Review examiner's reliance on a hearsay statement in an employment record to reject the employer's consistent, unrefuted testimony as to the basis for firing the claimant was unreasonable in relation to the evidence presented. The record was produced after the hearing for the limited purpose of showing the claimant's termination date, and the employer was not offered an opportunity to address the substantive entries. Where the employer discharged the claimant for several instances of no-call, no-show, the claimant's separation is analyzed under G.L. c. 151A, § 25(e)(1). Lack of transportation may have constituted an urgent, compelling, and necessitous reason for not being able to report for work, but it does not explain why the claimant failed to notify the employer of his absences. Held the claimant is ineligible for benefits.

Board of Review
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Issue ID: 0076 1267 09

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 was discharged from his position with the employer on February 18, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 17, 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 overturned the agency's initial determination and awarded benefits in a decision rendered on September 10, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the employer failed to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 afford the employer an opportunity to present evidence pertaining to the claimant's separation. Only the employer 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 was eligible for benefits under G.L. c. 151A, § 25(e)(2), where he was discharged for unexcused absences that both preceded and followed his motor vehicle accident, 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. From June 15, 2015 to February 18, 2022, the claimant worked as a full-time (50 hours weekly) store manager for the employer, a quick service station company.

2. The claimant worked Monday through Friday from 6:00 a.m. to 4:00 p.m.

3. The claimant's hourly rate was $16.25.

4. The claimant's direct supervisor was the employer's area leader (supervisor).

5. The claimant lived approximately 40 minutes away from the store and relied on his car for transportation to work. Public transportation was not available.

6. The employer has an attendance policy which requires employees to notify their supervisor at least two hours prior to the start of their shift if they cannot report for a scheduled shift. Per the language of the policy, if an employee is absent for 3 or more consecutive days without prior notification and explanation to the supervisor, the employee will be subject to disciplinary action up to and including termination. The attendance policy is contained in the orientation materials employees receive at the time of hire.

7. The employer has an attendance policy in order to ensure adequate staffing to maintain operations.

8. The claimant was aware of the attendance policy through his receipt of the policy at orientation and due to the June 20, 2021 Level 3 Written Warning, and the Level 2 Written Warning issued on January 23, 2022. The claimant knew the employer expected him to report for his scheduled shifts and to notify his supervisor if he could not report to work.

9. On June 18th, 19th, and 20th of 2021, the claimant was scheduled to work from 6:00 a.m. to 4:00 pm. The claimant did not work his scheduled hours and did not notify his supervisor.

10. On June 21, 2021, the claimant's supervisor, at the time, issued the claimant a Level 3 Final Written Warning for violating the employer's Absences/Tardiness policy, and reviewed the policy with the claimant. The warning stated, "Failure to follow the expected policies/standards could result in further disciplinary action up to and including termination." Subsequently, the claimant transferred to a new store and his supervisor changed, and the claimant's final written warning status ended.

11. The claimant's store is open 24 hours and has only one employee per shift. A manager is always assigned to work the 6:00 a.m. shift, and the claimant worked the 6:00 a.m. shift. If the manager does not report timely for his 6:00 a.m. shift, the overnight person leaves, locks the door and sets the alarm. When the alarm is set, the supervisor is notified.

12. On January 4th, 5th and 21st, 2022, the claimant was scheduled to work. The claimant did not report to work and did not notify his supervisor he would be absent.

13. The claimant was absent from work on January 4th and 5th because he was in jail. The claimant told his supervisor he did not have a phone to let the supervisor know he would be absent from work. For the January 21st absence, the claimant did not provide a reason as to why he did not report to work and did not notify his supervisor.

14. On January 23, 2022, the supervisor issued the claimant a Level 2 Written Warning due to the three unexcused absences on 4th, 5th and 21st. The warning included the language, "Failure to follow the expected policies/standards could result in further disciplinary action up to and including termination…Further absences such as this [will] result in Disciplinary action." When the supervisor gave the claimant the written warning, he told the claimant that any further unexcused absences would result in termination.

15. The claimant last physically worked for the employer before February 3, 2022.

16. On or about February 3, 2022, after the claimant's shift started at 6:00 a.m., the claimant was in a car accident and could not go to work.

17. On February 3, 2022, the claimant did not report to work for his 6:00 a.m. shift. The supervisor called the claimant asking where he was, and the claimant reported he had been in a car accident and his car was damaged. The claimant told the supervisor he could not report to work for the next few days due to a lack of transportation. The supervisor told the claimant he would work with the claimant to find a solution and asked the claimant if he had found someone to cover his shifts while he was out. The claimant told the supervisor "That's not my job, that is your job."

18. From January 23, 2022 to February 3, 2022, the claimant did not report for three consecutive shifts and did not notify the supervisor at least two hours prior to the shift starting. The supervisor decided to meet with the claimant during the claimant's next scheduled shift in order to determine if the claimant would be issued a Level 3 Written Warning or discharged.

19. The claimant was scheduled to work February 4th, 7th, 8th, 9th, 10th and 11th.

20. On or about February 6, 2022, the supervisor asked the claimant if he was returning to work for his scheduled shift on February 7th at 6:00 a.m. The claimant said he would come back to work, but, due to transportation issues, did not have a specific date. The claimant did not report to work for his scheduled shifts on February 7th, 8th, 9th, and 10th, due to a lack of transportation, and did not try to get coverage for his scheduled shifts.

21. The claimant asked the supervisor to use his vacation time for the January 27, 2022 to February 2, 2022 and for the February 3, 2022 to February 9, 2022 pay period, and the supervisor agreed. For the pay period January 27, 2022 to February 2, 2022, the claimant worked 17.76 hours and used 23 hours of sick time. For the pay period February 3, 2022 to February 9, 2022, the claimant used 39.5 hours of vacation time and .5 hours of sick time.

22. On February 11, 2022, the claimant did not report to work for his scheduled shift due to a lack of transportation and did not notify the supervisor. The supervisor determined the claimant had violated the employer's Attendance policy and decided to discharge the claimant. The supervisor asked the claimant to meet with him on February 13, 2022, the claimant's next scheduled workday. The claimant agreed and subsequently cancelled. The meeting was rescheduled for February 14, 2022, and then February 15, 2022. The claimant cancelled the meetings, due to a lack of transportation.

23. From January 23, 2022 to February 3, 2022, the claimant missed three consecutive shifts for unknown reasons.

24. From February 4, 2022 to February 18, 2022, the claimant missed three consecutive shifts due to a lack of transportation.

25. The claimant did not request a leave of absence, which was to end on February 18, 2022. He did not have approval to be out of work through February 18, 2022.

26. On February 18, 2022, the claimant was driven to the store and met with the supervisor. During their meeting, the supervisor discharged the claimant for failing to report to work for three consecutive shifts during the time period of January 23, 2022 to February 18, 2022. The supervisor did not tell the claimant he would be discharged unless he worked that day or the following day. The claimant did not tell the supervisor he could return to work on February 21, 2022.

27. On February 19, 2022, for the pay period February 10, 2022 to February 16, 2022, the employer paid the claimant his remaining balance of 19 hours of sick time and 110.4 hours of vacation time.

28. On April 1, 2022, the claimant filed a claim for unemployment benefits with an effective date of March 27, 2022.

29. In his responses to the DUA's requests for information, the claimant reported he was in a car accident during the February 10, 2022 to February 16, 2022 pay period. The claimant did not work for [sic] the February 10, 2022 to February 16, 2022 pay period.

30. In his responses to the DUA's requests for information, the claimant reported, "I [claimant] did have my work schedule covered except the last two days of the week and then week after that accident and he [supervisor] told me he would get it covered that I didn't have to worry about it." The claimant reported on February 18, 2022, the supervisor told him he needed to return to work as of tomorrow, if not today, and the claimant told the supervisor he needed two more days to get his next paycheck so he could get his car insurance and then he would be back on track.

Credibility Assessment:

There is no dispute, on February 18, 2022, the supervisor discharged the claimant for violating the employer's Attendance policy. The claimant acknowledged he was absent from work, but testified he was absent due to a lack of transportation, after his car was damaged in a motor vehicle accident. The supervisor did not dispute that the claimant was in a car accident and did not dispute that the claimant told the supervisor he could not report to work, following the accident, due to a lack of transportation. In addition, the supervisor acknowledged he had no personal knowledge, independent of the claimant's reports, as to why the claimant was absent from work after February 3, 2022.

The claimant provided multiple dates as to when the accident occurred, and initially reported, in his responses and at the hearing, that the accident occurred sometime between February 10th to February 16th, and his last physical day at work was February 10th or 11th. Subsequently, after the claimant read into the record his paystubs, which were later submitted to the DUA and added as exhibits, the review examiner asked the claimant how he could have worked on February 10th or 11th, when his paystubs showed that, beginning February 3, 2022, he did not work. The claimant was confused and flustered, and repeatedly stated he did not remember the exact date, but the accident happened when there was a really big snowstorm in [City A]. Subsequently, the claimant changed his testimony, and asserted the accident happened on January 30th. The claimant asserted he sent the supervisor a photo of the damaged car on January 30, 2022 and told the supervisor he needed a leave of absence. The claimant maintained that on January 31, 2022, he and the supervisor agreed the claimant could take a leave of absence and would return to work on February 18, 2022. The claimant alleged on February 11, 2022, the supervisor began asking when the claimant was returning to work, and the claimant told the supervisor his car would not be fixed until February 21st. When asked by the review examiner why the supervisor would approve a leave of absence with an end date of February 18, 2022, but then ask the claimant to return to work beginning February 11, 2022, the claimant could not provide a reason. When asked about the

discrepancy between his responses, in which the claimant reported he did not have transportation due to a lack of insurance, and his testimony at the hearing that the car was not repaired, the claimant was adamant that insurance was never an issue and could not explain the discrepancy. The claimant asserted when he met with the supervisor on February 18, 2022, the supervisor told him he would be discharged, unless he returned to work the next day, and maintained, when he told the supervisor he did not have transportation and could not afford a car service, the supervisor told the claimant he was fired.

The supervisor testified the claimant had a history of disciplinary action for excessive absenteeism and tardiness, which is corroborated by the June 2021 and January 23, 2022 written warnings. In addition, the supervisor testified, when he issued the January 2022 warning, he told the claimant he would be discharged for any further instances of unexcused absenteeism. The claimant did not dispute receiving the written warnings from June 2021 and January 2022, but asserted he was absent on January 4th and 5th, and did not notify the supervisor, because he was incarcerated. Subsequently the claimant asserted he was at court on January 4th, but worked on January 5th. In addition, the claimant contended the June 2021 warning was a misunderstanding regarding when he was scheduled to work. The supervisor testified in the weeks preceding February 3, 2022, the claimant was absent or tardy multiple times, which resulted in the store closing over 5 times or the supervisor covering the claimant's shift, which happened more than 5 times. The supervisor could not recall specific dates, and no longer had access to his text correspondence with the claimant for the time at issue, but was adamant from January 23, 2022 to February 18, 2022, the claimant was absent for three consecutive shifts. The supervisor asserted the accident happened no earlier than February 3, 2022, and testified the claimant never notified the supervisor he was in an accident. Rather, the supervisor only learned about the accident, after he contacted the claimant asking why he was not at work. The supervisor acknowledged, on the day of the accident, the claimant asked for "a few days off", while he addressed his "car situation". The supervisor acknowledged he told the claimant he would work with him, but denied agreeing that the claimant did not have to return to work until February 18, 2022. The supervisor testified, following the accident, he repeatedly asked the claimant to return to work, and the claimant agreed to return, but did not have a specific date due to a lack of transportation. Indeed, the claimant's lack of transportation is corroborated by the fact that he did not drive his car to the February 18, 2022 meeting. The supervisor testified he decided to discharge the claimant on or about February 11, 2022, due to the claimant's three consecutive absences, and denied telling the claimant on February 18, 2022 that he had to work on February 19, 2022 or else he would be discharged. Despite the supervisor's testimony as to the reasons for the claimant's discharge, it is noted, the termination paperwork, submitted by the employer, lists the claimant's reason for termination as performance based, and states the claimant is eligible for rehire.

Given the termination paperwork submitted by the employer, and despite the claimant's conflicting testimony regarding the timeline of events and the claimant's

> documented history of absenteeism and tardiness resulting in disciplinary action, as recently as two weeks prior to the time at issue, this review examiner finds the claimant's unrefuted assertion that he was prevented from returning to work after the February 3, 2022 accident, due to circumstances beyond his control, a lack of transportation, credible.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 26 insofar as it fails to include the claimant's failure to notify the employer of his absences as a basis for his discharge. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Consolidated Finding # 26 provides that, on February 18, 2022, the supervisor discharged the claimant for failing to report for work for three consecutive shifts during the period from January 23 through February 18, 2022. In rendering this finding, the review examiner seems to have rejected the employer's repeated, undisputed testimony that the claimant was fired for *unexcused* absences, which he described as failure to report for work *and* failure to notify the employer of the absence. Consolidated Finding # 26 also conflicts with Consolidated Findings ## 18 and 22, which include both reasons as to why the employer wanted to discharge him.

In the review examiner's credibility assessment, she seems to accept as credible only the claimant's failure to return to work as the basis for discharge because of an entry in termination paperwork, which the employer produced after the hearing, Remand Exhibit 6. Remand Exhibit 6 lists the reason for termination as performance based. 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). Based upon the record before us, we reject this portion of her credibility assessment and the limited nature of Consolidated Finding # 26.

The statements in the referenced termination paperwork are hearsay. Hearsay evidence is admissible in informal administrative proceedings, and it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). However, in this instance, we do not know who entered the information contained in Remand Exhibit 6, when, or why this reason for discharge was chosen. Moreover,

during the remand hearing, the employer's witness testified that he would obtain and produce the exhibit in order to answer the review examiner's request for the accurate date and time of termination.[1] He did not proffer the record to explain the reason for termination.

As the claimant's former manager and the person who discharged the claimant, he would know why he made that decision. He consistently testified that he discharged the claimant for violating the attendance policy, which required notice of absences. Specifically, it was because, prior to the motor vehicle accident, between January 23 and February 3, 2022, and again after the accident on February 11, 2022, the claimant did not report for his shifts and did not notify the supervisor at least two hours prior to the start of the shift that he would be out. *See* Consolidated Findings ## 18 and 22. If the review examiner wished to discredit this basis for discharge, she had an obligation to re-open the hearing and afford the employer's witness an opportunity to address the seemingly inconsistent hearsay statement. As she did not, we conclude that the referenced portion of Remand Exhibit 6, which states poor performance as the reason for termination, is not reliable evidence. It was an error to rely on it as a basis to discredit the employer's unrefuted testimony about the reason for firing the claimant.

Ordinarily, when employment ends in a discharge, we analyze the claimant's eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(2). However, in Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950), the Supreme Judicial Court upheld the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1). Thus, the claimant's eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1), which provides, in relevant 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 provisions expressly place the burden upon the claimant to show that he left for good cause attributable to the employer or urgent, compelling, and necessitous reasons.

As there is no suggestion that the employer's actions caused the claimant to not show up for work or call in his absences, there is no basis to conclude that the claimant left for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (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).

We consider whether the claimant has shown urgent, compelling, and necessitous reasons for his separation. Our standard for determining whether a claimant's reasons for leaving work are urgent,

[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).

compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992).

Consolidated Finding # 23 provides that the claimant missed three consecutive shifts from January 23 through February 3, 2022, for an unknown reason. His motor vehicle accident was on February 3, 2022. Consolidated Finding # 17. Between February 4 and February 18, 2022, the review examiner found that the claimant missed shifts due to lack of transportation. *See* Consolidated Finding # 24. Although this lack of transportation could constitute an urgent, compelling, and necessitous reason for not being able to report for scheduled shifts after February 3, 2022, it does not explain why he was absent *before* the accident. Nor does the lack of transportation explain the claimant's failure to inform the supervisor that he could not report for scheduled shifts — either before or after losing his transportation on February 3rd.

We, therefore, conclude as a matter of law that the claimant failed to meet his burden under G.L. c. 151A, § 25(e)(1), to show that he separated for good cause attributable to the employer or due to urgent, compelling, and necessitous reasons.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 13, 2022, 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 - September 29, 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
(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.

AB/rh