The employer fired a tractor-trailer driver because the trailer dropped from the tractor he was driving. To rebut the claimant's sworn testimony that he properly coupled the trailer to the tractor and conducted the required inspection prior to operating the vehicle, the employer offered only speculative testimony from a witness with no first-hand knowledge of the incident. The Board rejected the review examiner's findings that the claimant engaged in the alleged misconduct as unreasonable in relation to the evidence presented, and it awarded benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0066 4396 83

Introduction and Procedural History of this Appeal

The employer 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 was discharged from his position with the employer on February 4, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 16, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 10, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by failing to properly connect a trailer to the employer's tractor, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a distribution company, as a delivery driver, beginning November 30, 2020. The claimant was paid $19.25 per hour.

2. The employee handbook states, in part:

   Serious Offenses

   These infractions are extremely serious and due to their severity, you will be subject to disciplinary action up to and including termination for a first offense in the absence of mitigating circumstances.

   • Misuse, damage or destruction of company [sic]

3. The policy is a measure to ensure the safety of employees and the general public.

4. All employees are subject to the policy.

5. The claimant was not issued the employee handbook.

6. Discipline imposed for violation of the policy is left to the discretion of the employer based upon the circumstances.

7. The claimant, in a meeting with other employees conducted by the Director of Transportation (DOT), was told the following resulted in immediate discharge: 1. Use of a cell phone while driving[.] 2. Failing to use a seat while driving[.] 3. "Dropping" a trailer[.]

8. "Dropping" a trailer occurs when a driver fails to properly connect his tractor to the trailer and it disconnects in travel.

9. Properly connecting a tractor to a trailer includes conducting a pre-trip visual inspection of the fifth-wheel/king pin coupling to confirm the jaws of the fifth wheel have locked the trailer in place and also conducting a visual inspection of the release lever on the side of the trailer to confirm it has been pushed all the way in.

10. It was the employer's expectation drivers conduct a pre-trip visual inspection of the fifth-wheel/king pin coupling to confirm the jaws of the fifth wheel have locked the trailer in place and also conduct a visual inspection of the release lever on the side of the trailer to confirm it has been pushed all the way in.

11. The claimant, a CDL driver, was trained to conduct pre-trip visual inspections of his tractor-trailer at tractor-trailer school; visual inspections were part of CDL licensure tests conducted by the State Police; and had previously conducted pre-trip visual inspections of the fifth-wheel/king pin coupling to confirm the jaws of the fifth wheel have locked the trailer in place and had also conducted visual inspections of the release lever on the side of the trailer to confirm it has been pushed all the way in.

12. The claimant did not need to be told by the employer he was expected to conduct a pre-trip visual inspection of the fifth-wheel/king pin coupling to confirm the jaws of the fifth wheel have locked the trailer in place and also to conduct a visual inspection of the release lever on the side of the trailer to confirm it has been pushed all the way in.

13. A trailer will not "drop" from a tractor if the jaws of the fifth wheel have locked the trailer in place and the release lever on the side of the trailer has been pushed all the way in.

14. On February 3, 2021, the claimant drove his tractor with a trailer attached about 30 to 40 feet from the side of a building to the hand truck area. When the claimant left the hand truck area to exit the lot the trailer "dropped."

15. Prior to driving his tractor, the claimant did not conduct a visual inspection of the fifth-wheel/king pin coupling to confirm the jaws of the fifth wheel had locked the trailer in place or conduct a visual inspection of the release lever on the side of the trailer to confirm it has been pushed all the way in.

16. On February 4, 2021, the claimant was terminated for "dropping" a trailer in violation of its misuse, damage or destruction of company property policy.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Findings of Fact ## 13 and 15, because, for reasons set forth below, we do not believe that these findings are supported by substantial evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed below, we reject the review examiner's legal conclusion that the claimant is disqualified from receiving benefits.

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, . . .

We note at the outset that the review examiner concluded that the employer did not establish that the claimant knowingly violated a reasonable and uniformly enforced rule or policy. We concur in this conclusion, as the employer failed to show that the claimant had been given a policy handbook or that the policy was uniformly enforced. Consequently, we next consider whether the claimant should be disqualified under the "deliberate misconduct" prong of G.L. c. 151A, § 25(e)(2).

In determining whether a claimant engaged in deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2), "[the] issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted).

The explicit language in G.L. c. 151A, § 25(e)(2), places the burden of persuasion on the employer. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985). Thus, the employer in this case bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). On the record before us, we conclude the employer has failed to meet its evidentiary burden.

The employer's reason for discharging the claimant was his alleged failure to properly connect one of the employer's tractors to a trailer, and, as a result, the trailer disconnected (dropped) from the tractor during the claimant's operation of the vehicle. The employer further asserts that the claimant failed to conduct the required pre-trip inspection of his tractor and trailer. In order to meet its evidentiary burden in this matter, the employer must establish by substantial and credible evidence that the claimant engaged in this alleged misconduct. This, the employer failed to do.

In rendering Findings ## 13 and 15, the review examiner expressly discredited the claimant's sworn testimony that he properly connected the trailer to the tractor and performed the necessary pre-inspection. Instead, the review examiner credited the Director of Transportation's testimony that the trailer would not have dropped but for the claimant's failure to properly connect and inspect the trailer. 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). Upon review, we cannot accept Findings ## 13 and 15.

The employer's only witness was its Director of Transportation, who acknowledged in her testimony that she was not present at the employer's worksite at the time of the alleged trailer dropping incident and had no first-hand knowledge of the incident that led to the claimant's discharge. Rather, her knowledge was based on a report that she received on the date of the

incident. She further acknowledged that she did not review any video recording of the incident, nor did she speak with the claimant about it. Indeed, she was not certain that anyone from the employer ever directly questioned the claimant about the incident.[1]

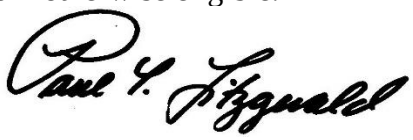
The Director, therefore, had no first-hand knowledge as to whether the claimant failed to properly couple the trailer to the tractor or failed to conduct the mandatory inspection to ensure that the trailer had been properly coupled to the tractor. Consequently, the employer offered no direct evidence to contradict the claimant's sworn testimony that he properly coupled the trailer to the tractor and conducted the required inspection prior to operating the vehicle.

Despite her lack of direct knowledge of the incident in question, the Director asserted that the trailer would not have "dropped" if the claimant had properly connected the trailer and conducted the mandatory pre-inspection. Other than her testimony, the Director offered no other evidence to support this assertion. Thus, its only evidence was pure speculation. We believe that the review examiner's decision to credit the employer in rendering Findings ## 13 and 15 was unreasonable in relation to the evidence presented. Consequently, we reject Findings ## 13 and 15, as they are not based on substantial and creditable evidence in the record before us.

For the foregoing reason, the employer has not sustained its evidentiary burden of establishing that the claimant engaged in the conduct which resulted in his separation from employment.

We, therefore, conclude as a matter of law that the claimant neither knowingly violated a reasonable and uniformly enforced rule or policy of the employer, nor engaged in deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 24, 2021, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - June 23, 2023

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

[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).

(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.

PF/rh