

The claimant had good cause attributable to the employer to quit, where the employer failed to offer any information about how to receive compensation following a work injury. He is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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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 resigned from his position with the employer on February 4, 2021. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 23, 2021. 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 7, 2022. 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 give the claimant an opportunity to testify and present other evidence. 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 voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law where, after remand, the review examiner found that the claimant resigned because the employer did not work with him to receive pay for the days he missed due to a work injury.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. On or about June 19, 2020, the claimant began working as a maintenance worker for the employer, a hotel.
2. Sometime near the end of January of 2021, the claimant was asked to move a washing machine by himself. He slipped while moving the washing machine. He fell to the ground and the washing machine fell on top of him.
3. The claimant was injured during the fall. He left his shift immediately and a coworker brought him to the emergency room.
4. The claimant was advised to take time off to let his body recover.
5. After his third day out of work, the employer informed the claimant he had to return to work.
6. The claimant returned to work and began working on lighter jobs.
7. On or about February 4, 2021, the claimant received his paycheck and noticed he was not paid for the days he missed due to his work injury.
8. The claimant asked the owner about his pay and the owner informed him he would not be paid for any of the days he missed after his work injury.
9. The employer did not notify the claimant about any potential workers' compensation claim, so the claimant did not file one.
10. The claimant was upset he was not going to be compensated for days missed after suffering a work-related injury.
11. The claimant resigned from his position effective immediately.
12. The employer had work available for the claimant when he resigned.
13. The employer was not considering discharging the claimant at the time he resigned.
14. The claimant would not have resigned if the employer worked with him to receive pay for the days he missed after his work injury.
15. On March 23, 2021, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Approval effective January 31, 2021.
16. The employer appealed the determination.

Credibility Assessment:

The claimant and employer witness attended the remand hearing and provided testimony. The claimant testified credibly that he was injured while at work and the employer was aware of the injury. The employer did not mention the claimant's injury at the original hearing but confirmed it at the remand hearing after hearing the claimant's testimony. The employer witness intentionally left out information in her testimony during the first hearing when the claimant was not present. Therefore, the employer witness's entire testimony from the first hearing is not credible. The employer had the opportunity to again testify fully at the remand hearing. Only testimony from the remand hearing provided in the presence of the claimant and subject to cross examination can be considered credible. The witness for the employer was not present for the conversations the claimant had with the owner of the company regarding his pay. Therefore, the claimant's firsthand knowledge of the conversation is more credible than any secondhand knowledge the employer witness had. The claimant was injured at work. The employer witness also testified during the first hearing that there was medical leave available for the claimant if he needed it. This testimony is not credible given that the employer knew the claimant was out of work for medical reasons, yet still told him he had to return to work. The employer failed to inform him that he did not have paid time off or discuss a workers' compensation claim. It was not until he received his paycheck that he realized he was not compensated for those days.

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. We reject the portion of Consolidated Finding # 2 which refers to a washing machine, as the claimant testified that a dryer fell on him. 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant resigned without good cause attributable to the employer.

Because the claimant resigned from his employment, his eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e), 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 . . . [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.

These statutory provisions expressly assign the burden of proof to the claimant.

The claimant here did not contend that he resigned for urgent, compelling, and necessitous reasons. Rather, the claimant contends that the separation was for good cause 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). Therefore, we consider whether the employer's conduct created good cause to resign.

Here, the review examiner found that the claimant resigned on February 4, 2021, due to the employer's failure to work with him to receive pay for the days he missed work after his injury. *See Consolidated Finding # 14*. On February 4th, the claimant noticed that his paycheck did not reflect payment for any of the days he had missed work due to his injury, and he asked the owner about the lack of pay. *See Consolidated Findings ## 7–8*. The owner informed the claimant that he would not be paid for those days but did not give the claimant an explanation for his decision. *See Consolidated Findings ## 8–9*. Specifically, the employer did not inform the claimant that he had exhausted his paid time off prior to his injury, or that workers' compensation was a potential option for him. *See Consolidated Finding # 9* and the credibility assessment.

In Massachusetts, all employers are required to provide workers' compensation insurance coverage to their employees. *See G.L. c. 152, § 25A*. Whether or not this work-related injury would have rendered the claimant eligible for workers' compensation benefits or a medical-only claim with the employer's insurance company is not before us. However, the employer's actions which triggered the claimant's resignation are. In our view, the failure of the employer to advise the claimant of his right to investigate either option was unreasonable in light of the fact that he hurt himself while performing a task at the employer's direction, and he could not work. *See Consolidated Findings ## 3–5*. In light of the foregoing, we are satisfied that the claimant has met his burden to show that he left for good cause attributable to the employer.

However, our analysis does not stop there. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action 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, 93–94 (1984). The consolidated findings show that the claimant asked the employer about the employer's failure to pay him for the days that he was out of work, but the employer refused to give the claimant an explanation as to why he would not receive pay. This satisfies his burden to show that, prior to resigning, he made a reasonable attempt to remedy the situation and that further attempts would have been futile.

We, therefore, conclude as a matter of law that the claimant resigned from employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 31, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 2024



Charlene A. Stawicki, Esq.
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 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.

SVL/rh