Claimant's refusal to follow a supervisor's order to clean a piece of machinery was insubordinate, but it was not done in wilful disregard of the employer's interest. His refusal was based upon fear that the task could expose him to electric shock without certain safety procedures in place. Given his OSHA training and limited knowledge of the machine, his safety concern was reasonable.

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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 reverse.

The claimant was discharged from his position with the employer on December 5, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 25, 2020. The employer 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 denied benefits in a decision rendered on March 26, 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, he 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 obtain further evidence about the claimant's Occupational Safety & Health Administration (OSHA) training and safety concerns about the task he had refused to do. 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 claimant's refusal to clean a bandsaw, as directed, was deliberate misconduct in wilful disregard of the employer's interest, 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 are set forth below in their entirety:

1. The claimant worked full-time for the employer, a machine shop, from May 7, 2018, to December 5, 2019 as a Lathe Machinist.

2. The employer had an expectation that employees perform reasonable tasks as directed.

3. The purpose of the expectation was to ensure its workforce remained active and performing duties while on the clock.

4. The employer operated under a collective bargaining agreement, which stated in relevant part that each employee will contribute to the overall cleanliness of the shop, equipment and benches.

5. The claimant obtained OSHA-10 certificates, one in Construction Safety and Health issued on May 13, 2015, and another in General Industry Safety and Health issued on December 29, 2017. The ten-hour trainings provided the claimant with knowledge about safety and how to recognize hazardous conditions and prevention.

6. The claimant kept his usually assigned machine very clean.

7. On December 5, 2019, the employer did not have any production work available.

8. The Foreman directed the claimant to clean up and around a bandsaw. The Foreman was not specific.

9. The Foreman believed that the claimant knew what he was directing because the claimant performed general machine cleaning in the past on his own machine.

10. The Foreman only expected the claimant to take a hand broom and sweep down the bandsaw, and the area around it, and wipe it down.

11. The Foreman left the area and when he returned, he saw that a Driver was cleaning the bandsaw and its area.

12. The Foreman found the claimant and asked why the Driver was cleaning the machine. The claimant stated that it was not his machine and that he did not need to clean others' messes.

13. The Foreman told the claimant, "Just clean the fucking saw."

14. The claimant refused and suggested that he clean his usual machine.

15. The part-time, retired Foreman intervened and tried to reason with the claimant.

16. The claimant raised his concern that he was "not trained in proper maintenance or proper lockout/tagout procedures."

17. Lockout/tagout requires all power sources be cut to a machine and to either lock access to the power source or tag it to prevent inadvertent powering of a machine while someone is working it.

18. The employer used lockout/tagout procedures when serviced by an outside maintenance mechanic or electrician.

19. The Foreman did not believe lockout/tagout procedures were necessary because what he was directing the claimant to do was not at the level of maintenance that would require such a procedure.

20. The claimant believed that cleaning was within the scope of maintenance and service per OSHA regulations. The claimant believed that any servicing, to include general cleaning, required lock-out/tagout procedures.

21. The claimant knew where the power switches were on the bandsaw. The claimant did not know where the breaker was for the bandsaw.

22. The bandsaw also had a safety power switch that cut the power to the saw when the guard door to the wheel housing was opened. The claimant did not know that the bandsaw was equipped with the guard door safety power switches.

23. The bandsaw also did not power on unless stock was on the saw deck.

24. The employer tasked other employees in a similar manner under similar circumstances. No employee has previously refused to perform such tasks as directed.

25. The band saw was a not assigned to a particular individual and was used by all employees as necessary.

26. The claimant understood that the Foreman wanted the claimant to broom the machine, remove wood chips, and wipe it down with a rag and degreaser as he performed on his regularly assigned machine.

27. The claimant had the same concerns based on his training even if the machine was not running.

28. The claimant's brother intervened and tried to convince the claimant to do as directed.

29. The claimant believed in the moment that his refusal could lead to his discharge from employment.

30. The claimant was taken to the office of the company President, where the claimant continued to refuse.

31. The claimant asked to have a union member with him as a witness. The retired Foreman refused the claimant's request.

32. The company President lectured the claimant on why it was unacceptable and what the employer was trying to accomplish.

33. The claimant did not agree to clean the bandsaw and its area as directed.

34. The claimant did not raise any safety concerns with the company President as his reason for refusal to clean the bandsaw.

35. The company President discharged the claimant from employment for insubordination.

36. On March 19, 2020, (after the unemployment hearing ended), the claimant filed a complaint (#[X]). The claimant raised general concerns about lockout/tagout procedures during the maintenance of any machine. The claimant was motivated to file the complaint after hearing the company President's testimony during the unemployment hearing about receiving recognition letters/certificates from insurance companies relating to the workplace being accident-free for whatever time period.

37. The employer responded to the OSHA complaint on March 30, 2020. The employer explained that it has the materials for lockout-tagout procedures, which were located in the tool-bin and which the employer believed were necessary for higher-level maintenance, not surface cleaning. The employer consulted with its insurance company and with the Department of Industrial Accidents, both representatives of which indicated that they did not believe the machine needed to be locked-out/tagged-out for what the employer wanted the claimant to do. The employer stated that it had training materials and that when there were no public safety issues as it related to the pandemic, representatives of the state would visit the workplace to provide onsite consultation. The employer indicated that it has lesson plans in the meantime.

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 to note the following. Consolidated Finding # 27 refers to the claimant having the same concerns, without specifying what those were. The claimant testified that he was concerned about safety. Consolidated Finding # 36 states that the claimant filed a complaint. It is evident from the record that this refers to a complaint filed with OSHA about safety issues at the employer's

workplace. We further clarify Consolidated Finding # 37. The employer's owner explained that the people he consulted with at the insurance company and state agency thought that lockout/tagout was unnecessary based upon his description of their use of the machine[1]. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the employer discharged the claimant, his eligibility 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. . . .

"[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).

The employer fired the claimant for insubordination. Consolidated Finding # 35. Specifically, he refused to clean a bandsaw, as directed on December 5, 2019. *See* Consolidated Findings ## 8 and 14. Because the record lacks evidence of a written policy or rule concerning insubordination, or evidence to demonstrate that it uniformly enforces such rule under similar circumstances, we cannot conclude that the claimant's refusal to clean the bandsaw was a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be ineligible for benefits under G.L. c. 151A, § 25(e)(2), if the employer shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The review examiner's original decision concludes that he did. We disagree.

There is no question that the claimant refused to clean the bandsaw, even though his supervisors told him to. However, in order to determine whether an employee's actions constitute deliberate misconduct within the meaning of the statutory provision above, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. 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).

[1] While not explicitly incorporated into the review examiner's findings, these parts of the claimant's and the owner's testimony are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

As provided in Consolidated Finding # 26, the claimant understood that the Foreman wanted him to clean the machine using a broom, remove wood chips, and wipe it down with a rag and degreaser. At the time, he also understood that if he refused to do as expected, he could lose his job. Consolidated Finding # 29. There is no dispute that the claimant's refusal to clean the bandsaw was deliberate in that he knew he was choosing not to follow a directive. It was not accidental. But, "[t]he issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.)

It is generally reasonable for an employer to expect an employee to follow a supervisor's instructions and refusing to do so is insubordination. A refusal by itself suggests wilful disregard of the supervisor's authority. However, it is also understood that there are circumstances when a refusal to follow an order is warranted, such as where a supervisor instructs an employee do something illegal, harmful, or unsafe. Here, the consolidated findings reveal that the claimant's insubordination was motivated by a genuine concern for his own safety. He had some expertise in this area. The claimant had completed two 10-hour OSHA training courses pertaining to recognizing and preventing hazardous workplace conditions. *See* Consolidated Finding # 5. It is apparent that, even if the bandsaw was not running, he believed that the cleaning he was being asked to do put him at potential risk of electric shock, unless he could completely shut down the bandsaw's power source using a lockout/tagout safety procedure. *See* Consolidated Findings ## 16, 17, and 20.

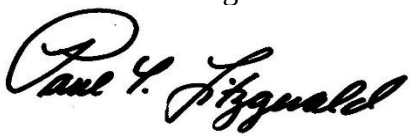
During the hearing, the parties disputed whether or not lockout/tagout procedures were necessary for the cleaning task assigned.[2] For our purposes, it is not necessary that the claimant prove that they were. Given his OSHA training and limited awareness of the safety features of this particular machine, we believe his safety concern was reasonable. *See* Consolidated Findings ## 21 and 22. The record shows that the claimant appropriately communicated his misgivings with the employer at the time. He raised his safety concern with two foremen, who basically told him to clean the bandsaw anyway. *See* Consolidate Finding # 16.[3] Under these circumstances, we conclude that the claimant's insubordination was not motivated by wilful disregard of the employer's interest, but a reasonable fear of personal injury.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

[2] We do not assign much weight to Consolidated Finding # 37, as the owner's testimony about what he was told by insurance company or state agency representatives is unreliable hearsay. These were opinions purportedly made by individuals who did not testify at the hearing, which were formed based upon how the owner described using this machinery.

[3] The placement of Consolidated Finding # 16 suggests that the claimant only spoke of safety to the part-time foreman, but during the hearing, his regular supervisor testified that he knew about the claimant's safety concerns but disagreed with them.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 5, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS Paul T. Fitzgerald, Esq.
DATE OF DECISION - June 12, 2020 Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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 July 1, 2020[4]. 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 Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.