Despite having medical reasons to be absent from work, the claimant nonetheless engaged in deliberate misconduct in wilful disregard of the employer's interest by failing to report to work for two days or to notify the employer of these absences. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0065 4788 77

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 reverse.

The claimant separated from his position with the employer on March 8, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 26, 2021. 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 July 14, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the employer had not met its burden to establish that the claimant was discharged for engaging in deliberate misconduct in wilful disregard of the employer's interest or for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, and, thus, the claimant 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 to testify and afford both parties an opportunity to present additional evidence. Only the employer 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 was discharged from his employment for non-disqualifying reasons, is supported by substantial and credible evidence and is free from error of law, where, after remand, the record indicates the claimant failed to report for a number of his scheduled work shifts or to communicate with the employer regarding these absences.

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 as a truck driver and general laborer for the employer, a septic company, from December 16, 2020, to March 8, 2021.

2. The claimant's immediate supervisor was the manager (the Manager).

3. The employer did not have a written attendance policy or a written employee handbook during the claimant's employment.

4. The employer had an expectation that employees attend scheduled workdays and provide a doctor's note for unexcused absences. The expectation was verbally communicated to the claimant at hire and during verbal warnings for attendance issues.

5. The claimant did not have medical insurance during his employment.

6. On December 17, 2020, the claimant missed work without notifying the employer. The claimant was given a verbal warning.

7. On January 12, 2021, the claimant called out of work because he was sick. The claimant provided the employer's Manager a doctor's note regarding the absence.

8. At some point after January 12, 2021, the Manager verbally warned the claimant to not miss any more days.

9. On February 22, 2021, the claimant called out of work, because he had injured himself slipping on ice. The claimant called the owner and told him he would need "a couple days." The claimant did not seek medical attention because he did not have medical insurance. The claimant did not call the Manager.

10. On February 23, 2021, the claimant did not attend work because of his injury. The claimant did not call the Manager.

11. At some point after February 23, 2021, the Manager verbally warned the claimant to not miss any more days. The Manager did not require the claimant to produce a doctor's note, because he could see that the claimant had fallen due to his condition.

12. On March 2, 2021, the claimant was performing a welding job on one of the employer's trucks. Due to an issue with his welding goggles, the claimant suffered either a flash burn to his eyes or an object in his eyes, which impaired his vision. From prior experience with flash burns, the claimant expected to be out for a few days to recover. The claimant did not seek medical attention because he did not have medical insurance.

13. On March 3, 2021, the claimant texted the Manager that he had flash burns to his eyes and would not be attending work.

14. On March 4, 2021, the claimant did not attend work because he was recovering from his flash burn injury and did not call the Manager.

15. On March 5, 2021, the claimant did not attend work because he was recovering from his flash burn injury and did not call the Manager.

16. The claimant did not call out of work on March 4 and March 5, 2021, because he thought the Manager would know that flash burns required a few days to recover.

17. On March 8, 2021, the claimant attended work.

18. On March 8, 2021, the Manager discharged the claimant for attendance issues, specifically being out of work on March 3 through 5, 2021.

19. The claimant did not believe he would be discharged for his attendance, because he had a medical reason for not attending work on March 3-5, 2021.

Credibility Assessment:

Concerning the attendance policy, the owner testified that the employer had instituted a written attendance policy requiring employees to present a doctor's note for unexcused absences. The owner testified that the policy was contained in an employee handbook issued on January 1, 2021. The employer did not produce this written policy during the remand hearing. However, the general manager testified that there was no written attendance policy or employee handbook. The general manager testified that he was in the process of creating an employee handbook as of September 10, 2021, (the remand hearing date). The general manager testified that the attendance policy was verbally given and that it required employees to be seen by a doctor if they were too sick to go to work. In the initial hearing, the claimant testified that the attendance policy was verbal and required a doctor's note for unexcused absences. As to the presence of a written policy, the owner's testimony is not deemed credible as it directly contradicts the general manager's testimony which was corroborated by the claimant's testimony.

Concerning the employer's expectations, the owner testified that the expectations included an expectation that employees produce a doctor's note following an unexcused absence. The owner testified that the expectation was included in a written policy. As indicated above, the written policy was not presented.

Concerning the claimant's flash burn, the claimant provided direct testimony that he had suffered flash burn and that he had not sought medical attention because he did not have medical insurance and because he had suffered flash burn before so

> he knew the treatment was to rest. The claimant testified that the flash burn was caused by faulty welding goggles. The owner and general manager testified that the claimant could not have suffered flash burn caused by the welding goggles. The employer did not present evidence to credibly dispute that there was nothing wrong with the claimant's vision. Indeed, both employer witnesses testified that the claimant said he may have an object in his eye that was causing his symptoms. As such, it is concluded that the claimant did have an injury to his eyes on March 2, 2021, which impaired his vision.
>
> The owner's, general manager's, and claimant's testimony was [sic] in agreement on the other facts in this hearing and remand hearing. Additionally, the claimant offered credible testimony as to why he did not seek medical attention or call out from work from March 3–5, 2021.

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 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, except for his statement that the claimant offered credible testimony as to why he did not call out from work from March 3–5, 2021. Additionally, we believe that the consolidated findings do not support an award of unemployment benefits, which we discuss more fully below.

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 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 . . . (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 . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The employer fired the claimant for being away from work from March 3–5, 2021, and specifically for not calling the employer or reporting for work on March 4, 2021, and March 5, 2021. *See* Consolidated Findings ## 14–15, and 18. This is a violation of the employer's expectations regarding employee attendance. *See* Consolidated Finding # 4. However, because

the record does not contain any information about other employees who committed this infraction, or whether the level of discipline imposed for violating this policy is discretionary, the employer has not demonstrated that the discharge was for a knowing violation of a reasonable and *uniformly enforced* policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the employer shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. We believe the employer has met its burden here.

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). 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) (citation omitted).

The consolidated findings establish that he engaged in deliberate misconduct in wilful disregard of the employer's interest. The employer maintained an expectation that the claimant show up for work, and the claimant was aware of that expectation, because he was informed about the attendance policy at hire and through verbal warnings concerning the same conduct. Consolidated Finding # 4. Consolidated Findings ## 14–15 show that, on March 4, 2021, and March 5, 2021, the claimant did not report for work and did not notify the employer that he would be absent, although he was aware that he was expected to call in to report his absence on March 4 and March 5, 2021. At the initial hearing, the claimant testified that he "was home by myself, I could not grab the phone and make the call, and I figured that, I was dealing with a mechanic, I should have called, but I didn't. I returned to work when I was feeling better, on March 8."[1] This statement suggests that the claimant knew he should have called to report his absences but did not, choosing instead to simply show up whenever he felt better and establishes that his failure to notify the employer was deliberate.

We now consider whether the claimant has demonstrated mitigating circumstances. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

The consolidated findings provide that the claimant stayed away from work due to an eye injury. *See* Consolidated Findings ## 13–15. The review examiner also made a credibility assessment accepting the claimant's testimony as to why he did not call out from work from March 3–5, 2021. 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

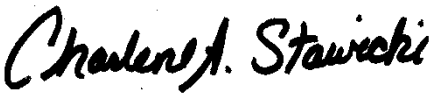
[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

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). However, based upon the record before us, we cannot agree with the review examiner's assessment on this matter.

Nothing in the record indicates that the claimant's eye injury was so disabling that he could not call the employer. In addition, whether or not the claimant reasonably believed that the employer would understand his need to be away from work for medical reasons stemming from an eye injury, such belief does not mitigate his failure to notify the employer of his absences from work. *See* Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984) (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); Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28* (the absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest). For these reasons, the claimant has not presented substantial evidence that there were mitigating circumstances for his misconduct. Absent such circumstances, we must infer that he acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2). He is ineligible for benefits.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 7, 2021, 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 - January 28, 2022

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.

JMO/rh