

The claimant had good cause attributable to the employer to resign because he reasonably believed his employer's working conditions were unsafe, and he made reasonable efforts to preserve before leaving. After quitting once before, conditions only worsened when a piece of heavy equipment fell to the ground, which rattled the claimant and caused him to resign again.

**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 resigned from his position with the employer on April 28, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 10, 2020. The claimant appealed the determination to the DUA hearings department. Both parties attended the first day of the telephone hearing, which took place on October 14, 2020. However, the employer did not attend the second day of the continued telephone hearing, which had been scheduled for November 5, 2020.¹ Following the hearing on the merits, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 7, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to allow the employer to continue providing witness testimony and to afford an opportunity for both parties 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 voluntarily quit his job due to safety issues, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

¹ In its appeal, the employer stated that it could not access the November 5th hearing due to problems with the assigned telephone PIN.

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 groundskeeper and heavy equipment operator for the employer, a recycling company, from 08/15/17 until 04/13/20.
2. The claimant holds a hoister's license. His job and certification required him to report safety issues with the heavy equipment in the workplace.
3. The employer has fifteen pieces of heavy equipment, including five (5) cranes. All the equipment has wear, but the equipment is overbuilt to ensure it can handle additional weight.
4. On 03/12/19 and 07/30/19, the claimant received employee performance reviews. The reviews noted that the claimant needed to make safety his priority while using equipment in the yard.
5. On 08/27/19, the claimant received a Written Warning for safety violations for failing to wear safety glasses and a harness.
6. The claimant did not wear the harness because he believed it would have been more unsafe than wearing one due to the length of the tether and distance he was from the ground.
7. Sometime in the summer of 2019, the claimant was frustrated because he was using a piece of equipment that was not working properly. A coworker threatened him and told him that he would run him over if he did not get out of his way. He radioed that he was quitting. The Plant Manager responded that if he wanted to quit, he knew where the two gates were and that he could go ahead and leave. The claimant left work.
8. The claimant's supervisor (Supervisor) called him and promised him things would get better at work and the claimant returned to his job the following day.
9. During the claimant's employment, he complained to the mechanics and to his supervisor about multiple unsafe conditions in the workplace.
10. For instance, the street sweeper he routinely used had no working brakes. The claimant had to put in it reverse to slow and stop it. The claimant complained about the matter multiple times and the employer sent it for repair, but the condition was not adequately fixed.
11. One of the tractor trailer doors was broken and would randomly open. The truck had no seatbelts and was unsafe.

12. The claimant often could not see out of the windows of the cranes because they were tarnished, scratched and/or dirty. The claimant was concerned that he might injure others because he could not see them while he was operating the crane.
13. The Supervisor often cleaned the windows, but they repeatedly got dirty and scratched from use. The tarnished windows were not replaced.
14. Once, the claimant also complained about a coworker who did not operate a crane safely. The coworker hovered the crane over the claimant's head and the claimant thought the crane would break and he would die underneath it.
15. When the claimant complained about the safety issues, the employer often told him that they would "get to it".
16. When the COVID-19 pandemic began, employees were very nervous when they realized they were considered essential workers and would be required to come to work.
17. 25% of the employer's workforce stopped coming to work due to the pandemic.
18. On 03/27/20, several employees had a conversation over the two-way work radios about the matter. The claimant indicated that the federal government was giving extra unemployment money. The Supervisor said, "that can't be true."
19. The claimant texted his Supervisor an article relating to the additional unemployment benefit.
20. The Supervisor responded, "Wow. Now for the bad news, we probably will not be getting laid off."
21. The claimant responded, "We could make more money on unemployment."
22. The Supervisor responded, "We do not need unemployment, we are employed."
23. Sometime during the next week, the claimant complained to the mechanic and to the Supervisor about one of the crane's pin[s] being worn. The claimant believed if the pin broke, the crane would kill someone.
24. The Supervisor looked at the crane, and as a licensed hoisting engineer, determined the wear on the pin was not significant enough to replace.
25. On 04/07/20, the claimant texted the Plant Manager and said that he was going to stay home because he was short of breath and woke up full of sweat.
26. On 04/09/20, the Plant Manager texted the claimant, "What hours are you working?"

27. The claimant responded, "I've been sending my hours to [Supervisor]. He is doing payroll from home."
28. The Supervisor was working from home because he had been exposed to COVID-19.
29. The claimant was reporting his hours directly to his Supervisor each week because the employer was trying to keep everyone from congregating in the breakroom and touching the timeclock during the COVID-19 pandemic.
30. The claimant worked on Friday, 04/10/20, and the Plant Manager texted him that everything looked good in his area.
31. On Monday, 04/13/20, the claimant texted the Plant Manager, "My mom has a low fever and a cough. I am staying home."
32. The Plant Manager replied that he should confirm his situation with his Supervisor.
33. On 04/13/20, the Supervisor texted the claimant and asked if he wanted to use vacation time to make up his hours the previous week.
34. The claimant replied, "No, please do not use any vacation time." [sic] I opened an unemployment claim to supplement my hours. I am praying I get that extra 600 dollars. LOL."
35. The employer had 50 hours of work available to the claimant each week, but the claimant was leaving work early because he was taking advantage of the fact that his supervisor was not in the workplace to oversee him. He never asked the Plant Manager to leave early and never asked the Plant Manager to find him something to do during any downtime he believed he may have had.
36. The Supervisor replied, "Ok. You got it."
37. On Tuesday, 04/14/20, the claimant texted his Supervisor indicating that the Plant Manager told him to check in. He further wrote that his mother had a fever and was up all night and that she said she was fine, but he was still worried about her.
38. The Supervisor replied that he should come to work if he had no fever or cough.
39. On Wednesday, 04/15/20 at 7:40 a.m., the Supervisor texted the claimant and asked what was going on because he was not at work.
40. The claimant replied that he was staying home because he was short on breath and had a tickle in his throat causing an occasional cough.

41. The Plant Manager called the claimant to advise him that he had received an unemployment claim on his behalf and that he would be responding to the claim by providing details to the agency. He suggested that the claimant should return to work rather than continue filing for benefits because work was available to him.
42. At 3:20 p.m., the claimant texted his Supervisor and indicated that he was “seriously pissed” because the Plant Manager accused him of filing a fraudulent unemployment claim.
43. The Supervisor responded that he spoke with the Plant Manager about his claim and that the claimant was all set to work the following day.
44. The claimant texted back indicating his mother was demanding that he get a COVID-19 test and that he had a telephone appointment with his physician in the morning.
45. On Thursday, 04/16/20, the claimant texted his Supervisor and told him that the doctor wanted him to stay home for a week due to his symptoms and that he was mailing him a letter that he would then send to the employer.
46. The Supervisor reminded the claimant to fax the doctor’s letter to ensure he got paid federal sick pay. The claimant inquired as to what that meant. The Supervisor responded that the federal government would pay him sick time while he was out. The claimant responded, “Oh, cool.”
47. That day, a coworker sent the claimant a text indicating the 2 ½ ton grapple broke and fell off one of the cranes. The news really rattled the claimant because he had that same grapple swung over his head several times during his employment and because he had complained about a different grapple just a few weeks before.
48. On Tuesday, 04/21/20, the Supervisor texted the claimant and asked how he was feeling. The claimant responded that he had no fever but pain in his chest.
49. On Wednesday, 04/22/20, the Supervisor texted the claimant and asked if he was getting better. The claimant replied that he thought he was getting better and would call his doctor. The claimant said he was meeting with his doctor the following day and should be ready to return to work on Monday.
50. On Friday, 04/24/20, the Supervisor asked the claimant if he could fax the [doctor’s] note that said he could return to work on Monday. The claimant said that he would call his doctor.

51. The claimant then indicated that his doctor did not believe he had COVID but that he was sending him to get tested and his doctor would not write a return to work letter until he got the results.
52. The Supervisor told the claimant to tell him as soon as he got the test results.
53. On Monday, 04/27/20, the Supervisor texted the claimant and asked about results. The claimant replied that he did not get the results yet.
54. On Tuesday, 04/28/20, the Supervisor asked about the results again. He asked the claimant to call the doctor if he did not get the results yet.
55. The claimant replied, "I'm sorry. I have to quit. I have been thinking about it a lot. And for a lot of personal reasons. I can't work for the company any longer."
56. The Supervisor responded, "Give me a call."
57. The claimant did not call his Supervisor.
58. The claimant tested negative for COVID-19.
59. Weeks later, on 05/18/20, the claimant texted his Supervisor, "Sorry if I screwed you over by just quitting. It had absolutely nothing to do with you. I enjoyed working with you. I just could [sic] continue working for [Plant Manager]. He is single handedly destroying the company. The equipment is all unsafe and just the way the Plant Manager treats his employees. I am sorry I left you short-handed."
60. The claimant and his Supervisor had a very good work relationship. The Supervisor respected the claimant and believed he was a hard worker and trustworthy.
61. While he was out of work quarantining due to COVID-19, the claimant had time to think about his work environment. The claimant felt the workplace was a "deathtrap." The claimant quit his job after learning the news of [sic] the 2½ ton grapple broke because he felt the workplace was unsafe to the extent that he believed he or a coworker would be killed.

Credibility Assessment:

Although the claimant's resignation coincided with the additional \$600 unemployment benefit and he had been leaving early for several weeks to collect that benefit, the claimant testified that he quit because of the unsafe conditions in the workplace. In this regard, the claimant's testimony is considered credible for several reasons. First, his supervisor described the claimant as a hardworking, trustworthy individual, which supports the fact the claimant would not have left work just to collect unemployment benefits. The supervisor also confirmed the

claimant repeatedly complained about equipment and other safety issues throughout his employment. The claimant was forthright with details supporting his claim that he felt unsafe at work and he demonstrated the workplace was an inherently dangerous [sic] due to the repetitive use of heavy equipment. He specifically felt it was a “deathtrap” and his resignation came just days after he received news that the 2 ½ ton grapple broke and within a month of his complaint about the wear on a different crane grapple. The claimant’s text messages surrounding the \$600 additional payment were sent in response to his supervisor’s disbelief about the benefit amount and does not prove that the claimant quit his job simply to collect the payment and not due to his safety concerns.

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 as follows. With respect to Consolidated Finding #1, we accept the date of April 13, 2020, only insofar as it reflects the claimant’s last physical date on which he worked for the employer, since other consolidated findings show that he did not resign until April 28, 2020. 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 evidence presented. As discussed more fully below, we also agree with the review examiner’s legal conclusion that the claimant is eligible for benefits.

Because the claimant resigned from his employment, we analyze his eligibility under G.L. c. 151A, § 25(e)(1), 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 (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

To determine if the claimant has carried his burden to show good cause under G.L. c. 151A, § 25(e)(1), 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) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief). The record before us establishes that, throughout his tenure, the claimant was concerned about dangerous working conditions at the employer’s company. *See* Consolidated Finding # 9. Specifically, the claimant feared for his safety and that of other employees while they handled heavy equipment, because he believed that the employer did not adequately maintain and repair the equipment. *See* Consolidated Findings ## 12, 14, and 23. While Consolidated Finding # 6 establishes that the claimant committed a safety violation of his own in 2019, that singular occurrence does not discount the extensive evidence showing that the claimant regularly complained about more serious infractions that could result in harm to others.

The findings show that part of the claimant's regular job as a groundskeeper and heavy equipment operator required him to report safety issues with the heavy equipment in the workplace. *See Consolidated Finding # 2.* On the occasions that the claimant complained, the employer seemingly agreed that his concerns were valid, expressing, at times, a willingness to address the problematic equipment. *See Consolidated Finding # 15.* However, the claimant felt so strongly that the employer failed to address his safety concerns that he quit in 2019 before resigning again on April 28, 2020. *See Consolidated Finding # 7.* When the claimant quit in 2019, he returned to work only after the Supervisor reassured him that conditions would improve. *See Consolidated Finding # 8.*

According to Consolidated Finding # 23, the claimant most recently complained to his Supervisor and a mechanic about one of the crane's pins being worn in early April 2020. The claimant believed that if this pin broke, the crane would kill someone. The consolidated findings also indicate that, by the time that he resigned on April 28, 2020, the claimant's working conditions had in fact worsened, as a grapple had fallen off a crane on April 16, 2020. The incident prompted his resignation, because he was rattled by the news and felt unsafe returning to work. *See Consolidated Findings ## 47 and 59.*

General and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1). *Sohler v. Dir. of Division of Employment Security*, 377 Mass. 785, 789 (1979). However, unhealthy or unsafe working conditions can constitute good cause to separate from one's employment. *Id.* A claimant does not need to prove that the conditions actually caused a health or safety problem, merely a reasonable belief that working conditions were putting his health at risk. *See Carney Hospital v. Dir. of Division of Employment Security*, 382 Mass. 691 (1981) (rescript opinion); *see also* Board of Review Decision 0015 9508 16 (May 24, 2016) (awarded benefits to claimant, who reasonably believed that fatigued and inexperienced crews using large volumes of chemicals at high temperatures and pressures put his well-being and that of his coworkers at risk); Board of Review Decision 0015 4034 71 (June 23, 2015) (employer, who repeatedly instructed the claimant to report for work in a coat and work in a frigid indoor retail work environment without an operable heating system, created good cause for claimant to resign). We are satisfied that the claimant's continuous use of worn out or malfunctioning heavy equipment created an unsafe work environment and a reasonable workplace complaint.

The claimant also has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. *Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 94 (1984). As discussed above, the record shows that the claimant had been raising his safety concerns about working with worn and malfunctioning heavy equipment to the Supervisor and mechanics on numerous occasions, to no avail. *See, e.g., Consolidated Finding # 7.* As the employer had failed to adequately address the claimant's concerns, even after he returned to work after quitting in 2019, it was reasonable for the claimant to believe that when he complained about the crane pin in April, 2020, the employer would persist in failing to address his concerns. Under these circumstances, we conclude that the claimant made reasonable efforts to have his safety concerns taken seriously, and that further attempts would have been futile.

We, therefore, conclude as a matter of law that the claimant voluntarily left his employment for good cause attributable to the employer, as meant under G.L. c. 151A, § 25(e)(1), and that he took reasonable steps to preserve his employment.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning April 26, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 28, 2021



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JMO/rh