available for the claimant that did not require a license.

16. As of July 25, 2018, the employer had driving work available for the claimant.

17. On July 25, 2018, the claimant quit his employment when his license was suspended for DUI.

18. At the time of his hearing, the claimant had a court date scheduled in December 2018 for his DUI.

### 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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject, as being unsupported by the record, the third sentence of Finding of Fact # 6,<sup>1</sup> the second portion of Finding of Fact # 9,<sup>2</sup> the entirety of Finding of Fact # 10,<sup>3</sup> and the entirety of Finding of Fact # 17.<sup>4</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we affirm the review examiner's decision to deny unemployment benefits.

As noted by the review examiner in her decision, there was some dispute between the parties as to whether the claimant separated voluntarily, or whether he was ultimately discharged or laid off. It is reasonable to conclude that the claimant's separation occurred on July 25, 2018, because the employer no longer had any non-driving work available to the claimant. *See* Findings of Fact ## 15 and 16. If the claimant had not lost his license, he could have continued to do his main work, truck driving.<sup>5</sup> There was no lack of work for him to do on July 25, 2018. He could not work anymore due to the loss of his license several months before, which he had been unable to get back. Because the claimant's separation occurred due to his own actions, he

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<sup>1</sup> The claimant admitted during the hearing that he had a prior OUI (this was his second offense). However, there was no testimony as to what had occurred with the prior OUI. There was not substantial and credible evidence in the record from which the review examiner could conclude that the claimant knew what would happen if he refused the breathalyzer. This part of the finding is speculation or assumption on the part of the review examiner.

<sup>2</sup> The claimant testified that he had informed the treasurer about a July, 2018, court date, but that he had mentioned that it would be about "motions." Although the employer provided some information in the record which might suggest that it thought that the claimant could get his license re-instated in July of 2018, *see* Exhibit # 2, there is not sufficient evidence in the record to find that, in April of 2018, the claimant told the employer that he expected to get his license back in July of 2018.

<sup>3</sup> As to why the treasurer allowed the claimant to remain employed, the gist of the testimony was that the employer was waiting to see if the claimant could get his license back. It is not clear that July of 2018 was specified by the claimant as the time when he could get his license back. The treasurer did not testify that he thought that the claimant would get his license back in July of 2018.

<sup>4</sup> The claimant did not quit on July 25, 2018, nor was his license suspended that day.

<sup>5</sup> The claimant made great effort during the hearing to try to show that he was hired to be a truck driver, as well as an assembler. He even suggested that his job description had changed after he lost his license. The review examiner did not credit this. She made supported findings that he was hired to mainly be a truck driver, with other fill-in work as needed.

brought the separation upon himself, and, therefore, we agree with the review examiner that G.L. c. 151A, § 25(e)(1), applies in this matter.<sup>6</sup> That section of law provides, in part, the following:

[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 . . . .

Under this section of law, the claimant has the burden to show that he is eligible to receive benefits. The review examiner concluded that he had not met his burden. She reasoned:

The claimant does not dispute his license was suspended after he was arrested for OUI on April 21, 2018. The claimant testified he refused to take a breathalyzer test which subsequently led to his license being suspended, thereby causing him to be unable to do his job. Since the claimant's position required him to possess a valid license and the loss of the claimant's license was due to fault on his part, the claimant's separation from work is considered voluntary and without good cause attributable to the employer.

We agree with this conclusion. See Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002 (1985) (rescript opinion). To the extent that the claimant argues in his appeal that there is no evidence that the license was required for his job, we disagree. His main duties included truck driving. Even if the claimant was not specifically told that he needed to maintain his license to keep his job, or even if this was not put in writing for him, it is reasonable to assume that the claimant was aware that, in order to keep his job doing truck driving work, he needed to maintain a valid driver's license.

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 in the record and free from error of law.

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<sup>6</sup> The claimant testified that his separation occurred after he told the employer that he was going to file a claim for unemployment benefits. The review examiner made no findings that the claimant's separation resulted from the filing of an unemployment claim.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 22, 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 - January 11, 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](http://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.

SF/rh