

**Claimant CNA, who was discharged for improperly removing a narcotic patch when helping a patient shower, lacked the requisite state of mind for disqualification, where the review examiner credited his testimony that he did not know the patch he removed was a narcotic patch.**

**Board of Review  
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**Issue ID: 0026 8582 92**

## **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 August 24, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 15, 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 November 16, 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 an opportunity to present testimony and other evidence. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 removing a narcotic patch from a patient before helping the patient with a shower constituted deliberate misconduct in wilful disregard of the employer's interest in the proper handling of medications, 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 as a Certified Nursing Assistant (CNA) for the employer, a skilled nursing provider. The claimant began work for the employer in August 2016.
2. The claimant worked 3 p.m. to 11 p.m. Depending on a shift differential, he earned between \$13 per hour and \$15 per hour. The employer's facility has 168 beds.
3. In February and April, 2018, the claimant was disciplined for failing to follow patient care plans. In July, 2018, the claimant was disciplined for poor patient care.
4. The employer did not discharge the claimant because they wanted to continue to try to work with him.
5. The claimant was aware of [sic] from his training as a CNA that he was not allowed to handle narcotic medication.
6. It is not known if the employer has a specific policy that states CNAs are prohibited from handling medication.
7. On August 19, 2018, the claimant was assigned to a patient who had recently returned from the hospital. The patient still had EKG patches on his chest. He also had a Fentanyl medication patch on his chest.
8. The claimant was asked by the nurse caring for the patient to assist him in taking a shower.
9. The claimant helped undress the patient. He noticed the patient had what he believed were several EKG patches on his chest. He removed the EKG patches.
10. The claimant also noticed a slightly different patch [sic] the patient's chest. He did not notice that [sic] whether or not the patch had a signature on it. He did not think it was a medical patch. He believed the patch was no longer needed. He removed the patch.
11. The claimant did not realize he was removing a medication patch.
12. The patient did not say anything to the claimant about removing the patch.
13. The claimant placed the patches together in his disposable gloves and threw them away with laundry.
14. Approximately one hour later, the nurse told the claimant he removed a Fentanyl patch from the patient.

15. The claimant found the laundry, gloves and patches he disposed of. He gave the Fentanyl patch to the nurse.

16. On August 20, 2018, the employer suspended the claimant.

17. On August 24, 2018, the claimant discharged the claimant for removing the Fentanyl patch from the patient.

#### Credibility Assessment:

The employer witness at the initial hearing on November 8, 2018 was the Director of Nursing. He admitted that he did not have direct knowledge of the claimant's conduct on August 19, 2018. He also did not provide evidence of written policies prohibiting CNAs from handling medication. He was also not present at the remand hearing on January 28, 2019. The claimant was not present at the initial hearing. He was present at the remand hearing. His testimony regarding the events on August 19, 2018 was first hand and was credible. Given the evidence in the record, the claimant's testimony regarding his knowledge of the employer's policies and the events that led to his discharge is credible. It is concluded he was aware from his training that he was prohibited from touching medication but was not aware of the employer's policy. His testimony that he was not aware that he was removing a Fentanyl medical patch was also credible.

#### 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 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. 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 reach our own conclusions of law.

The review examiner denied benefits after examining 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] . . . (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 . . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged 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. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Solely on the basis of the employer's testimony at the initial hearing, the review examiner concluded that the employer had met its burden. We remanded the case to take the claimant's testimony. After remand, we conclude that the employer has not met its burden.

Following remand, the review examiner found that the claimant knew from his training to become a certified nursing assistant (CNA) that he was not allowed to handle narcotic medications. From this finding, it logically follows that the claimant understood (or should have understood) that he could face discipline by the employer if he handled narcotic medications.

The review examiner also found that on August 19, 2018, a nurse assigned the claimant to assist a patient in taking a shower. The patient had just returned from the hospital and still had EKG patches on his chest, as well as a fentanyl medication patch on his chest. The claimant helped to undress the patient. While doing so, he noticed the patient still had what he believed were several EKG patches on his chest and removed them. The claimant also noticed a slightly different patch on the patient's chest. He did not notice whether or not the patch had a signature on it, and did not think it was a medical patch. Because he thought the patch was no longer needed, the claimant removed it and helped the patient shower. The employer suspended the claimant on August 20, 2018, and discharged him on August 24, 2018, for removing the fentanyl patch from the patient.

The review examiner found that the claimant did not realize he had removed a medication patch from the patient, and that the patient had not said anything to the claimant about that patch. Although it is undisputed that the claimant's removal of the patient's fentanyl patch was contrary to the employer's expectation that CNAs would not handle patient medications, as noted above, when an employee is discharged, the employer bears the burden of proof to establish deliberate misconduct or a knowing violation of a reasonable and uniformly enforced policy. Inherent in this burden of proof is establishing that the claimant *intended* to act in a manner contrary to the employer's policy or interest. To be a knowing violation at the time of the act, the employee must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, 423 Mass. at 813. Conspicuously absent from the review examiner's findings after remand is any finding that the claimant engaged in any intentional acts.

On the contrary, the review examiner made a credibility assessment accepting as true the claimant's testimony that he was not aware that he was removing a fentanyl patch at the time he was helping the patient to shower. 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). As stated, we believe the credibility assessment here is reasonable.

Where the review examiner credited the claimant's claim that he did not know that one of the patches he removed from the patient's body was a narcotic patch, he lacked the requisite state of

mind to disqualify him from benefits, and the employer has failed to meet its burden. We, therefore, conclude as a matter of law that the claimant's discharge was neither for a knowing violation of a reasonable and uniformly enforced policy of the employer, nor for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 25, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 26, 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.

JPC/rh