Employer expected that its employees would only transport patients to appointments in a wheelchair. The claimant discovered the wheelchair he needed for a patient was not available, but the patient refused to wait for the claimant to call the employer and began moving to the van on his own. The decision to assist the patient without contacting the employer first was not conduct in wilful disregard of the employer's interest, but in the interest of a client's safety. At most, he used poor judgment and is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0071 6750 35

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 separated from his position with the employer on July 12, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 2, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 22, 2022. 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 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 claimant's appeal, we remanded the case to the review examiner to obtain subsidiary findings of fact pertaining to the incident that led to the claimant's discharge. 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 engaged in deliberate misconduct because he failed to contact the office when he discovered the patient he was transporting did not have the required wheelchair, 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 part-time as a wheelchair driver for the employer, a transportation company, between August 14, 2020 and July 12, 2021, when he separated.

2. The claimant did not have a fixed schedule. The claimant earned $15.00 per hour.

3. This was the claimant's only job.

4. The claimant's supervisor was the dispatcher (supervisor).

5. The employer maintains an "Ambulatory Policy" (the policy). The policy read in relevant part "if a chaircar patient is ambulatory they will no longer be permitted to ride in the regular passenger seat. Every patient will go in/out and to/from their destination by wheelchair. The liability of having some of these patients walking to and exiting our vehicles is way too high. If the patients object they can choose to get their own transportation."

6. The purpose of the policy is for the safety and well-being of the patients.

7. On December 2, 2020, the claimant signed a copy of the policy.

8. The employer expects that employees transport patients in the required wheelchair and to refrain from transporting patients in the regular passenger seat.

9. The claimant was aware that the employer expected him to transport the patients in the required wheelchair and to refrain from transporting patients in the regular passenger seat.

10. On July 12, 2021, the claimant was assigned to transport one of the employer's patients (patient A) to a doctor's appointment for dialysis treatment.

11. Patient A, who was a repeat patient, required a bariatric wheelchair to be transported. Patient A had several health issues and used an oxygen tank.

12. The claimant, who typically transported patient A to his appointments on Mondays, Wednesdays, and Fridays, was aware that patient A required a bariatric wheelchair to be transported to the doctor's appointment.

13. On July 12, 2021, the claimant noticed that the bariatric wheelchair needed to transport patient A to the doctor's appointment was not in the van.

14. Throughout his employment, the claimant observed that whenever the bariatric wheelchair was not in the van, it had been left at patient A's house by one of the other drivers.

15. On July 12, 2021, the claimant believed that since the wheelchair was not in the van, it had been left at patient's A house by the driver who last transported him.

16. On July 12, 2021, the claimant went to patient A's house without a wheelchair.

17. When the claimant got to patient A's house the wheelchair was not there.

18. The claimant was aware that he should have contacted the office to inform the employer that he did not have the required wheelchair for patient A.

19. The claimant told patient A that he had to call the office to inform them that he did not have the wheelchair. Patient A, who was outside sitting in his rollo walker, began yelling and swearing that the claimant should take him to the appointment because he could not be late, or he would not be seen. Patient A told the claimant that they could use his rollo walker to get him to the van.

20. On July 12, 2021, since patient A was yelling and swearing at him, the claimant did not inform the employer that he did not have the required wheelchair to transport patient A to his doctor's appointment.

21. On July 12, 2021, the claimant began taking patient A to the van using patient A's rollo walker.

22. While going to the van, patient A began sliding out of the rollo walker onto the ground.

23. When patient A began slipping from the rollo walker, the claimant should have called the office to inform the employer that he needed assistance with the patient.

24. The claimant was aware that he should have contacted the employer's office to ask for help in getting patient A off the ground.

25. The claimant, who believed he could not leave patient A sitting on the ground, took him up and got him back onto the rollo walker.

26. The claimant was aware that patient A should not have been placed in, or ride in, the van's front seat.

27. On July 12, 2021, after getting patient A to the van, the claimant put patient A in the front seat because this was the easiest place and safest place for the patient without the use of the wheelchair based on his weight and health conditions. The claimant believed that it would have been unsafe to use the wheelchair lift while the patient was seated in his rollo walker.

28. On July 12, 2021, the claimant intended to call the employer as soon as patient A was seated in the van.

29. When the claimant got patient A in the van's front seat, he noticed that patient A began mumbling and eventually stopped speaking. The claimant also observed that patient A was no longer breathing, so he began shaking him. Patient A did not respond to the claimant because he was dead.

30. On July 12, 2021, once the claimant realized that patient A was dead, he called the office.

31. The claimant believed he would have been suspended for the actions he took with patient A on July 12, 2021.

32. On July 12, 2021, the employer concluded that the claimant had violated the employer's policy and expectations by transporting patient A without a wheelchair and by placing him in the front seat.

33. On July 12, 2021, the employer discharged the claimant from his employment effective immediately for transporting patient A without a wheelchair and by placing him in the front seat of the van.

Credibility Assessment:

As to the testimony about the wheelchair, the patient yelling at the claimant, the claimant's belief about using the wheelchair lift while the claimant was in the rollo walker, and the claimant's intention to call the employer, the claimant provided credible and forthcoming testimony. Therefore, it is found that those events and actions relating to the circumstances of July 12, 2021, occurred as testified to by the claimant.

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 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to benefits.

Because the claimant was discharged 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. . . .

Under this provision of the statute, "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).

As an initial matter, there is insufficient evidence in the record for us to conclude that the employer's policy, which the claimant violated, was uniformly enforced. Therefore, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

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). There was no dispute that the claimant understood that the employer expected its employees to transport patients in a wheelchair at all times, nor any dispute that the claimant did not adhere to this expectation when he arrived at patient A's house on July 12, 2021. Consolidated Findings ## 8, 9, 21–27. In considering these concessions, the review examiner concluded the claimant did so deliberately and in wilful disregard of the employer's interest. While we agree that the record supports a conclusion that the claimant deliberately chose not to transport patient A in a wheelchair, we do not agree that the claimant acted in wilful disregard of the employer's interest.

In Goodridge v. Dir. of Division of Employment Security, the SJC stated, "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 . . . which the employee knew was contrary to the employer's interest." 375 Mass. 434, 436 (1978) (citations omitted). The SJC has also stated, "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

In Garfield, the employer discharged a retail health food store manager for rearranging a store schedule without notifying the district manager. 377 Mass. at 98. The Court further stated, "[conclusions] of wilful misconduct must rest on findings of specific acts or omissions of the worker which adversely affect the employer's interest." Id. at 99. In that case, the store manager rearranged the schedule in order to ensure that the store had staff coverage while he attended a health food convention, and he did not notify the district manager because he believed that she was out of town and unreachable. Id. at 95, 98. The Court held that the claimant acted responsibly in rearranging the schedule to accommodate his absence and that, at worst, his failure to call or leave a message for the district manager was a good faith error of judgment. Id. at 98. Thus, the store manager's actions did not justify disqualification under G.L. c. 151A, § 25(e)(2). Id. at 100.

Here, the consolidated findings indicate that the claimant fully intended to comply with the employer's expectations by utilizing a wheelchair to transport patient A to his appointment. *See* Consolidated Findings ## 15, 19, and 28. Upon discovering that the wheelchair was not in the van, the claimant assumed, based on previous experience, that the wheelchair was at patient A's house. Consolidated Findings ## 13–15. While it likely would have been wiser for the claimant to confirm his belief before leaving, we do not believe that the consolidated findings indicate his failure to do so is evidence that he intended to disregard the employer's expectation that he use a wheelchair to transport patient A to and from his appointments. *See* Consolidated Finding # 15.

Upon learning that the wheelchair was not at patient A's house, the claimant informed the patient he needed to contact the employer's office. However, patient A became agitated and confrontational, insisting that the claimant take him to his appointment. Consolidated Finding # 19. While not in the findings of fact, the claimant's uncontested testimony was that patient A also began making his way down the driveway toward the van unassisted despite the claimant's requests that he wait.[1] Because the claimant believed it would have been unsafe to let patient A proceed to the van unassisted and the patient was disregarding the claimant's instructions to wait, he concluded the safest option was to contact the employer once the patient was secured in one of the van's passenger seats. Consolidated Findings ## 19–28. There was no indication from the record that the claimant actually intended to transport the patient after getting him seated in one of the van's passenger seats. Consolidated Finding # 28.

Upon reflection, the claimant's decision to delay contacting the employer may not have been the best practice. However, the consolidated findings indicate that the only reason for this delay was because the claimant believed patient A's safety was at risk. In the absence of any significant evidence detracting from the claimant's uncontested testimony that his actions that day were based on his concern for the safety of one of the employer's clients, we believe that the record demonstrates that the claimant's decision was, at most, a good-faith lapse in judgment rather than actions taken in wilful disregard of the employer's expectations.

We, therefore, conclude as a matter of law that the employer has not met its burden to demonstrate that it discharged the claimant for a knowing violation of a uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week of July 12, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 16, 2023

Charlene A. Stawicki, Esq.
Member

[1] The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

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.

LSW/rh