Employer's observations that the claimant was having trouble staying awake, holding on while standing, heightened emotions, and slow speech raised suspicion that she was not fit for duty. When a drug screen and follow up lab test were positive for cocaine, she was discharged. Held the employer's hearsay evidence was more reliable than screen shots the claimant produced of a negative drug screen taken at her doctor's office the next day, and there was no proof that other medications she took affected these test results. Thus, the claimant was ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0082 0601 24

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 her position with the employer on January 26, 2024. She filed a claim for unemployment benefits with the DUA, effective January 21, 2024, which was approved in a determination issued on April 9, 2024. The employer 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 awarded benefits in a decision rendered on September 14, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 pursuant to G.L. c. 151A, § 25(e)(2), because the employer unreasonably subjected the claimant to a drug test and failed to prove that she deliberately ingested cocaine, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time endoscopy technician for the employer, a healthcare organization, from February 23, 2015, until January 30, 2024, when she separated from her employment.

2. The claimant's direct supervisor was the manager of endoscopy.

3. The claimant suffers from side effects of a stroke.

4. The claimant is not addicted to alcohol.

5. The claimant is not addicted to drugs.

6. The employer maintained a "Fitness for Duty" policy (policy A).

7. Policy A was not mandated by the state or federal government.

8. The purpose of policy A was to ensure employees and patients were kept safe.

9. Policy A was communicated to the claimant during the new hire orientation.

10. The disciplinary consequences for violating policy A included "apply the discipline policy, if appropriate."

11. Policy A did not detail information regarding drug testing.

12. The employer maintained a "Statement of Confidentiality and Privacy Letter of Agreement" that included in part, "Substance Abuse" (policy B).

13. Policy B does not define substance abuse.

14. The purpose of policy B included in part, "I agree to uphold and promote these policies to maintain the confidentiality of all protected health and business information I come into contact with during my time at (employer)."

15. The claimant acknowledged policy B on February 24, 2015.

16. Policy B did not include the details of disciplinary consequences if the policy was violated.

17. The employer maintained an expectation that employees would not be impaired or under the influence of drugs while working their scheduled shift.

18. The purpose of the expectation was to ensure the safety of patients and employees.

19. The employer communicated the expectation to the claimant at new hire orientation.

20. On January 3, 2024, the claimant was seen by a medical provider and given acetaminophen by mouth, ketorolac, metoclopramide, morphine, and ondansetron by IV push slowly, and sodium chloride by IV infusion.

21. During her January 10, 2024, scheduled shift, the claimant took omeprazole and Tylenol medications.

22. On January 10, 2024, a medical doctor who was working alongside the claimant informed the manager of endoscopy that the claimant was having trouble staying awake.

23. Upon receiving the information from the medical doctor, the manager of endoscopy became concerned and completed a fitness for duty assessment on the claimant indicating the claimant was having trouble staying awake, was "holding on" when walking/standing, the claimant was "crying" , that the claimant was feeling "anxiety and distrust" for [sic] overwhelming emotions, her speech was "slow", and that her eyes, face, clothing, order, movements, thought process, through [sic] content, and attention/perception were all normal.

24. After completion of the fitness for duty assessment, the claimant was taken to the Employee Health Department of the employer for her vital signs to be taken.

25. While the claimant's vital signs were being taken, the nurse practitioner spoke to the manager of endoscopy whereby the manager of endoscopy stated that the medical doctor working with the claimant became concerned for patient safety because the claimant was having difficulty staying awake.

26. The nurse practitioner instructed the manager of endoscopy to stay in the lobby.

27. The manager of endoscopy did not participate in the further examination of the claimant.

28. The nurse practitioner then entered the room with the assistant, whereby the nurse practitioner began asking the claimant questions based upon the fitness for duty assessment checklist.

29. The claimant responded that she slept well the night before, she may have closed her eyes at one point during the medical procedure she was assisting on, but did not fall asleep.

30. While the nurse practitioner was questioning the claimant, the nurse practitioner did not observe any issues with the claimant's behavior or observe symptoms of impairment.

31. The nurse practitioner asked the claimant about her medical history, whereby the claimant stated she did not have diabetes or chronic medical issues, she took omeprazole for heartburn, albuterol as needed, a muscle relaxer in December 2023, and in the last five (5) months she took sumatriptan for a migraine.

32. The claimant informed the nurse practitioner she did not take controlled substances, medications that were not prescribed to her, or partake in illegal drugs.

33. The nurse practitioner asked the claimant if she consented to an alcohol breathalyzer test, whereby the claimant agreed.

34. The claimant was subjected to the breathalyzer test solely because the manager of endoscopy created a fitness for duty evaluation form on the claimant following the medical doctor informing the manager of endoscopy that the claimant was having trouble staying awake.

35. The employer, as a hospital, was a licensed facility to administer breathalyzer tests.

36. The breathalyzer test was administered by the assistant, and came back negative.

37. The claimant signed documentation confirming the breathalyzer test and its results.

38. The nurse practitioner then requested the claimant take a urine drug test.

39. The claimant then consented to a urine drug test.

40. The employer, as a hospital, was a licensed facility to administer urine drug tests.

41. The claimant was subjected to the urine drug test solely because the manager of endoscopy created a fitness for duty evaluation form on the claimant following the medical doctor informing the manager of endoscopy that the claimant was having trouble staying awake.

42. Blue dye was placed into a bathroom toilet so no adulteration would occur during the claimant's urine drug test.

43. The claimant went into the bathroom, closed the door, and completed the urine drug test.

44. After the claimant completed the urine drug test, she exited the bathroom with the sample, and provided the sample to the assistant.

45. The assistant then took the claimant's urine drug test, poured some of the claimant's sample into a second cup for the purpose of the split sample ("second sample") to be sent out for testing to a secondary laboratory testing facility ("Lab A").

46. The second sample was sealed with an adhesive label, which included the claimant's name, date of birth, date of the test, and the claimant's signature.

47. The assistant then began to complete a Premier Bio-Dip test on the first sample.

48. The assistant lowered the Premier Bio-Dip into the cup containing the first sample and pulled it out for the results.

49. The Premier Bio-Dip showed a C line and a T line.

50. If the T line did not show a line, it meant the urine same was positive for the specific drug that was being tested.

51. The Premier Bio-Dip test reviewed by the assistant showed there was no T line for the claimant for the test of cocaine, resulting in a positive drug test for cocaine.

52. The Premier Bio Dip did not indicate the exact level of cocaine in the claimant's sample.

53. The claimant was then informed of the positive urine test by the nurse practitioner, at which time the claimant informed the nurse practitioner that she did have a medical visit on January 3, 2024, where she was given medication.

54. The claimant was provided with a receipt of drug test being sent to the secondary laboratory.

55. The nurse practitioner then sent the claimant home.

56. The second sample, still sealed with an adhesive label, which included the claimant's name, date of birth, date of the test, and the claimant's signature, was then sent by the employer to Lab A in Massachusetts for testing.

57. Lab A was the facility the employer utilized for drug testing following a fitness for duty evaluation.

58. Lab A was a licensed medical facility.

59. On January 11, 2024, the claimant went to her personal care provider to request a drug test following the resulted [sic] of the employer's drug test.

60. On January 12, 2024, the claimant learned her urine drug test with her personal care provider came back negative for benzodiazepine, opiates, barbiturates, pain amphetamines, pain cocaine, pain cannabinoid.

61. Upon learning her urine drug test with her personal care provider came back negative, the claimant called the secretary of the employer, but was informed she needed to wait for the results from Lab A.

62. On January 12, 2024, Lab A received the claimant's second sample, which was sealed with an adhesive label, which included the claimant's name, date of birth, date of the test, and the claimant's signature.

63. Lab A tested the claimant's second sample for cocaine, amphetamines, barbiturates, benzodiazepines, methadone, opiates, oxycodones, and phencyclidine.

64. The medical review officer (MRO) of Lab A reviewed the claimant's test results and determined the claimant tested positive for cocaine.

65. The Lab A test results did not indicate the exact level of cocaine in the claimant's sample.

66. On January 15, 2024, the MRO of Lab A sent the employer the results of the claimant's urine test that include donor information, and testing information, including the claimant testing positive for cocaine.

67. The claimant was not provided a copy of the urine drug test results from Lab A.

68. Upon receiving the test results from Lab A, the employer informed the claimant that the results from Lab A concluded she tested positive for cocaine.

69. The employer then notified the claimant that she was being placed on administrative leave following the urine drug test results.

70. The claimant was not offered drug counseling by the employer following the two (2) drug tests that were positive for cocaine.

71. On approximately January 15, 2024, the claimant called the human resources business partner to ask for a second test, at which time the claimant was informed the employer would contact her back.

72. The claimant did not follow up with the employer.

73. On January 30, 2024, the employer attempted to call the claimant, but the claimant did not answer.

74. On January 30, 2024, the human resources business partner sent the claimant a letter indicating that she was discharged from her employment as of January 26, 2024.

75. The claimant was discharged from her employment following the two (2) January 10, 2024, urine drug tests that were positive for cocaine.

[Credibility Assessment:[1]]

While the employer provided the claimant's fitness for duty evaluation form, the employer did not present the manager of endoscopy who completed the claimant's fitness for duty evaluation form or the medical doctor who first raised the concern regarding the claimant's behavior for the hearing. Furthermore, the nurse practitioner admitted that when he met with the claimant on January 10, 2024, immediately prior to the claimant taking the urine drug test, he did not observe or suspect the claimant to be showing symptoms or signs that she was under the influence of drugs or alcohol. Lastly, while the claimant did test positive for cocaine in both January 10, 2024, urine drug tests, the claimant testified and provided medical records that indicate her January 11, 2024, drug test completed by her medical provider tested negative for cocaine. Furthermore, the claimant credibly testified and provided medical records that on January 3, 2024, she was given acetaminophen by mouth, ketorolac, metoclopramide, morphine, and ondansetron by IV push slowly, and sodium chloride by IV infusion. As such, the employer has failed to provide credible and substantial evidence that the parameters requiring the claimant to submit to the urine drug test were reasonable as the nurse practitioner did not observe or suspect the claimant to be showing symptoms or signs that she was under the influence of drugs or alcohol. Furthermore, the employer has failed to provide credible and substantial evidence that the claimant deliberately or intentionally ingested cocaine which subsequently caused two (2) positive for cocaine urine drug test results as the claimant received multiple medications on January 3, 2024, and a subsequent urine drug test by her medical provider included a negative test result for cocaine.

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 to note as follows. As written, Finding of Fact # 41 is inaccurate insofar as it fails to capture all of the employer's reasons for subjecting the claimant to a urine drug test. *See* Finding of Fact # 23. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

[1] We have copied and pasted here the portion of the conclusions and reasoning section in the review examiner's decision, which includes his credibility assessment.

Because the employer discharged the claimant, her 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).

In this case, the employer discharged the claimant because it determined that, on January 10, 2024, she was unfit for duty due to use of controlled substances. *See* Exhibits 4 and 7.[2] Inasmuch as the employer has not presented substantial evidence demonstrating that it discharged all employees under similar circumstances, it has not met its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* rule or policy. Alternatively, the employer may show that she engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must demonstrate the claimant engaged in the misconduct for which she was fired. The employer asserted that the claimant was unfit to perform her endoscopy technician duties on January 10, 2024, due to her use of cocaine. Thus, it must show that she was both unfit for duty, and that she had used cocaine.

Exhibit 21 is a copy of the employer's Fitness for Duty Assessment, which defines "fit for duty" to mean "an individual is in a physical, mental, and emotional state which enables the employee to perform the essential tasks of his or her work assignment in a manner which does NOT threaten the safety or health of oneself, coworkers, property, or the public at large."

To show that she was unfit for duty on January 10, 2024, the record includes observations of a medical doctor and the claimant's manager on that date. Specifically, while working with the claimant during a patient's medical procedure, the doctor observed that she was having trouble staying awake. *See* Finding of Fact # 22. Following this, the manager of the endoscopy department performed a fitness for duty examination and observed that the claimant was holding on while

[2] Exhibit 4 is the employer's corrective action termination report for the claimant. Exhibit 7 is the termination letter sent to the claimant. Although not explicitly incorporated into the review examiner's findings, these exhibits, as well as Exhibits 19–22, referenced below, are 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).

walking/standing, crying, her speech was slow, and she was feeling overwhelming emotions of anxiety and distrust. *See* Finding of Fact # 23.

In his credibility assessment, the review examiner suggests that these observations carry little weight compared to those of the nurse practitioner, who appeared at the hearing and testified that he did not observe any concerning symptoms. 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).

As the review examiner notes, neither the medical doctor nor the claimant's manager appeared as witnesses during the hearing. Their observations appear in the Fitness for Duty report, Exh. 21. In this regard, they constitute hearsay evidence. Hearsay evidence is not only admissible in informal administrative proceedings, but 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).

As the record indicates, these observations were made during and immediately after the medical procedure. *See* Findings of Fact ## 23 and 24. The contemporaneous nature of this evidence is an indicia of its reliability. In fact, contemporaneous observations are a critical component for subjecting an employee to a drug test based on reasonable cause in federal agencies such as the Federal Aviation Administration and the U.S. Department of Transportation. *See* 14 C.F.R. § 120.109(d), which states in relevant part:

> Each employer must test each employee who performs a safety-sensitive function and who is reasonably suspected of having used a prohibited drug. The decision must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific *contemporaneous* physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the symptoms of possible drug use, must substantiate and concur in the decision to test an employee who is reasonably suspected of drug use; . . .

(Emphasis added.)

Here, the endoscopy doctor observed her during the medical procedure and the findings indicate that the claimant's manager saw her either during or immediately after the procedure. *See* Findings of Fact ## 22 and 23. The nurse practitioner in the employer's health department saw the claimant at some point later. Although he did not feel that she was exhibiting symptoms at the time, the nurse practitioner nonetheless proceeded with the testing, presumably because *he knew* to rely on the contemporaneous reports from the doctor and manager. *See* Findings of Fact ## 25, 30, and

33. Moreover, the claimant did not refute the reported symptoms, except to say that she did not fall asleep, though she may have closed her eyes during the endoscopy procedure. *See* Finding of Fact # 29. In light of this evidence, we think that the review examiner unreasonably assigned more weight to the observations of the nurse practitioner in discrediting the employer's reasons for testing the claimant.

Although we have not been given the claimant's exact endoscopy technician job responsibilities during this patient's procedure, we can reasonably infer that her role was to provide some assistance to the physician, to the patient, or that she was responsible for using or monitoring some medical equipment. Even if the claimant did not actually fall asleep during the medical procedure, it is common sense that closing one's eyes or having difficulty staying awake, as well as slow speech and difficulty standing, could pose a safety risk to her, the patient, coworkers, or in using or monitoring medical equipment. Given this record, we are satisfied that the employer has shown that the claimant was not fit for duty at the time that she was working during the medical procedure.

The next question is whether the employer provided substantial and credible evidence that she was in this condition due to the use of a controlled substance, which in this case was cocaine. Both parties presented drug test evidence. The employer presented two test results that were positive for cocaine from a sample given on January 10, 2024. *See* Findings of Fact ## 51 and 66. To rebut this evidence, the claimant denied using controlled substances and presented a test performed on January 11, 2024, showing a negative result. *See* Findings of Fact ## 32, 59, and 60. Even though the review examiner neglected to render a finding as to whether the claimant actually had cocaine in her system on January 10, 2024, the employer has met its burden to show that she did.

The Substance Abuse and Mental Health Services Administration (SAMHSA) is the federal agency within the U.S. Department of Health and Human Services (HHS) that sets forth the mandatory drug testing protocols for federal agencies employing safety sensitive employees.[3] To become a SAMHSA-certified lab, *inter alia*, the facility must meet requirements for rigorous quality control and chain of custody procedures and undergo regular compliance audits by nationally recognized toxicology experts.[4] Although, in the present appeal, there is no evidence that the employer had to follow such protocols, the evidence indicates that it did.

The first test performed in the employer's Employee Health Department was actually just a drug screen. *See* Exhibits 19 and 20.[5] In conducting this screen, the Employee Health personnel appear to have followed the SAMHSA procedures for collecting a urine drug test. There was no dispute that the claimant was instructed to wash her hands, put her belongings away in a locker, and, after using the restroom, the Employee Health assistant created a split sample, which was sealed and signed by the claimant, then sent to an independent lab for further testing by a Medical Review

[3] "Pursuant to its authority under section 503 of Public Law 100-71, 5 U.S.C. 7301, and Executive Order 12564, HHS establishes the scientific and technical guidelines for Federal workplace drug testing programs and establishes standards for certification of laboratories engaged in drug testing for Federal agencies." Mandatory Guidelines for Federal Workplace Drug Testing Programs, 88 Fed. Reg. 70768 (Oct. 12, 2023) (to be codified at 42 C.F.R. Chapter 1).

[4] *See* U.S. Drug Test Centers, https://www.usdrugtestcenters.com/samhsa-certified-laboratories.html (viewed 1-17-2025).

[5] Exhibit 19 is a written statement from the nurse practitioner who interviewed the claimant immediately before she provided her urine test sample. Exhibit 20 is a medical assistant's description of the testing procedure followed at the Employee Health Department on January 10, 2024, for the claimant's test.

Officer (MRO). *See* Findings of Fact ## 42–46, 56, and 62.[6] After apparently interviewing the claimant, the MRO supervising this independent lab's drug test confirmed the positive cocaine result of the employer's initial screen. *See* Finding of Fact # 64 and Exhibit 22.

To rebut this evidence, the claimant denied using cocaine and offered evidence of a drug test done at her primary care provider's office on January 11, 2024, which reached a negative result. *See* Findings of Fact ## 32, 59, and 60. Exhibit 6a is the claimant's evidence of the negative drug test from her primary care provider's office. While this is some exculpatory evidence, we believe that the review examiner attributed an unreasonable amount of weight to this document in discrediting the employer's evidence that the claimant had used cocaine. The document includes two undated screen shots, and it states that this was a drug screen. Nothing in the exhibit indicates who performed the test or whether SAMHSA drug testing protocols were followed.

Thus, the record as a whole demonstrates that the claimant had detectable cocaine in her system at the time she presented as unfit for duty. The employer did not have to prove an absolute connection between her use of cocaine and the symptoms she exhibited on January 10, 2024. The standard is substantial evidence. We think that a reasonable mind would accept the employer's combined evidence of a positive test with symptoms of impairment as adequate to support a conclusion that she was unfit for duty due to having used this controlled substance. We are satisfied that it proved the claimant engaged in the misconduct for which she was fired.

Nonetheless, the review examiner concluded that the employer failed to show she deliberately ingested cocaine. We disagree. A person's intent is rarely susceptible of proof by direct evidence but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). While there is no evidence showing the claimant taking the drug, the circumstantial evidence from the positive drug test result establishes that she did. Absent any indication that she ingested cocaine by mistake, and we see none, it is reasonable to infer that she did so deliberately.

However, showing deliberate misconduct is not enough. The employer must also prove that she acted in wilful disregard of its interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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).

Findings of Fact ## 6 and 9 provide that the claimant was aware of the employer's Fitness for Duty policy. As the purpose of the policy was for the safety of employees and patients, it is self-evidently reasonable. In his decision, the review examiner concludes that the employer unreasonably followed its fitness for duty policy in this situation by having the claimant submit to a drug test. Again, we disagree. By themselves, the medical doctor's and manager's observations about her difficulty staying awake, standing, elevated emotions, and slow speech are a reasonable basis to suspect an individual is under the influence of drugs or alcohol.

[6] *See* U.S. Drug Test Centers, Urine Drug Testing | US Drug Test Centers (viewed 1-17-25).

The question is whether the claimant has presented mitigating circumstances for her positive cocaine test or the behavior which rendered her unfit for duty. 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).

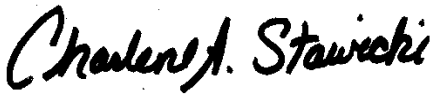
The findings reveal that the claimant had taken omeprazole and Tylenol during her shift on January 10, 2024. Finding of Fact # 21. She proffered evidence about prior medical treatment and health conditions, including the side effects of a stroke. *See* Findings of Fact ## 3, 20, 31, and 53. Specifically, a week before, she had been seen by a medical provider and administered acetaminophen, ketorolac, metoclopramide, morphine, ondansetron, and sodium chloride. *See* Finding of Fact # 20. She had taken omeprazole for heartburn, albuterol as needed, a muscle relaxer in December, 2023, and sumatriptan for a migraine over the prior five months. *See* Finding of Fact # 31. In his decision, the review examiner suggests that any of the multiple medications received on January 3, 2024, could have caused the positive test results. However, the only test result of concern is the one for cocaine. Nothing in the record shows that any of these medications or the two taken during her shift that day could lead to a positive cocaine test on January 10, 2024. Nor has the claimant presented medical evidence to show that any of her underlying medical conditions caused her to be unfit for duty that day. As such, the claimant has failed to show circumstances beyond her control, which caused her to violate the fitness for duty policy.

We, therefore, conclude as a matter of law that the employer has met its burden to demonstrate that it discharged the claimant 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 is denied benefits for the week beginning January 21, 2024, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2025

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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