Claimant CDL driver, who separated after losing his driver's license for operating under the influence of alcohol was entitled to benefits due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e). He provided substantial evidence that he had sought treatment for alcoholism prior to his separation, but that he relapsed prior to his arrest.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 10, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 3, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and allowed benefits in a decision rendered on September 11, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant involuntarily left employment for urgent, compelling, and necessitous reasons and, thus, was entitled to benefits 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 employer's appeal, we remanded the case to the review examiner to take additional evidence regarding the claimant's loss of his driver's license and his efforts to address his alcoholism. Three remand hearings were convened, all of which were attended by the employer; the claimant attended one of the remand hearings. 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 award benefits is supported by substantial and credible evidence and is free from error of law, where the claimant, who had worked for the employer as a driver, lost his commercial driver's license after being arrested for operating under the influence of alcohol, and could thus no longer work for the employer.

Findings of Fact

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

1. The claimant worked full-time for the employer, a food service product company, as a driver, from March 4, 2019, until July 10, 2019. The claimant was paid $18.00 hourly.

2. The claimant's job required driving the employer's vehicle to various customer locations.

3. Possessing an active CDL driver's license was a condition of the claimant's employment.

4. The claimant was aware that possessing an active CDL license was a condition of the claimant's employment.

5. The claimant is an admitted alcoholic.

6. From the summer of 2018 until February 2019, the claimant attended Alcoholic[s] Anonymous (AA) meetings 3 times a week at a church.

7. In February 2019, the claimant was experiencing stress and suffered a relapse.

8. On February 6, 2019, the claimant was admitted to a detoxification center, the [Facility A], through February 11, 2019. (Remand Exhibit 17)

9. The claimant was prescribed Vivitrol to suppress his compulsion to drink alcohol.

10. On March 4, 2019, the claimant started working for the employer.

11. The claimant was working 12 to 15 hours per day.

12. The claimant stopped attending AA meetings due the hours he was working.

13. The claimant thought he had things under control.

14. On July 6, 2019, the claimant had a fight with his girlfriend and began drinking alcohol.

15. The claimant drank alcohol through July 9, 2019.

16. On July 10, 2019, the claimant reported for work.

17. On July 10, 2019, at about 10:00 a.m., the claimant drank a beer.

18. On July 10, 2019, the claimant was arrested in [Town A], Massachusetts, and charged with operating a motor vehicle under the influence of alcohol.

19. The claimant had bought and drank another beer prior to his arrest.

20. The Chief of Police notified the employer of the claimant's arrest.

21. The claimant was arraigned, and his license was suspended for 30 days.

22. A few days later, the claimant called the employer and was told by the Office Manager there was no work for him because he did not have an active CDL license.

23. The claimant could not perform the duties of his employment without an active CDL driver's license.

24. The claimant lost his job due to loss of his CDL driver's license.

25. The claimant attended AA meetings following his arrest.

26. The claimant sought help [from] [Hospital A], the [Facility B] and the [Facility A] for his alcoholism.

27. The facilities did not have any beds available.

28. On August 5, 2019, the claimant sought treatment at [Hospital B] and was given the telephone number for the [Facility A].

29. The claimant was told by a [Hospital B] representative he would be called if his insurance would pay for the 30-day recovery program.

30. [Hospital B] did not call the claimant.

31. On September 25, 2019, the claimant was admitted to the [Facility A] through October 2, 2019. (Remand Exhibit 17)

32. On October 8, 2019, the claimant pleaded to sufficient facts for a guilty finding/ continued without a finding (CWOF). (Remand Exhibit 14)

33. [On] October 8, 2019, the [claimant] was placed on probation for 1 year (October 8, 2019 - October 7, 2020). (Remand Exhibit 14)

34. [On] October 8, 2019, the claimant's Class D driver's license was suspended for 45 days. (Remand Exhibit 14)

35. On October 9, 2019 through October 10, 2019, the claimant was admitted to the [Facility A]. (Remand Exhibit 17)

36. The claimant relapsed and on October 21, 2019, was admitted to [Hospital A] through on or about November 11, 2019. (Remand Exhibit 18)

37. The claimant was prescribed Vivitrol, met with a counselor, and attended AA meetings each day.

38. The claimant was to take Vivitrol 3 times daily upon discharge.

39. On November 29, 2019, the claimant's Class D driver's license was restored. (Remand Exhibit 15)

40. The claimant had not restored his Class D driver's license following the initial 30-day license suspension through November 29, 2019.

41. The claimant's Commercial Driver's License (CDL) was suspended for 1 year (October 20, 2019-October 19, 2020). (Remand Exhibit 16)

42. Work was available for the claimant at the time of separation.

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. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is entitled to benefits based on his separation from this employer.

The review examiner issued his decision pursuant to the following provisions of G.L. c. 151A, § 25(e), which provide, in relevant 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 (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 . . . .
>
> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under these provisions of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. In this case, the review examiner concluded that the claimant had met his burden. We agree.

Two Supreme Judicial Court (SJC) decisions are initially important to our analysis. In Rivard v. Dir. of Division of Employment Security, the SJC stated, "a person who causes the statutory impediment that bars his employment leaves his employment "voluntarily" within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment." 387 Mass. 528, 529 (1982). In that case, the claimant withdrew accumulated retirement monies knowing that the statute proscribed rehiring unless he repaid the funds back into the retirement system. After he was rehired, the employer had to discharge him because he could not repay the funds. Id. at 530. Here, the claimant was arrested for operating a motor vehicle under the influence of alcohol. This resulted in the suspension of his regular Class D driver's license as well as his commercial driver's license (CDL), which consequently impeded his ability to continue working for the employer.

Several years later, in Olmeda v. Dir. of Division of Employment Security, the SJC upheld the denial of unemployment benefits to a claimant who was unable to get to work, because his driver's license was suspended following a conviction for driving while intoxicated. 394 Mass. 1002 (1985) (rescript opinion). The Court rejected the claimant's contention that he did not leave work voluntarily. In so doing, the Court noted that the word "voluntarily," as used in G.L. c. 151A, § 25(e)(1), "is a term of art that must be read in light of the statutory purpose of providing compensation for those who are thrown out of work through no fault of their own." Id. at 1003 (citations, brackets and internal quotes omitted). The SJC further opined that, in determining whether an employee left work "voluntarily" for purposes of G.L. c. 151A, § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, but whether the employee brought his unemployment on himself. Id., *citing* Rivard, 387 Mass. at 530.

Rivard and Olmeda decided the claimants' separations under G.L. c. 151A, § 25(e)(1), regardless of whether the claimant resigned or had been terminated, because the claimant's actions caused the statutory impediment to continued employment. The same is the case here. The claimant's own actions initiated a series of events which caused him to leave his job, including being arrested for operating under the influence of alcohol that triggered his loss of license. Therefore, the review examiner properly analyzed the claimant's eligibility under G.L. c. 151A, § 25(e)(1).

In the case before us, however, we must also consider a third ruling from the SJC, addressing an issue not addressed in Rivard or Olmeda, which is the issue of alcoholism. Where the claimant admits he is an alcoholic, his separation may not actually be considered "voluntary." The argument is that the separation is attributable to the involuntary compulsion to drink, rather than to any intentional choice made by the claimant. The SJC had occasion to consider this issue in Shepherd v. Dir. of Division of Employment Security. 399 Mass. 737 (1987) (discharge for failing to meet with employer to discuss excessive absences analyzed under G.L. c. 151A, § 25(e)(2)).

The underlying principle in cases where the claimant is an admitted alcoholic is whether the claimant was responsible for his own unemployment. With regard to alcoholism, we turn to the SJC's instructions for remand in Shepherd. The Court directed the agency to focus on the claimant's circumstances and state of mind *at the time of his misconduct*. Shepherd, 399 Mass. at 740. Specifically, the Court remanded to know whether the misconduct was attributable to the

disease of alcoholism and whether, at the time of the misconduct, he "had control of his alcoholism or . . . he deliberately and willfully refused to accept help in controlling it." Id.

Thus, in instances where the claimant's conduct caused a statutory impediment to his continued employment and alcoholism may have played a role, Rivard and Olmeda dictate that the separation be deemed a quit for purposes of eligibility for unemployment benefits, and the burden of proof falls upon the claimant. Following the guidance in Shepherd, our analysis focuses on the time of the incident that caused the separation. To render the separation involuntary due to urgent, compelling, necessitous circumstances, the claimant would have to show that *before* the incident that caused him to lose his job, he knew he was an alcoholic and had tried, but was not successful at controlling the disease. If the claimant can meet this burden, he will have shown that he lost his job due to circumstances beyond his control and may not be disqualified under G.L. c. 151A, § 25(e)(1). On the other hand, if the evidence shows that the claimant knew he had a drinking problem and a concerted effort to address that problem did not begin until *after* the incident that lost him his job, then he is deemed to have caused his own unemployment and will be disqualified under G.L. c. 151A, § 25(e)(1).

Turning now to the facts of the case before us, there is no question that, in order to fulfill his driving duties, the claimant was required to have a valid CDL license for his job. Consolidated Findings ## 2–4. On July 10, 2019, the claimant was arrested by the police for operating a motor vehicle under the influence of alcohol. Consolidated Finding # 18. Thereafter, his license was suspended for 30 days. Consolidated Finding # 21. Because he no longer had a license, the claimant was no longer able to perform his normal job duties. Consolidated Findings # 22–24.

Although the claimant is an admitted alcoholic, *see* Consolidated Finding # 5, the review examiner's initial findings of fact did not address whether the claimant was making sincere efforts to control his alcoholism prior to his arrest on July 10, 2019. We remanded the case for additional evidence regarding the claimant's efforts to address his alcoholism prior to his arrest that led to his separation.

After remand, the review examiner found that the claimant had attended Alcoholics Anonymous (AA) meetings three times per week at a local church from the summer of 2018, until February of 2019, when he suffered a relapse after experiencing stress. Consolidated Findings ## 6–7. On February 6, 2019, the claimant was admitted into a detoxification center through February 11, 2019, and he was prescribed Vivitrol to suppress his compulsion to drink alcohol. Consolidated Findings ## 8-9; Remand Exhibit # 17.[1]

The review examiner found that the claimant began working for the employer on March 4, 2019, and worked 12 to 15 hours per day. Consolidated Findings ## 10–11. The claimant stopped

[1] The document provided by the claimant shows that prior to the claimant's admission on February 6, 2019, he had checked into that recovery program for inpatient care four separate times in 2013, and subsequently participated in an "intensive outpatient program" later in 2013. *See* Remand Exhibit # 17. We view this document as underscoring the claimant's longstanding struggle to address the disease of alcoholism. While not explicitly incorporated into the review examiner's findings, this evidence 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).

attending AA meetings because of the hours he was working, but he thought he had the issue under control. Consolidated Findings ## 12 and 13. The review examiner further found that the claimant began drinking alcohol after an argument with his girlfriend on July 6, 2019, and drank through July 9, 2019. Findings of Fact ## 14–15. On July 10, 2019, the claimant drank a beer after reporting to work. He was arrested later that day, after buying and drinking another beer. Consolidated Findings ## 17-18.

We conclude that the record contains substantial evidence to show that, prior to the time of the incident that caused his separation, the claimant had made sincere efforts to treat or otherwise control his alcohol consumption so that it would not adversely affect his employment. The claimant's candor in admitting to these relapses and continuing to seek treatment for his condition underscores the sincerity of his efforts. Thus, we conclude, as the review examiner did, that the claimant's separation was involuntary, arising from his irresistible compulsion to drink alcohol, and that he should be entitled to unemployment benefits.

We, therefore, conclude as a matter of law that the claimant separated from employment due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending July 13, 2019, and for subsequent weeks if otherwise eligible.

Where we conclude that the claimant's separation was involuntary, for urgent, compelling, and necessitous reasons, the charges for the claimant's benefits should be charged to the solvency account, provided that the employer is contributory and has met the requirements of G.L. c. 151A, § 14(d)(3).

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2020

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.

JPC/rh