

The claimant could only perform light duty work after being injured in a motor vehicle accident. The employer discharged him because it had no light duty work. He was out of work through no fault of his own and he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St.
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**

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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 was discharged from his position with the employer on August 6, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 24, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties,¹ the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 11, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not 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 employer's appeal, we remanded the case to the review examiner to clarify the verbal and written communications between the parties just prior to the claimant's separation. 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, which concluded that the employer had not demonstrated that the claimant had violated a policy or deliberately failed to meet an employer expectation, when he could only perform light duty work following a motor vehicle accident, 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 original hearing was conducted on two separate dates. The employer did not participate on the second date.

1. The claimant worked for the instant employer as a full-time Activity Aide from May 2019, until his last physical day of employment on 7/11/2019.
2. After last working on 7/11/2019, the claimant was involved in a motor vehicle accident and suffered acute back, shoulder and knee pain from the accident.
3. On 7/11/2019, the claimant informed the employer of his inability work as a result of a motor vehicle accident.
4. The employer did not place the claimant on a leave of absence and [the] Activities Director [sic] him they would hold his position as long as they could.
5. The claimant sought medical treatment and was informed to remain out of work until 7/22/2019, when he could return to work.
6. The claimant was still in pain on 7/22/2019, and was unable to work.
7. The claimant went to the Emergency Room on 7/22/2019, and was informed to remain out of work until 7/26/2019.
8. On 7/23/2019, the claimant called his own doctor, who informed him to remain out of work for two weeks until reevaluation.
9. The claimant was not able to visit his doctor due to his health insurance being temporarily cancelled.
10. On 7/23/2019, the claimant informed the Activities Director that his doctor instructed him to remain out of work two more weeks and the employer stated to keep them informed.
11. Between 7/23/2019, and 8/2/2019, the claimant informed the Activities Director of his next doctor's appointment on 8/2/2019.
12. On 8/2/2019, the claimant met with his doctor, who cleared him to return to work on 8/2/2019, with the restriction of not standing for more than 5 minutes without a break and to avoid frequent bending from 8/2/2019, through 8/31/2019. The claimant was provided a copy of these restrictions in writing dated 8/2/2019, by his doctor.
13. On 8/2/2019, the claimant informed the Activities Director that he was cleared to return to work for light duty effective 8/2/2019, with the two medical restrictions.
14. The employer determined they could not accommodate such medical restrictions and made the claimant an inactive employee.

15. The claimant was informed by the Activities Director to report back to work on 8/6/2019, for a meeting.
16. The claimant reported to work on 8/6/2019, and was informed by the employer that he was terminated and placed inactive because he was not able to perform his job duties.
17. The Human Resources Director was not present at the termination meeting on 8/6/2019.
18. The claimant had his doctor's letter with medical documentation with him on 8/6/2019.
19. The employer also handed the claimant a document informing him that he was terminated. The document did not indicate any reason.
20. The claimant was required to sign the employer's termination document which is dated 8/6/2019.
21. The termination document stated that the claimant was terminated effective 8/6/2019.
22. The claimant never resigned his employment.

Credibility Assessment:

The claimant's testimony is accepted as credible in all contested areas, since the claimant was forthright in giving firsthand testimony supported by medical documentation and his version of the events made more logical sense. The sole employer witness, the Human Resource Director's testimony was less detailed, she relied on notes from other employees and was speculative since a majority of the testimony was hearsay because the majority of communication occurred between the claimant and the Activities Director including the termination [sic]. For such reasons, the claimant's testimony [sic] to be considered more credible in all contested areas.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding of Fact # 17 is misleading insofar as it states that the Human Resources Director was not present for the termination meeting. At the remand hearing, the employer's current Human Resources Director testified that she was not at the meeting, but that the employer's former Human Resources Director, who has since left the company, was

present.² 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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is eligible for benefits.

Because the review examiner found that the employer terminated the claimant's employment, this case is properly analyzed under G.L. c. 151A, § 25(e)(2), which provides, 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 . . . (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

"[T]he grounds for disqualification in § 25(e)(2), are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Inasmuch as the employer has not presented evidence to show that the claimant violated any written rule or policy, we agree with the review examiner's conclusion that the claimant may not be disqualified under the knowing violation prong of G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be ineligible under G.L. c. 151A, § 25(e)(2), if the employer shows that he engaged in deliberate misconduct in wilful disregard of the employer's interest. As a threshold matter, the employer must establish that the claimant engaged in some form of misconduct. The employer alleged that the claimant failed to provide requested medical documentation to support his inability to work after July 11, 2019.³ However, the review examiner has found that this was not the reason it fired him. The actual reason for the claimant's discharge was that they could not accommodate his light duty restrictions. *See Consolidated Findings ## 14 and 19.* Simply put, the employer had no work for him to do.

There is no evidence that the claimant engaged in misconduct. Rather, he was restricted to light duty work because he was injured in a motor vehicle accident. The purpose of the unemployment statute is to provide temporary relief to persons who are out of work and unable to secure work

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

³ It appears that the claimant had not presented any medical notes to the employer until he returned to attend the August 6, 2019, meeting, *see Consolidated Finding # 18.* Nonetheless, the record shows that he remained in communication with his supervisor and updated her on his condition during the interim period. *See Consolidated Findings ## 3, 10, 11, and 13.*

through no fault of their own. Connolly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24 (2011) (further citations omitted). Here, the claimant was out of work through no fault of his own. He was available to perform light duty work for the employer, but none was available. Effectively, he was laid off.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant either knowingly violated a rule or policy or engaged in deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning August 4, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 9, 2020



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chariman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020⁴. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

AB/rh

⁴ See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.