

Claimant mechanic, who failed to lock out a machine before leaving to attend a benefits meeting, was discharged for deliberate misconduct in wilful disregard of the employer's interest, where review examiner did not credit his claims that he was not assigned to work on the machine in question.

**Board of Review
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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 November 22, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 9, 2020. 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 August 20, 2020. We accepted the claimant's application for review.

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 remanded the case to the review examiner to allow the claimant to provide testimony and evidence. Both parties attended a two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest, after failing to lock out a machine and demonstrating an unwillingness to improve his job performance, 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 claimant worked full-time as a mechanic for the employer's food manufacturing business from 3/13/17 until 11/22/19. The claimant worked a regular schedule of 40 hours

per week on the employer's second shift, which began at 2:00 p.m. and ended at 10:30 p.m. The claimant was paid \$24.17 per hour.

2. The employer maintains a workplace "lock out-tag out" policy that requires employees to lock and tag out machinery that they perform work on. The employee is required to lock out and tag the machinery prior to leaving it in order to prevent others from attempting to energize it and potentially being injured and/or causing damage. The employer trained the claimant on this policy prior to allowing him to begin work as a mechanic. The claimant was provided the training during an initial orientation session and during on-the-job training. After being trained, his manager provided the claimant with a lock-out, tag-out kit. If an employee fails to comply with the employer's lock-out, tag-out procedures, the employee's supervisor and Environmental Health and Safety Specialist determine the specific consequence. Decisions related to discipline are typically based upon the severity of the infraction. If the employer finds that a violation was minor, it may issue the employee a written warning and retraining.
3. During the term of the claimant's employment, the employer found that the claimant's performance declined. Consequently, on 9/4/19, the claimant's supervisor met with the claimant and discussed the employer's expectations for the claimant's performance and work accomplishments. The expectations were presented to the claimant in writing. The claimant agreed to perform his work as expected by the employer; he signed the document. Prior to 9/4/19, the claimant was provided feedback, but he was not issued any formal discipline.
4. On 11/21/19, the claimant was assigned by his supervisor to work on an extractor machine. The claimant performed work on the machine two days earlier and his attempt to repair the machine was unsuccessful. The claimant set his tools down at the machine but did not begin work on it at the start of his shift because he planned to attend a benefits meeting. Prior to the start of the shift, the supervisor sent a text message to all of his employees, informing them of the scheduled times for the benefit meeting sessions. The supervisor did not direct the employees to attend any specific session.
5. On 11/21/19, the supervisor assigned a first shift trainee to look into the problem with the machine. The supervisor did not expect the trainee to complete the repairs on the machine. The machine was inspected during the first shift, but no one performed any work on it. The machine was locked by the first shift trainee. After the claimant arrived for work, the trainee asked the claimant to secure the machine with his lock because the trainee planned to remove his lock due to his shift ending. The first shift trainee removed his lock and left work when his shift ended. The claimant did not secure the machine with his lock because he believed the first shift employees were assigned to work on the machine and should have completed the work.
6. On 11/21/19, the supervisor observed the machine was not in service and there was no lock on it. After the benefits meeting ended, the claimant returned to work on the machine and found a second shift trainee working on it. The claimant and second shift trainee continued work on the machine.

7. On 11/22/19, the claimant's supervisor informed the claimant that he violated the lock-out, tag-out protocol by leaving the second shift trainee with an unsecured machine. The claimant was told that he was negligent. The claimant became angry and told the supervisor that he (the supervisor) could not treat people like this. The claimant did not offer any explanation for failing to lock out the machine prior to leaving the work area on 11/21/19. The supervisor observed that the claimant's attitude was uncooperative. After concluding that the claimant lacked the knowledge required to do his position, and that he was unwilling to accept feedback and learn, the employer determined that the claimant's employment would be terminated.
8. The employer discharged the claimant because of continued poor performance that was attributed to his unwillingness to learn and uncooperative attitude, and due to his failure to comply with the employer's lock-out, tag-out policy.
9. The claimant filed an initial claim for unemployment insurance benefits, effective 11/17/19. The claimant notified the DUA that he was laid off from his work due to a lack of work.
10. On 12/11/19, the employer completed a DUA fact finding questionnaire. In its responses, the employer indicated that the claimant was discharged due to performance issues, and specifically because of his failure to follow OSHA lock-out, tag-out.
11. On 12/6/19, the claimant completed a DUA fact finding questionnaire. In his response, the claimant wrote: "I was on deferent assignment a coworker ask me for help I did gave him the direction he need in between what I was doing, another co-worker was on the floor to help him and they were to finish this job less than an hour, Whiles going for company meeting his guy has agree to give him the help after a two hour health insurance meeting came back on the floor the job is sitting their I ask the co-worker on the floor if we could finish it my boss blame me for not changing the lockout tagout When I was going the meting they were together on the work area."
12. On 5/9/20, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(2) of the law. The claimant's separation was attributed to a lack of work.
13. On 5/12/20, the employer appealed the Notice of Approval.

Credibility Assessment:

The claimant testified that he was not responsible for locking out the machine in question on 11/21/19 because he was not assigned to work on it. The supervisor testified that prior to the start of the second shift on 11/21/19, he directed the claimant to work on the machine because the claimant's previous attempt to repair it was unsuccessful. The claimant testified that upon arriving at work, he left his tools where the machine was located. Likewise, after attending the benefits meeting on 11/21/19, the claimant returned to the machine and began working on it with a trainee. The claimant's actions detract from his contention that he was not assigned to work on the extractor machine on 11/21/19 support [sic] the supervisor's

testimony that the claimant was assigned to work on the machine. Thus, the claimant's assertion that he was not responsible for locking the machine was also not credible.

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 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.

The review examiner awarded benefits after analyzing the claimant's separation under 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 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Solely on the basis of the employer's testimony at the initial hearing, the review examiner concluded the employer had met its burden. After remanding the case in order to take the claimant's testimony, we also conclude that the employer has met its burden.

The consolidated findings show that the employer maintains a "lock out-tag out" policy that requires employees to lock and tag out machinery that they perform work on. The employer trains employees on this policy before issuing them a lock-out/tag-out kit. *See* Consolidated Finding # 2 and Remand Exhibit # 3. The policy's purpose is to prevent injury to employees and damage to the employer's policy, and it is inherently reasonable. The claimant received training on the policy prior to being allowed to work as a mechanic. *See* Consolidated Finding # 2. But because the employer uses discretion when determining what discipline to impose based on the severity of the violation, there is no evidence that the employer uniformly enforces these policies. Thus, we conclude that the employer failed to meet its burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule.

Arising from the employer's policy, however, is an expectation that employees will follow the lock-out/tag-out procedure when working on machinery. As with the policy, the employer's expectation is reasonable. The claimant was aware of the expectation, as he was aware of the underlying policy. The claimant was also reminded of this expectation at a meeting on September

4, 2019, where his supervisor provided the claimant with a list of expectations that the employer believed necessary to improve the claimant's job performance. The claimant signed this list of expectations, acknowledging receipt of the employer's concerns. *See Consolidated Finding # 3 and Remand Exhibit # 4.*

After remand, the review examiner found that on November 21, 2019, the claimant was assigned to work on an extractor machine, which he had unsuccessfully tried to repair two days earlier. The claimant arrived at work and set his tools down at the machine but did not begin working on it because he planned to attend a benefits meeting. *See Consolidated Finding # 4.*

Earlier that day, the supervisor had assigned a first shift trainee to examine the problem with the machine. He did not expect the trainee to complete the repairs on the machine. The trainee had locked out the machine with his own lock, but he asked the claimant to secure the machine with his lock when he arrived at the workplace, since the trainee's shift was ending. The trainee removed his lock from the machine when the shift ended, but the claimant did not secure the machine with his own lock because he believed the first shift employees should have completed the work on the machine. *See Consolidated Finding # 5.*

Later on November 21, 2019, the supervisor observed that the machine was not in service and had no lock on it. When the benefits meeting ended, the claimant returned to the machine and worked on it with a second shift trainee. *See Consolidated Finding # 6.*

On November 22, 2019, the supervisor informed the claimant he had violated the lock-out/tag-out policy by leaving the second shift trainee with an unsecured machine. The claimant became angry and complained the supervisor could not treat him like this but did not offer any explanation for why he failed to lock out the machine before he went to the benefits meeting the day before. The supervisor determined that the claimant's attitude was uncooperative, that he lacked the knowledge required to perform his job, and that he was unwilling to accept feedback to learn how to improve his performance. The employer discharged the claimant that day for failure to comply with the lock-out/tag-out policy, and for continued poor performance that it attributed to his uncooperative attitude and unwillingness to learn. *See Consolidated Findings ## 7-8 and Remand Exhibit # 8.*

After remand, the review examiner provided a credibility assessment rejecting the claimant's claim that he had not been assigned to work on the extractor machine on November 21, 2019, noting that he had placed his tools at that machine upon arriving at work, then returned to work on the machine after the benefits meeting had ended. From there, the review examiner also rejected as not credible the claimant's assertion that he was not responsible for locking the machine out. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).* In light of the evidence presented, we believe her assessment is reasonable.

In order to determine whether the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest, we must consider his state of mind at the time of the behavior. *See Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984).* In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." *Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979).

Here, the review examiner found that the claimant knew the employer expected him to lock out machines with his own lock. This expectation is reasonable. The review examiner explicitly rejected the claimant's claims that he was not assigned to the machine and was not responsible for locking it out before he left for the benefits meeting. Moreover, nothing in the record suggests any circumstances that would have mitigated his failure to follow this procedure. Thus, the employer has met its burden to demonstrate the requisite state of mind to support disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending November 23, 2019, 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 - March 29, 2021



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

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

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

JPCA/rh