THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

In the matter of:

Appeal number: **BR-109252-A**

CLAIMANT:

EMPLOYING UNIT APPELLANT:

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S.S. #

EMP. # 8

Hearings Docket # 508661

Introduction and Procedural History of this Appeal

The employer appeals a decision by Wayne D. Robinson, a review examiner of the Division of Unemployment Assistance (DUA), to award unemployment benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged by the employer on October 3, 2008. He filed a claim for unemployment benefits with the DUA but was disqualified from receiving benefits in a determination issued by the agency on December 23, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, a review examiner overturned the agency's initial determination and awarded the claimant benefits in a decision rendered on February 13, 2009.

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 a knowing violation of 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 DUA hearing, the review examiner's decision and the employer's appeal, we remanded the case to the review examiner to make additional findings of fact. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant's positive drug test, standing alone, satisfied the employer's burden to show that the claimant engaged in either deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced employment policy.

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 Dock Worker with the employer's freight handling business from August 30, 2004 until discharged from employment on October 3, 2008 for allegedly testing positive for cocaine usage.

2. The employer has a handbook rule prohibiting the use of controlled substances in the workplace. The claimant received and signed for the handbook containing the rule, which mandates random drug testing.

3. The claimant received and signed for a handbook containing the rule. He had undergone random testing twice before during his employment. Both tests produced a negative result.

4. The employer's rule is intended as a safety measure, since employees operate heavy machinery.

5. The employer has not previously fired an employee for violating its prohibition. The employer is unaware of any violation of its policy that went unmet with the offender's dismissal.

6. On September 29, 2008, the claimant was selected for random testing and sent to a drug-testing facility. According to the employer's doctor who provided testimony at the remand hearing, the claimant was sent to a certified laboratory.

7. The actual procedures used to obtain and process the urine sample rendered by the claimant were not described in first-hand testimony at the remand hearing. The employer's doctor testified that customarily, individuals were taken to a testing facility where their urine specimen was identified to them, sent to a certified lab for testing for five controlled substances including cocaine, labeled, and then returned to the employer.

8. According to the chain of custody form of record, the claimant's urine specimen was collected at a Concentra facility in Springfield, the claimant was identified by photo I.D., the claimant signed the chain of custody form, the urine specimen was sent to a Labcorp facility and tested for five controlled substances including cocaine, and then sent back to the employer.

9. According to the employer's doctor, the tests used to analyze the claimant's urine sample were for marijuana, amphetamines, cocaine, heroin and PCP. The doctor further testified that the tests were professionally recognized and accepted as reliable.

10. According to the employer's doctor and lab results of record, the amount of cocaine detected in the claimant's positive result was 1790 parts of cocaine per billion. The cutoff to determine negative or positive results is 150 parts per billion.

11. According to the employer's doctor, a split sample was not taken from the claimant because it was not needed. Also according to the doctor and MRO detail Report of Record, the claimant was offered a retest but did not take a re-test.

12. According to the employer's doctor and MRO Report of record, the results were reviewed by a MRO and discussed with the claimant prior to issuance of the test to the employer. The claimant offered [no] explanation for testing positive for cocaine. The claimant denied using cocaine.

13. The claimant filed an application for unemployment compensation benefits on March 20, 2008. His wait week ended March 22, 2008. He filed a re-opened claim on October 3, 2008. His first compensable week ended October 4, 2008. The claimant was approved with a weekly benefit amount of $403 plus dependency allowance of $25 for total weekly benefits of $428. His earnings exclusion was $134.33.

14. The claimant collected total benefits of $242 in the week ending October 4, 2008; $428 in the week ending October 11, 2008; and $348 in the week ending October 18, 2008 for a total of $1,018 during the three weeks ending October 4, 2008 through October 18, 2008.

15. A Notice Of Claim Discrepancy (Form 3733A) was mailed to the claimant on November 22, 2008, alerting the claimant to a potential overpayment.

16. A Notice Of Redetermination And Overpayment (Form 3727-BA) was mailed to the claimant on December 23, 2008, based on the employer's allegation that the claimant failed a random drug test due to cocaine use triggering the claimant's dismissal for disqualifying reasons as meant under Section 25(e)(2) of the law. The claimant was disqualified for the week ending October 4, 2008 and for an eight-week re-qualifying period.

17. The claimant was also deemed overpaid in the amount of $1,018 collected by him as described above, pursuant to Section 71 of the law. This overpayment was due to error based on the reversal of the original decision granting the claimant benefits.

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 . . . 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 . . .

The issue before us is not whether the claimant did or did not use illegal drugs, but whether it has been shown that he violated a reasonable employment policy or engaged in deliberate misconduct. He was terminated for violating the employer's policy, which imposes random drug testing as a condition of employment and provides that an employee who tests positive for the presence of any illegal drug or controlled substance shall be discharged.[1] Specifically, the findings show that as a result of a random drug test, the claimant tested positive for cocaine.

In light of the safety-sensitive nature of the claimant's employment, which included the operation of heavy machinery, it was reasonable for the employer to impose random drug testing as a condition of employment. *See* Webster v. Motorola, Inc., 418 Mass. 425 (1994). Since the claimant had received a copy of the policy and undergone random testing for the employer before, the employer has proved that the claimant had knowledge of the employer's drug testing policy.

According to the findings, the employer followed numerous procedural safeguards in administering this drug test. These included establishing a chain of custody, utilizing a laboratory certified by the U.S. Department of Health and Human Services (DHHS), which conducted its tests under the supervision of an independent physician, and affording the claimant

[1] *See* Exhibit #17-22. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director, DET, 64 Mass. App. Ct. 370, 371 (2005).

the opportunity to explain the positive results or request a retest. Finding #11 states that the claimant did not take a retest. However, it would have been pointless for the claimant to have asked for a re-test, because the employer failed to split the claimant's original urine specimen before testing.

At the time that the claimant was administered his random drug test on September 29, 2008, the U.S. Department of Transportation (DOT) regulations mandated that all collections under DOT agency drug testing regulations be split specimen collections. 49 C.F.R. § 40.71(a). By November, 2008, the DHHS, which sets the scientific and technical guidelines for DOT, had revised its mandatory standards for certification of laboratories engaged in drug testing for Federal agencies to also require that urine specimens be collected as split specimens. 73 Fed. Reg. 71,858, 71,860, 71,877 n.1 (Nov. 25, 2008).

The reason for the change in DHHS rules was published in the Federal Register:

> "This policy is the same as the policy described in the Proposed Revisions to Mandatory Guidelines. Five commenters opposed the part that the single urine specimen collection procedure was being eliminated. *The department* disagrees with the commenters and *has eliminated the single urine specimen collection procedure*, not because the procedure is forensically or scientifically unsupportable, but *because the split specimen procedure ensures that the donor will have access to a split specimen that was not opened by the laboratory testing the primary specimen.* Additionally, there are a number of Federal employees working for agencies that have employees subject to both Federal drug testing guidelines and Department of Transportation workplace drug testing regulations. Requiring the use of a split specimen collection procedure will ensure that employees working in these dual regulation situations are treated the same." Id. at 71860. (Emphasis added.)

The updated DHHS scientific and technical guidelines were intended to establish ". . . standards that require the use of the best available technology for ensuring the full reliability and accuracy of urine drug tests . . . ." Id. at 71858.

According to findings of fact # 9 and #11, the employer's Medical Resource Officer (MRO) testified both that it was not necessary to take a split sample from the claimant and that the tests administered to the claimant were reliable. In his testimony, he explained that because the claimant's position was not governed by the DOT regulations, he was not administered a federally regulated test. It appears to be the employer's position that testing the claimant's single urine specimen was good enough. We disagree.

In cases involving a random drug test, where the *only* evidence of the presence of any illegal drug or controlled substance was the positive drug test, we conclude that the employer has not satisfied its burden to prove misconduct or a violation of its drug policy unless the test comports

with procedures that ensure the accuracy of the test result, following standards set forth by the federal government. Since the employer did not collect a split urine specimen from the claimant, it cannot be assured that the positive result came from an untainted sample.

We, therefore, conclude as a matter of law that the employer has not shown that the claimant engaged in either misconduct or a violation of an employment policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is allowed benefits beginning the week ending October 4, 2008 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 24, 2011

John A. King, Esq.
Chairman

Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

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 – March 28, 2011

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