Where an employer discharged a tractor trailer driver for taking his eyes off the road and causing a serious accident, held it was due to deliberate misconduct in wilful disregard of the employer's interest. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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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 March 7, 2024. He filed a claim for unemployment benefits with the DUA, effective March 3, 2024, which was denied in a determination issued on April 3, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 3, 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, he was not disqualified under 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that a serious accident caused by the claimant taking his eyes off the road was not due to deliberate misconduct in wilful disregard of the employer's interest, 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 as a truck driver for the employer, a long-haul trash transporting company, from July 16, 2018, until March 7, 2024.

2. The employer has a written policy entitled General Company Work Guidelines that contains a Vehicle Collision Policy (collectively "the policy").

3. The purpose of the policy is to advise employees of the employer's safety procedures.

4. The claimant became aware of the policy on July 11, 2018, when he signed an acknowledgment stating "I have read, received and understand the "[Employer] General Company Work Guidelines … Vehicle Collision Policy … and agree to abide by them."

5. The policy sets forth the discipline received by employees who are involved in motor vehicle accidents while operating company vehicles. The policy reads, "2. Termination Any driver/equipment operator with two (2) preventable collisions during a rolling twenty-four (24) month period will be subject to immediate termination. In addition, any driver/equipment operator involved in a serious accident while on duty as a result of recklessness or losing control of the vehicle (roll-over, jack-knife, run off road, losing control of vehicle, injury to others, rear end accident, stationary objects, etc.,) will be subject to immediate termination."

6. The employer has terminated other employees for a first offense of a serious accident.

7. The employer has an expectation that employees will remain attentive and keep vehicles they are operating on the road.

8. The employer communicated its expectation to the claimant through its policy.

9. The reason for the expectation is to avoid accidents and keep everyone safe.

10. The employer was harmed by the claimant's actions when it incurred monetary damages.

11. The employer determines the seriousness of an accident by a review of information conducted by the Safety Director, the Vice President, the General Manager, and the Terminal Manager (the TM).

12. The TM was the claimant's immediate supervisor.

13. The claimant had previously been involved in accidents while driving a truck in 2018 and 2020 for which he received verbal warnings.

14. On December 21, 2021, an employee [Employee A], who also drove tractor trailer trucks for the employer, was involved in an accident on the highway that damaged a length of guardrail and caused damage to the employer's truck on the front axles on both sides, front end, and gas tank. Employee A was not suspended or terminated by the employer.

15. On March 1, 2024, the claimant was operating a tractor trailer truck on a major highway in the right-hand lane traveling at the posted speed limit. There was some traffic present, but the claimant did not observe vehicles ahead of him in his lane. The claimant was not following any vehicles.

16. The claimant looked away from the road for a matter of seconds. The claimant sometimes looked away from the road to reach for a water bottle, to change the radio station, or to silence a tablet he used for work.

17. When the claimant looked back to the road, there was a tractor trailer stopped in the lane in which he was traveling. Traffic in other lanes was not stopped.

18. The claimant did not have time to stop behind the tractor trailer and could not pull into the lane to his left because there were vehicles traveling in that lane.

19. In an effort to avoid the stopped tractor trailer, the claimant pulled to the right, attempting to steer his truck between the stopped trailer and the guardrail. In doing so, the claimant struck the right rear of the trailer with the front left side of the truck he was operating causing the truck to run down into a ditch.

20. Following the accident, the claimant was joined at the scene by two mechanics and a tow company. The claimant was cited by the State Police for following too close pursuant to 700 CMR § 7.09(15).

21. From the scene, the claimant called the TM and reported the accident. In the conversation with the TM, the claimant admitted to looking away from the road.

22. The claimant was transported to the hospital by ambulance for treatment of a laceration on his face.

23. The employer incurred expenses from the accident of approximately $60,000.00.

24. The employer conducted a review of the details of the accident. The Safety Director, Vice President, General Manager and TM unanimously determined the claimant's accident was "serious" and warranted immediate termination pursuant to the policy.

25. On May [sic] 7, 2024, the TM told the claimant in person that he was terminated for a serious accident that involved going off the road on March 1, 2024.

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 the following. The

date of May 7, 2024, in Finding of Fact # 25 is incorrect, as the record reveals that the claimant was terminated on March 7, 2024. 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.

Because the claimant was discharged from his employment, his eligibility for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. . . .

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

The employer fired the claimant for causing a serious accident that involved going off the road. *See* Finding of Fact # 25. More specifically, as the employer explained during the hearing, his conduct fell within two policy provisions that can be grounds for immediate termination. The first is in its Code of Conduct: "16. Operating Company equipment in a careless or unsafe manner." The second is set forth under its Vehicle Collision Policy: "any driver/equipment operator involved in a serious accident while on duty as a result of recklessness or losing control of the vehicle (roll over, jack-knife, run off road, losing control of vehicle, injury to others, rear end accident, stationary objects, etc.)."[1]

There is no dispute that, on March 1, 2024, the claimant had an accident while on duty driving a tractor trailer for the employer, that his truck went off the road, and that the accident caused extensive damage. *See* Findings of Fact ## 15–24. During the hearing, the claimant agreed with the employer's assessment that it was a serious accident.[2]

The employer reviews each accident on a case-by-case basis to decide whether it warrants immediate discharge, and the record indicates that at least one other driver was allowed to continue

[1] *See* page 3, line 16, and page 6, item 2 in Exhibit 4, which has the Employer's Code of Conduct and Vehicle Collision Policy, respectively. Although not explicitly incorporated into the review examiner's findings, the contents of this exhibit and the employer's testimony referring to the reason for termination are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

[2] This portion of the claimant's testimony and the portions of his testimony referenced below are also part of the unchallenged evidence in the record.

working after having a serious accident. *See* Findings of Fact ## 11 and 14.[3] Given these findings, the employer has not sustained its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Both parties attributed the accident to the claimant taking his eyes off the road. *See* Findings of Fact ## 16–18, and 21.[4] Notably, Finding of Fact # 16 does not state why the claimant looked away from the road in that instance. In fact, during the hearing, the claimant could not remember. Thus, Finding of Fact # 16 goes only so far as to state the reasons the claimant would *usually* take his eyes off the road — to reach for water, change the radio station, or silence a computer tablet. But, given the lack of more definitive evidence, we accept that, on March 1, 2024, he looked away for one of these reasons. Reaching for water, changing a radio station, and silencing a tablet are self-evidently deliberate gestures.

However, showing deliberate misconduct is not enough. The employer must also prove that the claimant acted in wilful disregard of the employer's 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).

The claimant was aware of the employer's expectations to stay attentive while operating his tractor trailer, to avoid preventable collisions, and to keep the truck on the road. *See* Findings of Fact ## 2–5, and 7–8. Such expectations are reasonable as a matter of public safety and to minimize the employer's liability. The question is whether there were mitigating factors for the claimant's conduct. 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).

At the time of the accident, the claimant was driving down a major highway at 65 miles per hour. *See* Finding of Fact # 15. Finding of Fact # 16 suggests that he only looked away for a few seconds. However, his actual testimony was that he did not know how long he took his eyes off the road, that it was seconds and not minutes. That's a long window of time — anywhere from two seconds to 59. He further testified that, before he looked away, the road was clear, and ,when he looked back, he saw another tractor trailer stopped in his lane, and it was too late to stop. *See* Findings of Fact ## 17 and 18. We find it difficult to believe that the claimant's eyes were off the road for just a few seconds. Nothing in the record suggests that the other truck suddenly applied its brakes. Because he said nothing was in his lane when he looked away, common sense dictates that at 65 miles per hour, the claimant took his eyes off the road long enough to travel quite a distance before

[3] We note that the claimant's testimony about this other employee's accident was all elicited in response his attorney's leading questions. As such, this portion of the record reflects the attorney's words, not the claimant's, and, therefore, it does not rise to substantial evidence. However, we have accepted Finding of Fact # 14, because it is based upon this former employee's own testimony in response to the review examiner's open-ended questions.

[4] When the review examiner asked if this was a preventable accident, the claimant testified, "Yes. I could have kept my eyes on the road."

catching up to a stationary object up ahead. This was reckless behavior, not a circumstance beyond his control.

We, therefore, conclude as a matter of law that the employer has met its burden to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 3, 2024, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh