The employer ended the claimant's employment because of a medical provider's note, which mistakenly returned the claimant to work. Because the claimant was not able to return to work yet, and because he did not know that the employer had expected him to return to work (according to the terms of the erroneous medical note), he did not have the state of mind necessary to disqualify him under G.L. c. 151A, § 25(e)(2).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0030 3724 31

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 separated from his position with the employer on March 12, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 8, 2019. 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 June 18, 2019.

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 and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence, as well as to review medical documentation in the record. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 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 was not able to work indefinitely due to a work-related injury, he did not know that a letter was mistakenly sent to the employer allegedly returning him to work as of March 1, 2019, and the employer informed him that he was separated from work on March 12, 2019 based on information contained in the erroneous letter.

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 full-time for the employer, a warehouse distributer, as a freezer worker, from May 14, 2018 until March 1, 2019. The claimant was paid $14.25 per hour.

2. The employer has a policy which states, in part:

   "Any employee who is absent on their scheduled workday without reporting their absence to their supervisor will be considered an 'automatic quit'." (Exhibit 13)

3. The policy is a measure to ensure the employer is adequately staffed to conduct its business and service customers.

4. All employees are subject to the policy.

5. All employees who have been absent on their scheduled workday without reporting their absence to their supervisor have been considered an "automatic quit."

6. The claimant was aware of the policy having received and signed for the Employee Handbook on May 21, 2018. (Exhibit 14)

7. On or about November 13, 2018, the claimant suffered a work related injury to his elbow and trapezius muscles.

8. The claimant was placed on an approved absence beginning November 13, 2018.

9. On February 8, 2019, the claimant was examined by his physician.

10. The claimant's physician provided the claimant with a signed medical note dated February 8, 2019, which stated, in part:

    "[X] No work until completion of Physical Therapy" (Exhibit 8)

11. On March 12, 2019, the employer's worker's compensation insurer called the Human Resources Manager (HRM) and told her about a medical note from the claimant's physician dated March 12, 2019, which stated the claimant was released to work beginning March 1, 2019.

12. On March 12, 2019, the HRM called the claimant and told him it was reported by his physician he was released to work on March 1, 2019 and he was being let go for failing to return to work on March 1, 2019.

13. On March 1, 2019, the claimant was absent without reporting his absence to his supervisor.

14. The claimant did not know he was scheduled for work on March 1, 2019.

15. The claimant was not seen by his physician on March 1, 2019 or March 12, 2019.

16. The claimant was not provided the March 12, 2019 medical note by his physician.

17. The claimant was still undergoing physical therapy with appointments scheduled for March 14, 2019 through April 9, 2019. (Exhibit 11)

18. The claimant told the HRM the March 12, 2019 physician's medical note was a mistake and he was still undergoing physical therapy.

19. The claimant brought the HRM his physical therapy appointment schedule. (Exhibit 11)

20. The employer considered the claimant to be separated from his employment on March 1, 2019 based upon the worker's compensation insurer's telephone call about the medical note from the claimant's physician dated March 12, 2019, which stated the claimant was released to work beginning March 1, 2019.

21. The HRM did not contact the claimant on March 1, 2019 to tell him he was separated because the HRM first learned of the March 12, 2019 medical note on March 12, 2019 releasing the claimant to work on March 1, 2019.

22. On March 14, 2019, the HRM received from its worker's compensation insurer the claimant's physician's note dated March 12, 2019, which stated, in part:

    "[X] May return to work on: 3/1/19" (Exhibit 9)

23. The March 12, 2019 medical note was not signed. (Exhibit 9)

24. The claimant was next examined by his physician on April 5, 2019.

25. The claimant's physician provided the claimant with a signed medical note dated April 5, 2019, which stated, in part:

"[X] May return to work on: April 15, 2019"
"[X] Full time, regular duty" (Exhibit 10)

26. The April 5, 2019, medical note further stated:

    "Comments: Previous letter dated March 12, 2019 stating [Claimant] may return to work on March 1, 2019 was done in ERROR. Please disregard and use this letter. If you have any questions or concerns please feel free to contact our office at [XXX-XXX-XXXX]. Thank you." (Exhibit 10)

27. On April 5, 2019, the claimant provided the HRM with the April 5, 2019 physician's note. The claimant was not reinstated.

28. Employees who are absent from work due to medical reasons are "kept active", are never taken off the schedule, and are immediately returned to work upon submission of a physician's return-to-work medical note.

29. The claimant was in "active" status between March 1, 2019 and March 12, 2019 because the employer was unaware until March 12, 2019 of the March 12, 2019 physician's note releasing the claimant to work on March 1, 2019.

Credibility Assessment:

The claimant testified he was only seen by his physician on February 8, 2019 and April 5, 2019 and had no knowledge of the March 12, 2019 unsigned physician's medical note releasing him to work on March 1, 2019. The claimant's testimony is corroborated by his physician's comment in the April 5, 2019 medical note that the March 12, 2019 medical note releasing the claimant to work on March 1, 2019 was an error. The claimant's testimony is deemed 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. In light of the other consolidated findings of fact, especially Consolidated Finding of Fact # 29, we think that the claimant's employment ended on March 12, 2019, not on March 1, 2019, as indicated in Consolidated Finding of Fact # 1. Although the employer considered him to be separated on March 1, 2019, the employer admitted during the remand hearing that the claimant was still an active employee until March 12, 2019, and the claimant was informed of his separation from employment on March 12, 2019. In adopting the remaining findings, we deem 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 reject the review examiner's legal conclusion that the claimant is subject to disqualification from the receipt of unemployment benefits.

As an initial matter, we must decide which provision of law controls the claimant's separation from employment. The DUA originally applied G.L. c. 151A, § 25(e)(2), the section of law that applies to discharges, or employer-initiated separations. *See* Exhibit # 4. The review examiner, after hearing the employer's testimony that it considered the claimant to have abandoned his job, applied G.L. c. 151A, § 25(e)(1), the section of law covering resignations and other employee-initiated separations.

Although the employer maintains a policy which implies that one absence, without reporting it to a supervisor, will be deemed an "automatic quit," *see* Consolidated Findings of Fact ## 2 and 5, we do not believe that the findings or the record supports a conclusion that the claimant abandoned his job. The claimant was out of work due to an injury. He was not to return to work until he completed physical therapy. As of February 8, 2019, the length of time he was to be out of work was indeterminate. *See* Consolidated Finding of Fact # 10. It has been established that the subsequent note sent to the employer, allegedly clearing the claimant to return to work on March 1, 2019, was erroneous. A subsequent note clarifies the mistake. *See* Consolidated Findings of Fact ## 11, 25, and 26. This evidence shows that the claimant had no intention of leaving his job. In fact, there is a reasonable explanation for why he did not return to work on March 1, 2019. He was still undergoing physical therapy and had not been cleared to return to work yet. Moreover, the claimant's effort to show the employer that he was still undergoing physical therapy soon after the March 12, 2019, conversation with the Human Resources Manager indicates that the claimant was not abandoning his job. *See* Consolidated Findings of Fact ## 17–19. All of the evidence, including the supported findings of fact drawn from the evidence, establish that the claimant did not quit his job. The record supports the conclusion that the claimant's separation was initiated by the employer on March 12, 2019, because the claimant failed to return to work on March 1, 2019.

Because the claimant's separation was initiated by the employer, 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). We conclude that the employer has not carried its burden.

Although it is not entirely clear that the claimant's behavior constituted misconduct or a policy violation, it is apparent that he did not possess the state of mind necessary to deny benefits under G.L. c. 151A, § 25(e)(2). The question of the claimant's state of mind is of paramount importance and consideration in cases decided under the statute cited above. A violation must be

knowing, and misconduct must be deliberate in order for benefits to be denied. *See* Still, 423 Mass. at 813; Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). Here, the claimant did not have a disqualifying state of mind. The claimant did not know that he was to report to work on March 1, 2019. Consolidated Finding of Fact # 14. He was still undergoing physical therapy as of March 1, 2019. Consolidated Finding of Fact # 17. Rather than a knowing policy violation or deliberate misconduct, the claimant's separation from work is attributable to an erroneous return-to-work note sent to the workers' compensation insurance carrier, which was then forwarded to the employer. *See* Consolidated Findings of Fact ## 11 and 22. As such, the claimant is not disqualified from receiving unemployment benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because (1) the claimant did not quit or abandon his job, and, therefore, G.L. c. 151A, § 25(e)(1), is inapplicable, and (2) pursuant to G.L. c. 151A, § 25(e)(2), the claimant did not have the state of mind necessary to disqualify him from receiving benefits.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 10, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 20, 2019

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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.
SF/rh