Where the consolidated findings explicitly state that the claimant's truck accident was not on purpose, and where the findings indicate that he took proper precautions when taking a left-hand turn, his discharge was not attribute to deliberate misconduct under § 25(e)(2).

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Issue ID: 0033 0513 54

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 December 12, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 4, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 7, 2020. 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 and, thus, 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 allow the employer an opportunity to testify and offer other evidence. Only the employer attended the remand hearing[1]. Thereafter, the review examiner issued her 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 discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit'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] We note that the remand hearing was erroneously scheduled for the Memorial Day holiday, before being re-scheduled for the following day. Although he had seven days' notice of the rescheduled hearing, the claimant maintains that he was not aware of the new date. While the claimant's absence from the remand hearing presents due process concerns, we believe that the review examiner's consolidated findings and the result of the decision render these concerns moot.

1. In November, 2018, the claimant started working fulltime for the employer, a recycling company, as a driver. The claimant was scheduled to work Monday through Friday varying hours. The claimant was paid $23 per hour.

2. The claimant's supervisor was the General Manager.

3. The employer expects employees not to be involved in motor vehicle accidents while working for the employer. The claimant was aware of this expectation.

4. On January 24, 2019, the employer issued the claimant a warning for being involved in a motor vehicle accident.

5. The employer expects employees not to be involved in motor vehicle accidents while working for the employer to ensure safety for the employees and others driving.

6. The employer also expects drivers not to drive trucks in a no truck residential zone areas. The claimant was aware of this expectation. The claimant was not issued warnings in the past for violating this expectation.

7. The claimant's last date of work was on December 9, 2019.

8. On the claimant's last date of work, the claimant was involved in a motor vehicle accident while working for the employer. The claimant was driving the employer's tractor trailer truck while involved in the motor vehicle accident. The claimant was stopped at a stop sign in the right lane. The claimant did not see any other vehicles in the left lane. The claimant put on his turn signal to turn left. Another motor vehicle was subsequently in the left lane, and the claimant collided with the other motor vehicle.

9. The claimant did not get into the motor vehicle accident on purpose.

10. After the accident, the claimant informed the General Manager about the accident. The General Manager asked the claimant why the claimant was driving in a prohibited truck residential zone. In response to this question, the claimant informed the General Manager that the claimant was following GPS instructions and that he drives in that area every day. The claimant also explained he took a left turn from the right lane as the claimant needed to take a wide turn with the truck.

11. On the claimant's last date of work, the employer informed the claimant that the employer will call the claimant about his employment status.

12. On December 12, 2019, the employer informed the claimant during a telephone conversation that the claimant was discharged from work.

13. The employer discharged the claimant from work because the claimant was involved in a motor vehicle accident while working on his last date of work while driving the employer's truck.

14. The discipline that the employer would have issued for the claimant driving in the no truck residential zone alone if a motor vehicle accident did not occur would have been a warning by the employer.

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 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. In addition, as discussed more fully below, we conclude that the review examiner's consolidated findings of fact support the conclusion that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest and that the claimant is therefore entitled to unemployment benefits.

Because the claimant was terminated from his employment, his qualification for benefits is governed by 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, . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

Here, the claimant was discharged because he collided with another vehicle in the employer's truck. The claimant did not dispute that the employer expected him to avoid such accidents, or that the collision in fact occurred. However, in order to determine whether an employee's actions constitute deliberate misconduct, 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). "When a worker is ill equipped for his job or has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under Section 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In short, the question is not merely whether the accident could have been avoided by the claimant, but whether the claimant's actions were deliberate or intentional.

The review examiner's consolidated findings explicitly state that the claimant did not get into the motor vehicle accident on purpose. In addition, the review examiner credited the claimant's

testimony that he used his turn signal and checked his mirrors before turning but did not see the other vehicle. We must accept the review examiner's findings, as they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence."). Based on these findings, it cannot be concluded that the claimant's actions were deliberate.

We note that the claimant was driving in a residential "no truck zone" at the time of the accident. This separate conduct may in fact have been deliberate on the part of the claimant. However, there is nothing in the record to indicate that this was a factor in the claimant's accident. The employer also testified that, if not for the accident, the claimant would merely have been issued a warning for driving in a "no truck zone." Therefore, we must conclude that the misconduct of driving in a 'no truck zone" was unrelated to the claimant's discharge and is not relevant to our analysis under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending December 21, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS Charlene A. Stawicki, Esq.
DATE OF DECISION - June 5, 2020 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
(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[2]. 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.

JRK/rh

[2] *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.