

The claimant stopped reporting for work for an unknown reason and, therefore, did not establish good cause attributable to the employer or urgent, compelling, and necessitous reasons for his separation. Although he is disqualified under G.L. c. 151A, § 25(e)(1), the penalty is a constructive deduction rather than a full denial of unemployment benefits, because this was a part-time benefit year employer.

**Board of Review
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Issue ID: 0031 9370 62

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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA effective March 24, 2019, and began collecting benefits. He separated from his position with the instant employer on April 3, 2019, and was disqualified based on this separation in a determination issued on September 17, 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 awarded benefits in a decision rendered on October 30, 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 not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the events leading to the claimant's separation from employment. The employer participated for the entirety of the remand hearing, but the claimant disconnected from the telephone at the time he began providing his testimony. 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 claimant involuntarily left employment for urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant stopped reporting for work for an unknown reason more than a week before he entered a rehabilitation program. Additionally, we consider

whether the claimant is subject to a total disqualification from his weekly benefit amount or merely a constructive deduction.

Findings of Fact

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

1. The employer is a temporary staffing agency.
2. The employer assigned the claimant to work for a landscape company. The claimant worked as a full-time landscaper. The claimant began this assignment on 4/19/19.
3. The employer created a document titled Temporary Employee Policies and Procedures." The claimant signed an acknowledgement of the document. The acknowledgment reads, in part, "I have received, read, and understand [the employer's] Employee Policies and Procedures Form. By signing below, I agree to comply with and understand the policies contained herein." The claimant electronically signed the acknowledgment on 4/18/19. The claimant thereafter had access to the document in the employer's electronic system.
4. The claimant did not present for work after 4/30/19. The reason for this is unknown.
5. The claimant did not communicate with the employer about why he did not present for work after 4/30/19.
6. On or around 5/13/19, the employer determined that the claimant had abandoned his job.
7. The claimant was arrested for suspected OUI on 5/08/19. The claimant spent the night in jail.
8. The claimant's wife called the landscape company after the claimant's arrest. The claimant's wife reported that the claimant could not report to work because he planned to enter a rehabilitation program.
9. It is unknown why the claimant did not give the employer's telephone number to his wife so she could inform the employer about the claimant's continued absence from work after 4/30/19.
10. The claimant began an alcohol dependency rehabilitation program on 5/09/19. It is unknown whether the claimant's participation in this program was court-ordered. The claimant remained in this program through 5/21/19. The claimant lived at the rehabilitation center. The claimant was not allowed to have his cellular telephone while in this program. The claimant was not allowed to work while in this program.

11. The claimant began a second alcohol dependency rehabilitation program on 5/21/19. It is unknown whether the claimant's participation in this program was court-ordered. The claimant remained in this program through 7/24/19. The claimant lived at the rehabilitation center. The claimant was not allowed to work while in this program.
12. The claimant self-identifies as an alcoholic.
13. It is unknown whether the claimant's OUI charges are still pending. It is unknown whether a final disposition has been issued.
14. The employer could not have held the claimant's assignment with the landscape company. The landscape company had the power to decide whether to hold the claimant's assignment for the claimant. The employer could have potentially placed the claimant on another assignment. The claimant never asked the employer to place him on a different assignment.
15. The employer had continued work for the claimant if the claimant had continued to present for work.

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. 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, except as follows. We reject the portion of Consolidated Finding of Fact # 2, which states that the claimant worked full-time for the instant employer. The employer's testimony indicates that the claimant worked part-time, which is substantiated by the wage statement submitted by the employer. Further, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant involuntarily left his employment for urgent, compelling and necessitous reasons.

Since the claimant abandoned his job, we analyze his eligibility for benefits under G.L. c. 151A, § 25(e), 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 (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 . . . [or] if such individual established 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.

In his original decision, dated October 30, 2019, the review examiner credited the claimant's testimony had he had to leave his employment on May 9, 2019, to enter a rehabilitation program

for alcohol dependency. It does not appear that the review examiner considered the employer's testimony that the claimant last worked on April 30, 2019. Based on the claimant's testimony, the review examiner concluded that the claimant left his employment for urgent, compelling, and necessitous reasons, as meant under G.L. c. 151A, § 25(e). Given the parties' conflicting testimony regarding the claimant's last day of work, in addition to some other unanswered questions in the record, the Board decided to remand this case to the review examiner for additional evidence.

After remand, the review examiner concluded that the claimant last worked for the employer's client on April 30, 2019, and the reason for the claimant's separation on this date was unknown. Additionally, the review examiner found that the claimant did not ask the employer for reassignment after he stopped reporting to the client on April 30th. The review examiner did not provide an explicit credibility determination to explain these consolidated findings of fact. However, we can reasonably infer that he arrived at the conclusion that the claimant last worked on April 30th, after considering the employer's testimony as well as the documentary evidence submitted by the employer during the remand hearing to establish the claimant's last day of work. Remand Exhibit 6, p. 1, is a wage statement for the claimant, which shows that, between the period of December 18, 2018, and December 18, 2019, the claimant's last pay period was between April 28, 2019, and May 4, 2019.¹ In light of this testimonial and documentary evidence, we will not disturb the review examiner's determination that the claimant last worked for the employer on April 30, 2019. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Similarly, since the claimant disconnected from the remand hearing before providing an explanation as to why he failed to return to work for the client after April 30th or ask the employer for reassignment, and the employer was unaware of the reason why the claimant stopped reporting to work after this date, we will not disturb the portion of the consolidated findings above pertaining to these facts.

In light of the foregoing, we conclude that the claimant abandoned his job, not just with the client, but also with the instant employer, for an unknown reason after last working on April 30, 2019. Although the review examiner found that the claimant could not work after May 8, 2019, because he entered a rehabilitation program for alcohol dependency, this occurred over a week after the claimant stopped reporting for work, and, on the record before us, we cannot conclude that the claimant's alcohol dependency was the reason why he stopped reporting for work after April 30th.

We, therefore, conclude as a matter of law that the claimant did not establish that he left his employment for urgent, compelling, and necessitous reasons or for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e).

Our inquiry into the claimant's eligibility for unemployment benefits does not stop here, however. We take administrative notice of the claimant's employment records in the DUA's UI Online System, which show that he separated from a full-time base period employer on March 15, 2019, and the DUA determined on April 19, 2019, that his separation from that employer was

¹ The claimant's wage statement, while not explicitly incorporated into the review examiner's findings, 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).

qualifying. Since the instant employer appears to be a part-time benefit year employer, as evidenced by the claimant's April 18, 2019, start date, and the wage statement submitted by the employer showing part-time hours for the duration of the claimant's employment, the instant disqualifying separation only subjects the claimant to a constructive deduction to his weekly unemployment benefit amount. *See* 430 CMR 4.76(1)(a)(2).

The review examiner's decision is reversed in part and affirmed in part. We reverse the part of the decision that concluded that the claimant's separation from the instant employer was qualifying under G.L. c. 151A, § 25(e). However, we affirm the part of the decision which concluded that the claimant was entitled to some of his benefits, because, even though the claimant's separation was disqualifying, the instant employer was a part-time benefit year employer. The claimant is only subject to a constructive deduction of his weekly benefit amount as of the week ending May 4, 2019, and pursuant to 430 CMR 4.78(1)(c), the amount of the constructive deduction shall be \$143.00.²

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 20, 2020



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.

SVL/rh

² Per the claimant's wage statement, he earned a total of \$429.00 gross during his three weeks of employment. Pursuant to 430 CMR 4.78(1)(c), we divided his gross wages by the number of weeks he worked, to calculate the amount of his constructive deduction.