Awarded benefits to claimant who was fired for alcohol-related misconduct, because the employer failed to prove that the claimant either had control over his alcoholism or deliberately refused to control it. The Board notes that it is reviewing this long-standing rule in light of recent changes in disability law.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

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MEMBER

Introduction and Procedural History of this Appeal

rule or policy of the employer. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on December 1, 2008. He filed a claim for unemployment benefits with the DUA, but was disqualified in a determination issued by the agency on February 23, 2009. The claimant appealed the determination to the hearings department. Both parties attended a hearing on the merits, after which the review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on March 25, 2009. Benefits were denied after the review examiner determined that the claimant was disqualified under G.L. c. 151A, § 25(e)(2), because he reported for work under the influence of alcohol.

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we remanded the case back to the DUA review examiner to take additional evidence as to whether the claimant was an alcoholic. Both the claimant and the employer attended the remand hearing. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based on our review of the entire record, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant's reporting for work under the influence of alcohol was a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or a symptom of a disability over which the claimant lacked control.

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 a delivery driver for the employer, an office products supplier, from 01/25/99 until 12/01/08 when he became separated.

2. The claimant became separated as the result of an alcoholic relapse.

3. The employer maintains an alcohol and drugs in the workplace policy which states: "An associate is not permitted to report to work while under the influence of alcohol."

4. The purpose of the employer's policy is to promote a safe work environment and comply with Department of Transportation (DOT) regulations.

5. The claimant was aware of the employer's policies.

6. The employer will always discharge employees who are under the influence of alcohol while at work.

7. Prior to his separation the claimant and some of his supervisors had discussed the claimant's drinking and the employer had allowed the claimant to participate in counseling as a result of his drinking.

8. On or about 2006 the claimant participated in a 14 day detoxification program for alcoholism. The employer was aware of the detoxification and allowed the claimant to take time off to participate.

9. The claimant was identified through his counseling and detoxification program as an alcoholic.

11. On 12/04/08 the claimant had an alcoholic relapse and arrived at work under the influence of alcohol.

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12. The claimant's supervisor and his supervisor suspected that the claimant was intoxicated and made arrangements for him to be sent to the employer's vendor for alcohol screening.

13. When the claimant arrived at the vendor he informed its personnel that he was there for drug screening. The claimant was then asked to submit a urine sample.

14. The claimant returned to the employer and was excused from work for the day in accordance with the employer's policies.

15. The vendor informed the claimant's supervisors that he had submitted a urine sample. As he was driving home, but before he left the employer's premises, he received a telephone call on his cell phone from the employer asking him to return.

16. The claimant returned and went to the vendor again.

17. The claimant submitted to a breathalyzer test which was then confirmed.

18. The test results were .132 on the first test and .128 on the confirmation test.

19. The employer considers any employee with a result over .04 to be intoxicated.

20. The testing result included a chain of custody form which was signed by the claimant.

21. The claimant was then transported back to the employer and then transported to his home.

22. Subsequently the claimant was informed by the employer that he was discharged.

23. The claimant has been attending Alcoholics Anonymous meetings seven days per week since March, 2009.

24. The claimant has a sponsor and is currently sober.

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.

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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 ... 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 ... 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....

help in controlling it. Shepherd v. Director of Div. of Employment Sec., 399 Mass. 737, 739-740 (1987).[1] The employer did not prove either of these points.

We, therefore, conclude as a matter of law that the claimant is entitled to benefits. The review examiner's decision is reversed. The claimant is allowed benefits for the week ending December 6, 2008, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 18, 2010

/s/
John A. King, Esq.
Chairman

/s/
Sandor J. Zapolin
Member

/s/
Stephen M. Linsky, Esq.
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 – April 20, 2010
LH/rh

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[1] As a note, the Board is currently reviewing the continued applicability of the case of Shepherd v. Director of Div. of Unemployment Sec., 399 Mass. 737 (1987), which deals with the effect of alcoholism on a claimant's ability to form the intent necessary for disqualification under the Massachusetts unemployment law, G.L. c. 151A. This review will encompass an evaluation of changes in G.L. c. 151A, court cases, precedent, and other statutory changes, such as the passage and subsequent interpretation of the Americans With Disabilities Act, 42 USC § 12114. The Board is cognizant of its own and the DUA's reliance on Shepherd for over twenty years and seeks a careful and thoughtful consideration of this matter.

Last Updated (Monday, 26 July 2010)

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