

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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SECRETARY, LABOR AND
WORKFORCE DEVELOPMENT

**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

In the matter of:

Appeal number: **BR-103925**

CLAIMANT APPELLANT:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Office #01

EMPLOYING UNIT:

United Personnel Services Inc.
1331 Main Street
Springfield, MA 01103

EMP. #80-425420

On October 17, 2007, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Commissioner's representative on May 10, 2007.

On July 2, 2007, the Board allowed the claimant's application for review of the Commissioner's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Unemployment Insurance Law (the Law). The Board remanded the case to the Commissioner for further review and to make further findings of fact from the record. The Commissioner returned the case to the Board on August 9, 2007.

The Board has reviewed the entire case to determine whether the Commissioner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The appeal of the claimant is from a decision of the Commissioner which concluded:

The claimant did not sever the employment relationship. Therefore, Section 25(e)(1) does not apply to this matter.

In accordance with Section 25(e)(2), the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant's discharge was attributable to deliberate misconduct in willful disregard of the employing unit's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule, unless the violation was the result of the employee's incompetence.

The employer had a reasonable policy, which the claimant knew based on his receipt of the policy and based on his testimony. The employer did not have an applicable progressive system of discipline and has not previously encountered any similar acts in violation of the safety policy. Therefore, the employer uniformly enforced its policy, albeit only once.

Although the employer presented a substantial amount of hearsay testimony in regards to the final event, the claimant corroborated the employer's testimony and offered no mitigating circumstance for his actions. The claimant only testified that, at the time of this hearing, he could not recall whether he turned the machine off and furthermore, offered only conjecture that the machine's off switch might have malfunctioned due to the age of the machine. With nothing to substantiate his assertion, the testimony was given no evidentiary weight. Therefore, the occurrence of that event was found to be credible and in violation of the employer's specific safety policy.

The claimant testified that he knew discharge was possible for violating the employer's safety policy and that he always turned the machine off upon occurrence of a jam in the past. Such testimony goes to knowledge and excludes the possibility of incompetence. Therefore, the claimant knowingly violated the employer's policy or rule.

For these reasons, the claimant knowingly violated a reasonable and uniformly enforced policy or rule.

The employer had a reasonable expectation that the claimant follow the safety rules and procedures, of which the claimant was aware. However, the final incident cannot be found to be deliberate misconduct within the meaning of the applicable law given lack of the requisite level of intent to show forethought, or deliberation. For this reason, the claimant's act could not have risen to the level of deliberate misconduct in willful disregard of the employing unit's interest for that one reason alone.

Accordingly, the claimant is subject to disqualification only on the tier of policy violation.

Benefits are denied for the week ending March 3, 2007 and until [sic] claimant has had eight weeks of work and in each week earned an amount equal to or in excess of his weekly benefit amount.

Section 25(e) of Chapter 151A of the General Laws is pertinent and provides, in part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for. . . . For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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. . . .

The Commissioner's representative held a hearing on May 10, 2007. Both parties appeared. The Board remanded the case to the Commissioner for further review and to make further findings of fact. The Commissioner's representative then issued the following consolidated findings of fact:

1. The claimant worked full-time for the employer from August 18, 2006 to February 12, 2007 as a machine operator.
2. The employer is an employment agency.
3. The employer discharged the claimant for violating the safety policy.
4. The employer had a safety policy that stated amongst others, "STOP all machinery before cleaning, clearing equipment jams, removing or repairing parts."
5. The purpose of the employer's policy was to prevent injury.
6. The employer's policy warned of immediate termination for violations of the safety policy, indicating that immediate dismissal *could* occur.
7. The claimant understood that dismissal from employment was possible for violating the safety policy.

8. The employer never before encountered a similar violation that gave rise to the claimant's discharge, thereby making the claimant the only violator of the employer's safety policy regarding the turning off of machinery before clearing jams.
9. The claimant was not aware of any other employees acting or omitting to act in violation of the employer's safety policy.
10. The employer typically had a progressive system of discipline that consisted of a verbal warning, a written warning, a final warning and then discharge, but did not apply it to the instant situation due to it being a case of first impression and due its assessment of the severity.
11. The claimant received the employer's policy on August 16, 2006, admittedly knew the employer's policy and prior to February 12, 2007 adhered to the safety policy, specifically turning off the machine before clearing a jam.
12. The claimant received no previous warnings for failing to adhere to the safety policy before the final incident on February 12, 2007 because of his past adherence to it (*see* Finding of Fact #11).
13. On February 12, 2007 at approximately 1:00 a.m., the claimant encountered a jam on the machine, which he operated.
14. The claimant omitted turning the machine off and instead proceeded to use a 1"x1" wooden stick to pry the material from the machine, which caused the jam.
15. The machine jolted, broke the stick in two and the broken end struck the claimant's neck above the right shoulder causing injury.
16. The employer sent the claimant to the hospital due to the appearance of the injury.
17. The claimant did not intend to directly violate the employer's safety policy.
18. On February 12, 2007, the claimant's on-site supervisor completed a "Supervisor's Investigative Report of Injury/Occupational Illness," which described what occurred on February 12, 2007 as a result of the claimant's act/omission (*see* Exhibit #8).
19. The employer discharged the claimant on February 12, 2007 due to the seriousness of the safety violation and resultant injury.

20. The claimant provided no explanation for his act or omission in violation of the safety policy.
21. At the hearing on May 10, 2007, the claimant did not recall whether or not he shut the machine off before he attempted to clear the jam on February 12, 2007.
22. At the hearing on May 10, 2007, no other evidence was presented to show that the claimant realized his omission in failing to shut the machine off before clearing the jam.

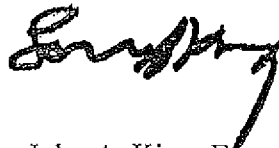
After reviewing the record, the Board adopts the findings of fact made by the Commissioner's representative as being supported by substantial evidence. The Board concludes as follows:

Under G. L. c. 151A, § 25(e)(2), the burden of proof is upon the employer to establish that the claimant was discharged for either a knowing violation of a reasonable and uniformly enforced rule or policy, or for deliberate misconduct in wilful disregard of the employer's interests. The employer has not met its burden in the present case.

The employer discharged the claimant for his failure to shut off a machine prior to an attempt by him to dislodge a jam. As a result of the claimant not turning the machine off, the claimant sustained an injury to his neck which necessitated a medical examination at the hospital. The claimant knew it was the employer's expectation and policy to turn off machinery before cleaning, clearing equipment jams, and removing or repairing parts.

Although the Board does not dispute the reasonableness of the employer's safety policy, the Board must, nevertheless, consider the claimant's state of mind at the time he engaged in the wrongful act. The claimant never intended to violate the employer's safety policy. The claimant did not realize he had failed to shut off the machine before he tried to clear the jam in the machine on February 12, 2007. Since the claimant had always adhered to the safety policies before the incident of February 12 and since there are no findings to indicate there was a purposeful intent by the claimant to circumvent the employer's safety guidelines, the claimant's conduct, although negligent, does not subject him to disqualification under either test of the statutory language comprising section 25(e)(2) of the Law.

The Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending March 3, 2007, and subsequent weeks, if otherwise eligible.



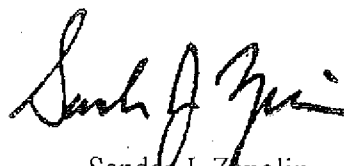
John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING -

OCT 24 2007



Donna A. Freni
Member



Sandra J. Zapolin
Member

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

LAST DAY - NOV 23 2007

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