

Claimant deliberately refused to haul loads because he felt they were unsafe, even though others then hauled them safely, and refused to abide by reasonable work rules that he not use a client's offices. Held he was subject to disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0027 6754 85

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 his position with the employer on August 30, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 14, 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 December 21, 2018.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding his separation from employment. 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.¹

The issue before the Board is whether the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant refused to perform some of

¹ During the first day of the remand hearing, the review examiner did not enter several agency documents into the record. Documents not entered include the December 18, 2018, decision, the claimant's appeal to the Board, the Board's acceptance of review and remand order, and the notices for the March 14, 2019, hearing. Of these documents, only the claimant's appeal would not have been available to the employer. Because the documents at issue are primarily agency records, and the most relevant documents were sent to the parties, we do not feel it necessary to remand this matter again. We note that the review examiner did enter the notice for the April 9, 2019, hearing into the record on that day as Remand Exhibit # 6.

his job duties, his co-workers had to step in to do his work instead, and the employer discharged the claimant for his intentional failure to complete his work.

Findings of Fact

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

1. From June 25, 2018 through August 30, 2018, the claimant worked full-time on 3rd shift as a yard man for the employer, a flatbed carrier.
2. The claimant's job duties consisted, in part, of moving trailers around the yard on a customer site ([A]).
3. During his brief employment, the claimant was frequently spoken to by his direct supervisors regarding his failure to perform his job duties, follow directives of management and the customer, and attendance issues.
4. Specifically, the claimant was talked to about: his failure to move equipment when asked - the employer often needed to tell the claimant to do so multiple times before it was completed; his refusal to move loads he personally deemed unsafe (even if the employer and/or customer had deemed them safe); his continuing use of [A]'s offices and break room despite being told, and received a warning regarding, the area was for [A] employees only; his failure to be at work as scheduled and on time; and, his failure to follow appropriate break times.
5. [A] complained to the employer multiple times about the claimant's failure to follow directions and protocol.
6. The employer had an expectation that the claimant would be at work as scheduled and follow all employer directives and rules.
7. The claimant was aware of these expectations as he had received an electronic handbook at hire, and acknowledged same on June 25, 2018. He had also received continuous training as the employer tried to work with him on his performance, attitude, and his refusal to follow employer/customer directives.
8. The claimant received a verbal warning on August 8, 2018, which was documented in writing, with regard to issues with his hours, time performance, and his continuing failure to stay out of the [A] offices despite having been told repeatedly he was not allowed to be there.
9. The claimant understood that he was not allowed to be in the [A] offices or breakroom, but continued to intentionally disobey the directive to stay out of the [A] offices and breakroom because he felt that [A] was being "selective" and unfair about who was allowed to be there.

10. On August 14, 2018, the claimant received a written warning regarding his continuing failure to show up to work on time, to complete his breaks as directed, and to complete tasks when asked.
11. The August 14, 2018, warning stated that the employer would “continue the corrective action process to include possible termination” if they did not see improvement in the area’s addressed in the warning.
12. On August 22, 2018, the claimant received another warning regarding complaints the employer had received from [A] that the claimant had not taken his breaks at the required times.
13. The claimant frequently complained that loads he was required to move, which had been put together by [A] employees to be in proper balance for transport, were too unbalanced to move and would flip over if he attempted to do so. The claimant would then refuse to move the loads. This happened 2 to 3 times each week.
14. Initially in his employment, when instructed to move a load after his refusal to do so (because the employer or [A] deemed a load to be safe), the claimant would comply. The claimant felt “forced” to do so because he was told if he didn’t, he would be fired. At some point the claimant got “tired of it” and decided he would not move them despite the fact he knew he could be fired for his refusal.
15. The claimant’s refusal to move loads because he had deemed them to be unbalanced, resulted in other employees needing to inspect the loads to see if they were unbalanced — which they generally were not — and resulted in lost time and productivity. Despite being instructed not to do so, the claimant continued to refuse to move loads that he alone decided were unbalanced and unsafe.
16. In the 13 years that the claimant’s supervisor was with the employer a truck had never flipped over because it was unbalanced.
17. On August 29, 2018, the employer received an email from the 1st shift yard man who had been called in early for his shift. He was told by [A] that he needed to come in early because the claimant had informed the [A] supervisor that did not know how to drive a stick shift or drive an alternate vehicle when there are issues with the “shag truck” (the truck used to move trailers) as the claimant was alleging that morning.
18. The claimant’s job description required that he be able to drive a truck with a stick shift.

19. When the 1st shift employee arrived, he discovered there was no mechanical issue with the shag truck and the claimant stated he had never said there was an issue or that he couldn't drive a stick shift. When he spoke with the client (the [A] supervisor) he was told that the claimant had insisted there was an issue with the shag truck causing him to not be able to drive it, and that he was unable to drive another yard vehicle because he could not drive a stick shift. The customer was very unhappy with the claimant's attitude, work ethic and timeliness in moving trailers, and felt the claimant was intentionally failing to follow instructions and do his job.
20. The 1st shift employee had to complete a number of tasks the claimant had refused to do, or had not done.
21. The claimant's attitude and intentional poor performance, in refusing to move loads because he claimed there was a mechanical issue with the shag truck, and that he could not drive a stick shift, on August 29, 2018 was the final straw for the employer, who decided to terminate the claimant the following day.
22. The claimant was terminated on August 30, 2018 for intentional poor performance, failure to follow employer and customer rules and directives, and poor attendance and timeliness.
23. The claimant filed a claim for unemployment benefits on October 15, 2018, with an effective date of October 14, 2018.
24. On November 14, 2018, the Department of Unemployment Assistance (DUA) issued a Notice of Approval to the claimant. The employer appealed that determination.

Credibility Assessment:

During the remand hearing, the claimant appeared and testified for the first time in this matter. The employer also appeared and testified. During the remand hearing, the claimant acknowledged that he had intentionally refused to comply with the employer's instructions to stay out of the [A] offices, to move loads as directed (even if he felt they were unbalanced), and to take his breaks as directed. The employer's requests were reasonable as they were essentially requests for the claimant to do his job. The claimant continued to refuse to comply, including on the date of the final incident when he told the customer that he could not move a load because of a mechanical issue with the shag truck, and that he couldn't use an alternate vehicle because he did not know how to drive a stick shift. This resulted in another employee being called into work early to do the claimant's tasks, and cost the employer additional time and money. Thus, I conclude that the claimant's refusal to perform his tasks, and his failure to perform to the employer and its customer's standards, was intentional.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and the record to determine: (1) whether the consolidated 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 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. As discussed more fully below, we conclude that the review examiner's decision to deny benefits is supported by the record.

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 relevant part, as follows:²

[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

Under this section of law, the burden rests with the employer to show that the claimant is not eligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following the first hearing, at which only the employer offered evidence, the review examiner concluded that the employer had carried its burden. After reviewing the entire record, including the testimony from the remand hearing and the consolidated findings of fact, we agree.

The review examiner found that the claimant was discharged for "intentional poor performance, failure to follow employer and customer rules and directives, and poor attendance and timeliness." Consolidated Finding of Fact # 22. During the hearings, the employer's witness, the project manager, focused mainly on the claimant's refusal to perform work tasks (intentional poor performance) and his failure to abide by rules of the workplace. Therefore, our decision focuses on those issues.

The final incident which led to the claimant's discharge occurred on August 29, 2018. On that day, the employer learned that the claimant had refused to operate a truck and had reported that he was unable to drive a stick shift, a skill which was required for him to obtain his job with the employer. *See* Consolidated Findings of Fact ## 17 and 19. Another employee had to complete the tasks which the claimant asserted he could not do. The employee did the work without incident. Consolidated Finding of Fact # 20. This was the last in a series of incidents in which the claimant indicated that he could not move loads. *See* Consolidated Findings of Fact ## 4 and 15.

² No applicable policies were offered by the employer. Therefore, we agree with the review examiner's conclusion that the employer did not show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

There is no question that the employer expected the claimant to perform the tasks assigned to him. Consolidated Finding of Fact # 6. Based on the multiple times that the claimant had been spoken to about the employer's expectations and concerns, *see* Consolidated Findings of Fact ## 3, 4, 7, 8, and 9, it is concluded that the claimant was aware that he was to comply with the employer's expectations, rules, and policies.

During the remand hearing, the claimant testified that he did refuse to move some loads. However, he did so because he deemed the loads to be unbalanced and, therefore, unsafe. He was not willing to jeopardize his commercial driver's license to move the unsafe loads. If the employer's expectation that the claimant move the loads was found unreasonable due to a safety issue, then the claimant would not be subject to disqualification under G.L. c. 151A, § 25(e)(2). In addition, if the claimant's refusal to do a specific task was somehow mitigated, he also could not be denied benefits. *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979) (noting that claimant's state of mind is important factor under G.L. c. 151A, § 25(e)(2), and it is evaluated by taking into account the worker's knowledge of an expectation, the reasonableness of that expectation and the presence of any mitigating factors).

The review examiner's findings of fact show that the employer's expectations were reasonable, and that nothing prevented the claimant from complying with those expectations. Each time that the claimant refused to do a task, another employee did it, suggesting that the task was possible to perform and that it was not unsafe to do. *See* Consolidated Findings of Fact ## 15, 19, and 20. The project manager testified, and the review examiner found, that a truck has never flipped due to an unbalanced load. Consolidated Finding of Fact # 16. This suggests that the claimant's assertions that the loads were too unbalanced to move two to three times per week were exaggerated at best and most likely not accurate or true. *See* Consolidated Finding of Fact # 13. Indeed, the review examiner made no finding that the claimant's tasks were actually unsafe to do. It also does not appear that she found credible the claimant's testimony that he genuinely thought that the loads were unsafe. On the contrary, she found that "[d]espite being instructed not to do so, the claimant continued to refuse to move loads that he alone decided were unbalanced and unsafe." Consolidated Finding of Fact # 15. Read together, the consolidated findings of fact show that the claimant deliberately refused to do work which he could have done, and that nothing prevented him from doing his work.

As to the claimant's failure to comply with the employer's rules and policies, the claimant was warned on August 8, 2018, that he needed to stay out of [A]'s offices. Consolidated Finding of Fact # 8. The claimant knew that he was not supposed to be in the offices. Nevertheless, he "continued to intentionally disobey the directive." Consolidated Finding of Fact # 9. As indicated in the finding, the claimant's actions were deliberate. We see nothing unreasonable about the directive to stay out of the offices. The claimant's reason for not complying with the directive, that he felt the rules were unfair, do not amount to mitigating circumstances.

The claimant's conduct in unreasonably refusing to do his work and intentionally failing to follow work rules and policies, absent any mitigating factors, leads to the conclusion that his separation was attributable to deliberate misconduct in wilful disregard of the employer's interest. 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)(2), 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 August 26, 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 - May 21, 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

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