The claimant quit his job after calling out sick for three consecutive days and refusing to provide the employer with a doctor's note because he lacked health insurance. Because the employer had made health insurance available and the claimant also had an option to enroll under his partner's health insurance plan, his lack of health insurance cannot be attributed to the employer. Held the claimant was ineligible for benefits, as he failed to show he resigned for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

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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 separated from his position with the employer. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 5, 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 December 30, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to allow the claimant to testify and afford both parties an opportunity to present additional evidence. Both parties attended the remand hearing. 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 quit his job because he was unwilling to provide the employer with a doctor's note after calling out sick for three consecutive days, 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 for the employer's asbestos abatement business from 2/1/19 until 3/13/20. The claimant worked from 7:00 a.m. until 3:30 p.m. on Monday through Friday and was paid $20 per hour.

2. On 3/16/20, the claimant sent the business owner a text message that reads: "I won't be in today feeling under the weather, best to play it safe!"

3. On 3/17/20, the claimant sent the business owner a test message that reads: "I am out today as well."

4. On 3/18/20, the claimant sent the business owner a text message that reads: "I won't be in today." The business owner responded by text, stating: "(Claimant) I will need a doctors [sic] note saying you are ok to return to work." The employer requested the claimant provide a doctor's note because of concerns related to COVID-19 and the employer's interest in protecting other employees. The claimant replied: "I don't have health insurance so I won't be able to attain [sic] a note, I'll take my mandated three sick days via Massachusetts law and we will go are (sic) separate ways, and I'll take my chances with unemployment."

5. The employer offers health insurance to its employees. The employer informed the claimant at the time of hire that health insurance is available for him to purchase after completion of his three-month probationary period.

6. On 11/13/19, the claimant sent a text message to the employer's Manager, asking about the cost of health coverage for a single person. The claimant was able to obtain benefits through his partner's health insurance plan and wrote that the open enrollment ended in the middle of the next week. The claimant explained in the text to the Manager that he was trying to figure out if it made sense to subscribe to the employer's plan. The Manager replied that she would look into it[,] but thought the cost was around $48 but [sic] could not remember off the top of her head. On 11/14/19, the Manager sent the claimant a text message that reads: "It's $48.70 per week." The claimant responded: "Okay thanks." The claimant did not request any additional information about the employer's health insurance benefits. The claimant did not purchase health insurance through the employer.

7. The claimant quit his work because he was unwilling to obtain a medical note.

8. On 3/20/20, the claimant filed an initial claim for unemployment insurance benefits, effective 3/15/20. The employer [sic] informed the DUA that the claimant was discharged from his work.

9. On 4/15/20, the employer notified the DUA's Employer Charge Unit that the claimant quit his work.

10. On 5/28/20, the claimant completed a DUA fact-finding questionnaire. In his responses, the claimant wrote that the employer requested a doctor's note, and he informed the employer that he did not have health insurance and would not be able to provide a note. The claimant wrote that, after informing the employer of this, the employer did not contact him again. The claimant did not inform the DUA that he told the employer that they would go their separate ways and he would take his chances with unemployment.

11. On 6/4/20, the employer informed the DUA that the claimant quit.

12. On 6/5/20, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(1) of the law.

13. On 6/8/20, the employer appealed the Notice of Approval.

Credibility Assessment:

During the remand hearing, the claimant testified that he was unable to obtain a medical note to return to work because he did not have health insurance, and he could not afford the expense of a clinic visit. The claimant attributed his lack of insurance to the employer's failure to provide him a package of information about its health insurance benefits. The claimant's testimony on this point was not credible since the text messages exchanged between the claimant and the Manager confirmed that the claimant had benefits available through his partner's health plan, and that he only inquired about the cost of coverage through the employer's plan. The claimant's contention that he asked for information when speaking in person with the Manager was not credible given his subsequent inability to recall whether he spoke with the manager. Likewise, the Manager's testimony confirmed that there was no communication about health insurance beyond her text messages exchanged with the claimant. The claimant's text message on 11/14/19 stated that he had only until the middle of the next week to decide whether to subscribe to his partner's plan. There was no evidence of any subsequent communication with the Manager or any request to subscribe to the employer's plan. Even at the time of quitting, the claimant informed the employer that he did not have insurance, but he did not attribute this to the employer. In light of the above, the claimant's overall credibility was diminished.

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, except Finding of Fact # 7, to the extent it contains a mixed question of fact and law. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). Additionally, Finding of Fact # 8 erroneously states that the employer reported to DUA that the

claimant was discharged from employment, where the record establishes that it was the claimant, not the employer, who reported to DUA that he was discharged. *See* Exhibit 1. In adopting the remaining findings, we deem 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 record. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question we must decide is whether the claimant separated voluntarily or was discharged. The parties disputed the nature of the claimant's separation. The employer maintained that the claimant voluntarily left employment after he called out sick for three consecutive days, did not provide the employer with a doctor's note as requested, and made no effort to return to work. The claimant, on the other hand, denied quitting and alleged that the employer never contacted him again, once he had informed them that he would not be able to provide a doctor's note because he lacked health insurance.

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Here, the review examiner made a credibility assessment in favor of the employer. 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). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). As stated previously, we believe that the review examiner's credibility assessment was reasonable in relation to the evidence presented.

There is nothing in the record to suggest that the employer discharged the claimant. The review examiner found that, on March 18, 2020, and after a series of text messages with the employer regarding his three consecutive absences from work, the claimant declined to provide the employer with a doctor's note and informed the employer that "we will go are [sic] separate ways, and I'll take my chances with unemployment." *See* Consolidated Finding # 4. Neither the claimant nor the employer dispute that the claimant did not return to work after he called out sick on March 16, 17, and 18, 2020, or that he had no further contact with the employer any time after March 18, 2020.[1] *See* Consolidated Findings ## 2–4. Given the review examiner's consolidated findings and other undisputed testimony contained in the record, we agree that the claimant initiated his own separation and voluntarily resigned from his position with the employer.

Because the claimant quit his job, we analyze the claimant's separation under G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

> [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.

Under the above provision, it is the claimant's burden to establish that he left his job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

Nothing in the record suggests that the claimant's decision to leave employment is based on urgent, compelling, or necessitous circumstances. Although the claimant testified that he called out of work because he was feeling sick, he offered no additional testimony or documentary evidence about his health status, or whether any medical condition influenced his decision to separate from employment.

The remaining question, then, is whether the claimant left for good cause reasons that are attributable to the employer. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). To determine if the claimant has carried his burden to show good cause under the above-cited statute, we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985). As the review examiner noted in her credibility assessment, the claimant testified that he was unable to obtain a medical note to return to work because he did not have health insurance and could not afford the expense of a clinic visit. The review examiner also noted that the claimant attributed his lack of insurance to the employer's failure to provide him a package of information about its health insurance benefits.

However, the review examiner found that, on November 14, 2019, the employer had promptly responded to the claimant's November 13, 2019, inquiry regarding the cost of health insurance for a single person. Consolidated Finding # 6. Consolidated Finding # 6 also indicates that the claimant did not inquire about the employer's health insurance any further, and that he also had the option of enrolling into his partner's health insurance plan. Although the claimant had the choice of enrolling in a health insurance plan through the employer or through his partner's health insurance plan, he nonetheless told the employer on March 18, 2020, that he did not have any health insurance and was unable to provide a doctor's note. Consolidated Finding # 4. As the review examiner noted, there is nothing in the claimant's March 18, 2020, text message that attributes his lack of health insurance to the employer. *See* Exhibit 5.

At the remand hearing, the claimant suggested that it was not customary practice for the employer to request doctors' notes. However, the employer testified that he requested a doctor's note from the claimant because he was concerned about the onset of the COVID-19 public health emergency and protecting the health of his other employees. Consolidated Finding # 4. The employer's

concerns were rational, given the uncertainties surrounding the COVID-19 virus at the time. For these reasons, we believe that the claimant did not establish that he had a reasonable workplace complaint that constitutes good cause for resigning, particularly where the claimant did not demonstrate how the employer's request for a doctor's note was unduly burdensome or unreasonable under the circumstances.

Because the record does not suggest that the employer acted unreasonably towards the claimant at any time, we cannot conclude that the claimant left his employment for good cause attributable to the employer.

We, therefore, conclude as a matter of law that the review examiner's original conclusion that the claimant's separation from employment was disqualifying under G.L. c. 151A, § 25(e)(1), is supported by substantial evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 15, 2020, 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 - October 27, 2022

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
(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.

JMO/rh