THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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MEMBER

BR-118149 (May 29, 2012) - Under the standard set forth by the Supreme Judicial Court's Thomas O'Connor & Co. decision, the majority held that a claimant's post-accident positive marijuana test did not preclude him from collecting unemployment benefits. Since he was not impaired at the time of the accident, the claimant's use of marijuana at a bar-b-que outside of work several weeks earlier was not deliberate misconduct in wilful disregard of the employer's drug testing policy. One Member wrote a dissenting opinion.

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 was discharged from his position with the employer on August 13, 2010. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 23, 2010. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 24, 2011. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, and he was therefore 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 develop the record as to the questions of the claimant's impairment and the employer's policy. Only the claimant attended the remand hearing. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based upon our review of the entire record including the recorded testimony and evidence from the remand hearing and the consolidated findings of fact.

The issues on appeal are: (a) whether the claimant, who was involved in an on-the-job accident and tested positive for marijuana after the accident, was impaired at the time of the accident; and (b) whether the employer's policy allowed post-accident drug testing when the accident did not result in a fatality or a citation.

Findings of Fact

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

1. The claimant worked as an "Equipment Operator" for the employer, a "Stone Quarry Company" from April 18, 2001 until August 13, 2010, when he was discharged.

2. The claimant worked a regular full-time schedule.

3. The claimant was discharged for failing to testing [sic] positive on a drug test on August 9, 2010.

4. The claimant was not discharged for operating work equipment under the influence of drugs.

5. The employees at this company mostly work with big, dangerous, and expensive machines. The employer has a policy of drug testing employees both randomly and after accidents which involve the loss of human life or where the employee receives a citation for a moving traffic violation arising from the accident. The policy is reasonable to ensure a safe working environment for all employees. The claimant was aware of the policy because he received a copy of it and signed a Drug Abuse Policy Acknowledgment on April 7, 2001. A violation of this policy results in disciplinary action. The employer retains the discretion whether or not to terminate the violator or require the employee to undergo substance abuse counseling.

6. The employer expects that when an employee is drug tested that the results will be negative. The claimant was aware of this expectation because he had been drug tested several times during his tenure with his employer. The claimant also knew that other employees were drug tested as well. Additionally, the claimant knew that he had to test negative on a drug test as a condition of being hired by the employer.

7. In the beginning of August 2010, the claimant smoked marijuana at a barbeque.

8. The claimant reported to work for his scheduled shift on August 9, 2010. While operating an excavator, the claimant and his machine collided with another employees' truck. The collision resulted in substantial damage to the machines. The claimant's Supervisor was called to the scene of the accident.

9. The claimant's Supervisor informed the claimant that he was going to bring him to a medical facility to get a drug and alcohol test. The claimant complied.

10. The claimant was tested for alcohol and drugs. No results were given at the medical facility.

11. The Supervisor took the claimant back to the work site, gave him a written warning for the accident, and sent him home on suspension until the results of the test came back.

12. The Supervisor spoke with the Owner and it was decided that if the results came back positive, the claimant would be terminated. While on the phone with the Supervisor, the claimant admitted that he had smoked marijuana a few weeks earlier while at a barbeque.

13. The employer received the test results on August 13, 2010. The results indicated that the claimant had tested positive for marijuana.

14. The claimant's Supervisor called him on August 13, 2010 to inform him that the results of the test came back positive. The claimant was informed that he would be terminated.

15. The claimant went into the employer's office on August 17, 2010 and received an exit letter.

16. The claimant filed for unemployment benefits on August 27, 2010, effective August 21, 2010.

17. The claimant was not impaired at the time of the accident. The claimant got into an accident when he accidentally hit a truck with part of his excavator that he was operating at the time. The claimant was operating an excavator and using the excavator to fill other trucks with stone and dirt. When the claimant was finished filling truck X, the claimant waved to the driver of the truck to let him know that he was finished filling the truck. The driver of truck X then started the truck and began to move to leave, after about a minute, the claimant assumed the truck had left and swung the arm of the excavator back. Truck X had not left; the truck was stuck in neutral and rolled backwards some and that is when the arm of the excavator and truck X collided.

18. The claimant was not impaired at or around the time of the accident.

    - I. The claimant did not demonstrate any signs of being impaired. No one accused the claimant of looking impaired at the time of the accident. The claimant was alert and was not slurring his speech.

    - II. The claimant felt the collision was an accident that occurred due to the truck X not having left the area once the claimant made the driver of the truck aware that the truck was filled.

19. Section 6321 accurately states the employer's drug testing policy. The policy does not mandate drug testing after accidents that neither involved loss of life nor resulted in a citation for a moving violation. The claimant had previously been in an accident that did not involve the loss of life nor resulted in a citation for a moving violation and was not drug tested at that time.

20. The claimant knew that the employer would drug test an employee if the employer thought the employee was impaired and also knew that there was random drug-testing. The claimant never knew of anyone being fired for testing positive for marijuana. The claimant knew of employees who tested positive for marijuana and were then given the option to receive counseling. The claimant only knew of employees being fired for testing positive for drugs when it involved cocaine or heroin.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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 . . . 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest or for knowingly violating the employer's uniformly enforced policy or rule. The review examiner initially concluded that the employer had met its burden to prove that the claimant engaged in deliberate misconduct. After remand, we conclude that the employer did not meet its burden with regard to either misconduct or a knowing violation of a rule or policy of the workplace.

At the outset, we note that the employer's policy did not even call for a drug test under the circumstances of this case, because, although the claimant had been involved in an accident, there was no fatality and no citation for a moving violation, and the employer's policy called for post-accident testing only under these two conditions. The employer was inconsistent in its application of the post-accident testing policy. Sometimes the employer tested the employee when no citation or loss of life occurred, and at other times the employer did not. Moreover, the employer was inconsistent in its handling of positive test results. Sometimes the employer fired an employee for a positive test, and sometimes the employer did not. Hence, there could be no policy violation by the claimant, as the policy itself was not uniformly applied. *See* New England Wooden Ware Corp. v. Commissioner of the Dept. of Employment & Training, 61 Mass. App. Ct. 532 (2004) (to support a disqualification under the knowing rule violation standard, the rule or policy must be uniform in both its construction and its application).

As to misconduct, we believe that both the facts and the outcome of this case parallel those of Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training, 422 Mass. 1007 (1996). In O'Connor & Co., the Supreme Judicial Court held that a claimant who was terminated after he tested positive for marijuana was entitled to benefits because the mere presence of a positive drug test result, without more, did not compel the conclusion that the employee was using or impaired by drugs while he was at work. Id.

Here, the results of the drug test showed only that the claimant tested positive for marijuana. He admitted that he had used it at a non-work-related social event several weeks earlier. In our view, the positive test results, when combined with the fact that an accident occurred, give rise to a rebuttable presumption of impairment. For that reason, we remanded the case to obtain findings on any evidence that might address the question of the claimant's impairment. The findings following remand reveal that the claimant was not impaired at the time of the accident, or, so far as the evidence suggests, at any other time while he was at work; nor was he discharged for operating work equipment under the influence of drugs. Therefore, as in O'Connor & Co., the claimant's positive drug test result is not, by itself, a sufficient basis for denying the claimant benefits. Id.

Before closing, we find it necessary to say a few words about the relevance of Webster v. Motorola, Inc., 418 Mass 425 (1994), and Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass 388 (1994), to the present case. The dissent states that these two cases create a precedent for unemployment benefit disqualification for those employees who are validly subject to random drug testing and fail these tests. We do not read those cases as having that effect. By their own terms, the Webster and Folmsbee decisions address only the question of when workers could validly object to submitting to such tests; they say nothing about the effect of positive test results on the employment tenure of those who did participate in the tests. There is no controversy presented in this case on whether the claimant was validly susceptible to a (here, non-random) drug test, and the record is clear that he voluntarily participated in it. Rather, the only question presented is whether his positive test result, which stemmed from non-work-related drug use approximately a week before he was tested for drug use, should, in and of itself,

require his disqualification. To discern the answer to that question, we must be guided not by the Webster and Folmsbee decisions, which involve claims of wrongful discharge and violations of statutory rights of privacy, but rather to the Court's more narrowly focused examination of positive drug test results in the context of unemployment benefits eligibility. In that regard, the majority believes that the O'Connor decision, cited above, controls, and the majority believes our ruling today is consistent with it.

We, therefore, conclude as a matter of law that the claimant's separation was not attributable to either misconduct or a knowing violation of the employer's policy, as defined in G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 21, 2010 and for subsequent weeks if otherwise eligible.

John A. King, Esq.
Chairman

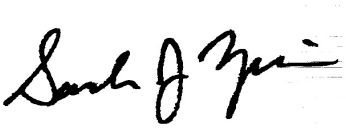
Stephen M. Linsky, Esq.
Member

*** DISSENT ***

The majority here ignores the employer's clear need to prohibit drug use by a claimant who operates "big, dangerous, and expensive machines" as part of his regular duties. It is well established that safety sensitive work provides a sufficient business interest to justify random drug testing. Webster v. Motorola, 418 Mass. 425, 432-433 (1994) (held operating a motor vehicle is safety sensitive work); Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 394 (1994) (tool grinder work is safety sensitive). Based on this precedent, the claimant's positive drug test while operating heavy machinery for the employer, together with the accident, should be sufficient to deny unemployment insurance.

Further, this Board has long ruled that a positive drug test by a claimant whose employment is covered by US Department of Transportation regulations is disqualifying. Given the legitimate interests of this employer in protecting the public from a claimant who has used drugs and reducing liability, the claimant here should not be granted unemployment insurance benefits solely because his operating heavy machinery does not happen to fall under the US DOT.

Based on the foregoing, I respectfully dissent.



BOSTON, MASSACHUSETTS
DATE OF MAILING - May 29, 2012

Sandor J. Zapolin
Member

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

LAST DAY TO FILE AN APPEAL IN COURT – June 28, 2012

LH/rh