

Employer failed to establish that the claimant stole gasoline. Review examiner credited claimant's direct testimony that he had an agreement with the operations manager and the co-owner to use the company gas card to refuel his personal vehicles after using them for work purposes, and the employer provided no direct testimony from either of those employees to counter the claimant's claims.

**Board of Review
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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 December 11, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 22, 2020. 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 April 11, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, was entitled to benefits 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 take additional testimony and evidence from the parties. Both parties attended the 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's discharge for alleged theft by using the employer's gas card to refuel his personal vehicles was neither a knowing violation of a reasonable and uniformly-enforced employer policy, nor 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked as a full-time Senior Foreman and Field Manager for the employer, a basement waterproofing company, between 01/02/2015, and 12/11/2019, when he separated.
2. The claimant's direct supervisor was the former Operations Manager.
3. The employer maintained a "Standards of Conduct" policy which prohibited employees from stealing or being dishonest.
4. The purpose of this policy was to ensure that the company does not lose property and materials through theft of its employees.
5. The claimant received the company handbook containing the "Standards of Conduct" policy [sic] in 2018.
6. A violation of the "Standards of Conduct" policy "may result in discipline up to and including termination."
7. The employer expected employees to refrain from purchasing gas with the company gas account for their personal use.
8. The purpose of this expectation was to ensure that the company does not lose property and materials by theft of employees.
9. The disciplinary action incurred when an employee violates this expectation is termination.
10. The claimant was made aware of this expectation at the time of hire, when he made an agreement with Co-Owner B regarding using the company gas account to purchase gas for work purposes, and when he received the company handbook in 2018.
11. When the claimant was hired, the claimant made a verbal agreement with Co-Owner B that he would use his personal vehicles for work purposes and use the company gas account to pay for the gas that he used in his personal vehicles instead of submitting mileage to the employer for reimbursement.
12. Included in the agreement was that the claimant would purchase the gas on an "honors system" where the claimant was not required to provide the employer with documentation when he used his personal vehicles for work and when he purchased gasoline using the employer's account, but that he would only purchase gas using the employer's account for work purposes.

13. Co-Owner B separated from the company on or around 05/13/2020. Co-Owner A did not request that Co-Owner B participate in the hearing.
14. The former Operations Manager may have had knowledge regarding the agreement; however, he is no longer employed by the employer. Co-Owner A did not request that the former Operations Manager participate n [sic] the hearing to testify to the agreement.
15. When an employee purchases gas using the company gas account, the gas attendant records the license plate of the car purchasing the gas and the cost of gas which is placed on the receipt. The purchaser is required to sign the receipt. The receipts are provided to the employer.
16. In September 2019, the employer made a company vehicle available for the claimant's use.
17. After having a company vehicle assigned to the claimant, one was not always available to the claimant because it was being used by other employees, down for maintenance, or the claimant had to travel to another client prior to visiting the job site. Co-Owner B or the former Operations Manager would reassign vehicles when needed pursuant to business needs.
18. When the employer did not have a company vehicle available for the claimant, the employer expected the claimant to use his personal vehicle for work purposes.
19. When a company vehicle was made available to the claimant, the employer and the claimant did not discuss the previous agreement made or if the claimant was no longer authorized to use the employer's account to purchase gas for his personal vehicles when he used them for work purposes because the claimant did not ask the employer and the employer did not inform the claimant that the agreement had changed. The claimant assumed the initial agreement was still effective regarding when he was to use his personal vehicles for work purposes and purchase gas for his personal vehicle.
20. The claimant's need to use his personal vehicles for work purposes varied weekly. The claimant used his personal vehicles at least one (1) time per week but would often use his personal vehicles multiple times per week depending on the need of the employer.
21. On the following dates, the claimant purchased gas for his personal vehicles using the company gas account for work purposes in the amounts indicated: 09/06/2019 - \$42.46; 09/20/2019 - \$42.56; 09/27/2019 - \$38.83; 10/07/2019 - \$47.24; 10/24/2019 - \$41.87; 10/29/2019 - \$43.36; 11/01/2019 - \$38.40; 11/20/2019 - \$48.10; 11/26/2019 - \$59.50; and 11/29/2019 - \$43.04 totaling \$445.36.

22. The claimant owned two (2) personal vehicles, a Dodge Ram pick-up truck (personal vehicle A) with a license plate of [redacted] and a GMC Acadia (personal vehicle B) with a license plate of [redacted].
23. The claimant used both vehicles for work related purposes. The aforementioned receipts each indicate that license plate [redacted] or [redacted] purchased gas using the employer's account.
24. The claimant does not recall how many times per week he used his personal vehicles for work purposes or how many miles he drove between the employer's base and the job sites for each week because he does not have access to view his work calendar to review the jobs he was assigned during those times once separated from the employer.
25. The claimant used his personal vehicles rather than a company vehicle on the aforementioned dates because one was either not available for his use by the employer as it was being used by other employees, down for maintenance, or the claimant had to travel to another client prior to visiting the job site.
26. The claimant did not use his personal vehicle if there was a company vehicle available for him on any given day and he did not have to travel to another client prior to visiting the job site.
27. During the week beginning 11/25/2019, through 11/29/2019, the claimant worked three (3) days and used his personal vehicles two (2) of the three (3) days because a company vehicle was not available for him.
28. The claimant would average between sixty (60) and one hundred (100) miles of travel per day while working. The claimant does not recall how many miles he travelled from the employer's base to the job site between 11/25/2019 and 11/29/2019.
29. On 11/26/2019, the claimant purchased gas for personal vehicle A for work purposes. That evening, personal vehicle A broke and was towed to the gas station for service.
30. On 11/27/2019, the claimant used personal vehicle B for work purposes using the gas that was already in his car which he purchased with his own funds.
31. On 11/29/2019, the claimant went to the gas station to attend to his broken car (which was at the gas station for repairs and towing). While at the gas station, the claimant purchased gas for personal vehicle B, using the company gas account, to replace the gas he had used on 11/27/2019 or the previous week when using personal vehicle B for work purposes, which he previously purchased with his own funds.

32. The claimant never used the company gas account to purchase gas for any car other than his two (2) personal vehicles.
33. The claimant did not purchase gas for his personal vehicles using the employer's account "out of habit."
34. Co-Owner B or the former Operations Manager reviewed the business expenses and noticed charges on the company gas account purchased by license plates that were not registered with the company on 11/29/2019, and they believed that the claimant was not working on that date.
35. Co-Owner A was not aware that the claimant had two (2) vehicles that he used for personal use, each having a different license plate number prior to the hearing. Co-Owner B and the former Operations Manager may not have known that the claimant owned two (2) vehicles with two (2) different license plate numbers.
36. Either Co-Owner B or the former Operations Manager began an investigation into the alleged misuse of the company's gas account by the claimant.
37. Co-Owner B requested that the Bookkeeper pull the receipt for gas purchased by the claimant on 11/29/2019. Co-Owner B later requested that the Bookkeeper pull all the receipts for the purchase of gas from July, 2019, through the December, 2019, by the claimant. The Bookkeeper provided all the requested receipts to Co-Owner B.
38. On or about 12/10/2019, Co-Owner B met with the claimant and read the claimant a list of dates that he alleged that claimant purchased gas for his personal vehicles for non-working purposes. The previous agreement was discussed at this meeting as Co-Owner B was alleging that the purchases were made for non-working purposes. No other individuals were present at the meeting.
39. The claimant was informed that the cost of the gas purchased for alleged non-work purposes between September, 2019, to 12/11/2019, totaled \$700.00.
40. Co-Owner B did not show the claimant the list of dates or show the claimant the receipts for such purchases.
41. The claimant denied purchasing gas using the business gas account for personal use on the days listed by Co-Owner B and specifically denied purchasing gas on 11/29/2019.
42. During the period of July, 2019, and December, 2019, the claimant purchased gas for his personal vehicles for personal use using his own funds.

43. On 12/11/2019, the claimant was discharged for allegedly purchasing gas for non-work purposes using the company's gas account.
44. At the time of discharge, the claimant admitted to Co-Owner B that he did purchase gas on 11/29/2019, using the company gas account and that the gas purchased was to replace gas he previously purchased using his own money that was used for work purposes. The claimant did not remember the transaction on 12/10/2019, when questioned by Co-Owner B.
45. Approximately one (1) week after the claimant was discharged, the claimant spoke with the former Operations Manager who asked the claimant to pay restitution of \$700 (the amount of the gas allegedly purchased by the claimant for his personal use) or threatened that he would have criminal charges filed against him.
46. On or about 12/16/2019, the former Operation Manager visited the claimant's home and the claimant paid him the \$700 because he did not want the employer to file criminal charges against him.

Credibility Assessment:

The claimant's testimony is deemed to be more credible than that of Co-Owner A. Co-Owner A provided multi-level hearsay and vague testimony regarding the initial agreement made between the claimant and Co-Owner B, the alleged end of the agreement, the investigation into the allegation that the claimant used the employer's gas account to purchase gas for his personal vehicles for personal use, and the employer's conclusion that the claimant purchased gas for his personal use. Co-Owner A testified that he was informed of the existence of a verbal agreement between the claimant and Co-Owner B but does not remember when the agreement began. Co-Owner A testified that he knew the agreement generally consisted that the claimant was able to purchase gas on the company account for his personal vehicles when he used them for work purposes, but he did not know any specifics of the agreement. Co-Owner A was informed by Co-Owner B in November 2019 that the claimant had exceeded the verbal agreement by purchasing gas for his personal use, it was considered theft, and the decision to terminate him was made, however Co-Owner A was not aware who discovered the alleged misconduct, and did not conduct or was not involved in the investigation, but was merely shown the receipts. Co-Owner A testified that the agreement between Co-Owner B and the claimant ended but was unable to testify at what time the agreement ended and who ended the agreement. Co-Owner A also made inconsistent statements in that he first testified that after the claimant was promoted and a company vehicle was made available in September 2019, if a company vehicle was not available on any day the claimant was expected to use his personal vehicle. Co-Owner A later stated that after September 2019, the claimant did not need a company vehicle due to the nature of his position and if a company vehicle was not available to the claimant, he believes that the jobs and work for the day "would probably be cancelled." Additionally, Co-Owner B, who made the initial agreement with the claimant and

knew the terms and conditions of such agreement, or the former Operations Manager, who was aware of the specifics of the agreement, were not presented as witnesses.

The claimant provided direct, detailed, and forthcoming testimony regarding the details of the agreement between himself and Co-Owner B, including when the agreement began, what the agreement included, and that the agreement was never explicitly modified or rescinded by Co-Owner B or the former Operations Manager. The claimant also provided testimony regarding when company vehicles were available to him and when and why they were not available requiring him to use his personal vehicle for work purposes. During the original hearing, the claimant testified that he occasionally purchased gas for his personal vehicles using the employer's account "out of habit." During the remand hearing, the claimant corrected himself that he did not purchase gas for his personal vehicles using the employer's account "out of habit." The claimant's corrected testimony during the remand hearing is found to be more credible than his initial testimony during the original hearing because the claimant testified that after the initial hearing he was able to think about the specifics of each transaction and concluded that he did not use the company gas account to purchase gas for his personal vehicles for personal use.

At the remand hearing, Remand Exhibit 6 and 7 were entered into the record.

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). The review examiner concluded the employer had not met its burden. We remanded the case to take additional testimony and evidence. After remand, we also conclude that the employer has not met its burden.

While some of the details of the review examiner's consolidated findings differ from and expand upon her initial findings, the fundamental facts remain the same. The employer's Standards of Conduct policy prohibited theft. Arising from this policy is an expectation that employees will not steal from the company. *See Consolidated Findings ## 3 and 7; and Remand Exhibit 7.* The claimant received the policy and was aware of the corresponding expectation. *See Consolidated Findings ## 5 and 10.* While the employer's contemplated discipline for those who violate its policy is discretionary, all employees who violate its expectation by stealing are discharged. *See Consolidated Findings ## 6 and 9.*

Before and after remand, the review examiner found that at hire, the claimant reached a verbal agreement with Co-Owner B that when he used one of his personal vehicles for work purposes, he could use the employer's company gas card to refuel his vehicle to pay for the gas he used for work, rather than submitting mileage reports to the employer for reimbursement. *See Consolidated Finding # 11.*

After remand, the review examiner found that in September of 2019, the employer made a company vehicle available for the claimant to use. *See Consolidated Finding # 16.* Nevertheless, the employer did not always have a company vehicle available for the claimant to use. *See Consolidated Finding # 17.* On those occasions, the employer expected the claimant to continue to use one of his personal vehicles for work purposes. *See Consolidated Finding # 18.* The claimant did not use his personal vehicles for work purposes if there was a company vehicle available to him. *See Consolidated Finding # 26.* After the employer began to make company vehicles available to the claimant, the parties did not revisit the prior agreement permitting the claimant to use the company gas card to refuel his personal vehicles after using them for work purposes, and the claimant believed the agreement remained in effect. *See Consolidated Finding # 19.*

Before and after remand, the review examiner found that after November 29, 2019, either the operations manager or Co-Owner B reviewed the employer's business expenses and noticed charges on the company gas account that were not for vehicles registered to the employer. *See Consolidated Finding # 34.* The employer began an investigation into the claimant's alleged misuse of the company's gas card, and reviewed gas receipts for fuel purchased by the claimant from July through December 2019. *See Consolidated Findings ## 36–37.*

On December 10, 2019, Co-Owner B met with the claimant and read a list of dates when he alleged the claimant purchased gas for non-business purposes, claiming his allegedly improper purchases totaled \$700.00. *See Consolidated Findings ## 38–39.* The claimant denied using the company gas card for personal use. *See Consolidated Finding # 41.* The employer discharged the claimant on December 11, 2019, for allegedly using its company card to buy fuel for non-business purposes. *See Consolidated Finding # 43.*

The review examiner initially concluded that the employer failed to meet its burden of proof to show that the claimant stole from the employer, *i.e.*, that he used the company gas card to refuel his personal vehicles without having used them for business purposes. The review examiner's initial conclusion found more credible the claimant's direct testimony that he had an agreement with his managers to use the company gas card to refuel his personal vehicles after he used them for business purposes, over Co-Owner A's testimony, which was less specific. The review examiner's initial conclusion also claimed the employer failed to produce the receipts it relied upon to determine the claimant had misused its gas card, and noted that Co-Owner B was not present to testify about the initial agreement with the claimant or his investigation into the claimant's alleged misuse. *See* Remand Exhibit # 2.

We remanded the case, in part, because notwithstanding the review examiner's assertion to the contrary, the employer had timely provided the DUA with the gasoline receipts it believed would establish the claimant's alleged theft. *See* Remand Exhibit # 6. Where we were remanding the case for the employer to explain how the receipts established the claimant's alleged theft, we also invited testimony from Co-Owner B and the operations manager regarding their agreement with the claimant to use the company gas card, as well as their investigation into the claimant's alleged misuse of same.

After remand, while the parties offered testimony and the review examiner issued consolidated findings about the receipts, the employer failed to produce either of the two percipient witnesses to the agreement to use the company gas card or the investigation into allegations of misuse. *See* Consolidated Findings ## 13–14.

Consequently, as noted above, the crux of the review examiner's initial findings remains the same. The employer failed to establish that the claimant used the company gas card to refuel his personal vehicles for non-work purposes. Rather, the claimant continued a practice of using his own vehicles when an employer-owned vehicle was unavailable to him, and then using the company's gas card to reimburse him for fuel used while conducting the employer's business from his own vehicles.

We note that while the receipts produced by the employer establish that the claimant used the company gas card to refuel his own vehicles a number of times from September through November of 2019, the receipts do not establish that the claimant used the card for non-business driving. Simply put, the receipts by themselves do not establish theft.

The review examiner issued a lengthy and detailed credibility assessment explaining why she credited the claimant's testimony over the employer's, specifically noting the vagueness, inconsistency, and multi-level hearsay proffered by Co-Owner A. 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 that the claimant had an agreement with the employer to use the company gas card to refuel his personal vehicles after he used them for business purposes. Although the employer eventually allowed the claimant to use company vehicles to perform his job on some days, he continued to use his personal vehicles when company ones were not available for him. On those days, he continued under the agreement to refuel his personal vehicles using the company gas card. Because the record shows that the claimant believed he had permission to do so, the employer has failed to establish that the claimant either knowingly violated the employer's policy, or acted in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly-enforced rule or policy, 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 ending December 14, 2019, and for subsequent weeks if otherwise eligible.



Paul T.

BOSTON, MASSACHUSETTS

Fitzgerald, Esq.

DATE OF DECISION - June 29, 2020

Chairman



Charlene A. Stawicki, Esq.
Member

**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, 2020¹. 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

¹ 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.

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