BR-122720-A

CLAIMANT: **EMPLOYING UNIT APPELLANT:**
Hearings Docket #605000

Introduction and Procedural History of this Appeal

The employer appeals a decision by Jennifer J. Rainville, 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 affirm.

The claimant was discharged from his position with the employer on December 19, 2011. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 9, 2012. The employer 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 awarded benefits in a decision rendered on March 15, 2012. 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 willful disregard of the employer's interest, or knowingly violated 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 hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner twice to take further testimony as to the circumstances of the claimant's separation from employment. Only the employer attended the remand hearings. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record. This case required two additional hearings for further evidence.

The issue on appeal is whether the claimant had mitigating circumstances for his inability to timely arrive at work on December 19, 2011.

Findings of Fact

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

1. The claimant was a laborer for the employer, a commercial roofing business, from November 4, 2011 to December 19, 2011, when the claimant was discharged.

2. The claimant worked full-time, 6:00A.M. to varied end times, approximately 55 hours a week, and his rate of pay was $14.00 an hour.

3. The claimant was discharged for his absenteeism.

4. The claimant was scheduled to work at 6:00A.M. on December 19, 2011.

5. Prior to December 13, 2011, the claimant received verbal warnings for being absent.

6. The claimant was given a verbal warning for being absent on December 13, 2011. The claimant was absent on said date because he got a piece of fiberglass stuck in his eye the day before and was having trouble seeing.

7. The claimant was notified during the verbal warning that he could be discharged in the future for future absences.

8. At approximately 5:40A.M. on December 19, 2011, as the claimant was driving to work, he got a flat tire approximately three miles from his house.

9. The claimant had to get his car towed. (See AAA Southern New England Call Detail Report for December 19, 2011 entered into evidence as Exhibit #3 at the initial hearing.) He walked back to his house to use the phone because he does not have a cell phone.

10. The precise distance from the claimant's home to the location of the car is unknown. The claimant's walking speed is unknown.

11. The claimant had to get his car towed. The claimant used AAA to tow his car. A copy of the AAA work order was presented during the original hearing as one of the agency exhibits. (See Exhibit 3).

12. The claimant called the vice president at approximately 6:05A.M. to notify him that he had a flat tire and he would be in later that day.

13. The vice president discharged the claimant during this call.

14. The employer has a policy that requires employees to attend work. The consequence for violating this policy is progressive discipline 1) verbal warning, 2) termination.

15. The employer expected the claimant to be at work by 6:00A.M. on December 19, 2011. The claimant was aware of this expectation because he knew the employer relied on him to be at work. The employer had this expectation in order to maintain a team of workers.

16. The employer conducted research on the world record for walking. The most recent record presented by the employer was a record set on April 27, 1980 where a person (male) walked 12 miles and 752.2 yards in 1 hour, 19 minutes, and 25 seconds.

    This review examiner declines to draw a negative credibility inference against the claimant on the basis that he did not appear at the remand hearings. The claimant testified during the initial hearing that he was late on December 19, 2011 because he had a flat tire on his way to work approximately three miles from his house. The claimant provided an AAA report to corroborate his testimony. Whether the claimant specifically walked exactly three miles in thirty minutes would not change the fact that his reason for being late on December 19, 2011 was due to his flat tire. The claimant's version of events is consistent, plausible, and supported by documentary evidence. His testimony is deemed credible. Since the claimant's testimony and evidence is deemed credible, an inference regarding the claimant's appearance at the remand hearings is not warranted.

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 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 . . .

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 willful disregard of the employers interest, or knowingly violating a reasonable and uniformly enforced rule or policy of the employer. After remand, we conclude that the employer has not met its burden.

The consolidated findings of fact establish that the claimant was driving to work on December 19, 2011, when he got a flat tire approximately three miles from his home. The employer expected the claimant to be at work by 6:00 a.m. on December 19, 2012. The claimant was aware of this expectation. The claimant had to get his car towed, and used the AAA to do so. A copy of the AAA work order is included in the record among the agency exhibits. The claimant walked home to use the phone to call the employer because he did not have a cell phone. He called the vice president at approximately 6:05 a.m. to notify him that he had a flat tire and he would be in later that day. The employer discharged the claimant during this call.

Due to the critical nature of an employee's state of mind and surrounding mitigating circumstances, mere violation of an employer's rule does not automatically justify a disqualification from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass. 776 (1982). Mitigating circumstances over which a claimant may have no control include a situation such as the claimant's inability to arrive at work on time on December 19, 2011. The claimant's inability to timely report to work that day was caused by circumstances beyond his control, including the breakdown of his car on the way to work that morning, and the fact that he was unable to call the employer until he reached home because he did not have a cell phone. These circumstances mitigate the claimant's conduct in calling out five minutes after he was due to report to work. After reviewing the testimony and evidence presented of the claimant's good faith attempt to report to work that day, we reach the conclusion that the claimant did not have the state of mind for a knowing violation or deliberate misconduct, within the meaning of G.L. c. 151A, § 25(e)(2), because he had mitigating circumstances.

Further, the review examiner provided a credibility assessment setting forth her reasons for accepting the claimant's testimony over the employer's. The review examiner found that since the claimant's testimony and evidence is deemed credible, a negative inference on the basis that the claimant did not appear at the remand hearings is not warranted. She repeatedly found that the claimant's version of events was consistent, plausible, and supported by documentary evidence. Such credibility assessments are within the scope of the review examiner's fact finding role, and unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. School Committee of Brockton v. MCAD, 423 Mass. 7, 15 (1996).

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in willful disregard of the employer's interest, or knowingly violate a reasonable and uniformly rule or policy of the employer.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending December 31, 2011 and for subsequent weeks if otherwise eligible.

Sandor J. Zapolin
Member

Stephen M. Linsky, Esq.
Member

*** DISSENT ***

The majority dutifully recites the hornbook rule of law that a G.L.c. 30A hearing officer's findings of fact may not be set aside on appeal unless they are unreasonable in relation to the evidence presented, School Committee of Brockton , 423 Mass. 7. Unfortunately, they then proceed to ignore it by putting their imprimatur of approval on a compendium of the most glaringly unreasonable of findings. I will limit discussion to just a few of the most egregious of the many absurdities in the review examiner's findings.

Thus, we are asked by the majority to find "reasonable" the review examiner's determination that the claimant is an Olympic-class "speed walking" athletic wonder who was able to cover the approximately three miles from his supposedly disabled car to his house in something less than 25 minutes. As the employer appellant has very aptly pointed out, this walking speed would truly place the claimant among the immortals of speed walking history. If we are to believe the claimant's self-declared walking speed — which equates to 8.33 minutes per mile — it is only marginally slower than the 8.25 minutes per mile world's record walking speed set by Herman Muller in Berlin Germany in October, 1911 and the 8.17 minute mile record achieved by Emile Anthoine in Paris in July, 1913.[1]

[1] The claimant's self-reported walking speed is, sadly, not quite fully competitive with Vaclav Balsan's 7.83 minute mile record, set in the Czech Republic in August, 1933. Moreover, it is distinctly not in the same winner's circle as some of the more recent record holders from former Soviet and East Bloc territories, such as Gennady Agapov, who set a new world's record of a 7.08 minute mile in Leningrad, USSR in July 1968 (a feat he repeated in East Berlin in May, 1972); Anatoly Solomin, who achieved a record of 6.96 minutes in Vilnius, Lithuanian SSR in July, 1978; or Vadim Tsetkov, who reached a 6.86 minute mile in Klaipeda, Lithuanian SSR in May, 1979. *Sic transit gloria mundi!* Of course, steroid use among East Bloc athletes was widely suspected, and had the claimant attended either of the two remand hearings we ordered, he might well have been able to offer a defense of his walking speed record against these challengers on the grounds of unfair advantage. However, since he declined to appear in either session, we will have to let the existing records stand. *See* Remand Exhibit 6a for a complete inventory of speed-walking record holders over the past century. (Speeds are reported on Exhibit 6a in kph; I have converted them to mph in order to allow for easy comparison with the claimant's purported walking speed which the review examiner recited in mph.)

In a similar vein, the majority would have us suspend disbelief and credit as "reasonable" the notion that the claimant, who asserted that he was unable to call his employer promptly when his car became disabled on the way to work because he did *not* have a cell phone, was nonetheless able to photograph the car in its disabled state — using a cell phone to take the photos! — in order to produce corroborative evidence of the breakdown.

Furthermore, we are asked to somehow explain away in our minds the glaring logical inconsistency between the time when the claimant stated that the breakdown occurred (5:40 AM), and the recorded time of the towing call to AAA (10:05AM). *See* Exhibit 3 for AAA call sheet time. It would seem rather obvious that something is amiss here — either the claimant, despite his heroic speed-walking back home was in no hurry to get the car repaired and himself in to work, or there was no relationship between the state of car and the reason for the claimant's failure to show up at his job on time. The evidence compels the conclusion that the latter explanation is the correct one.

Among the interesting data items reported on the AAA call sheet, which the claimant himself introduced into evidence, is the name of the AAA member who called and asked for a tow. As this record indicates, the AAA member who called here was one Gregg Collins, rather than the claimant. Now, there are several features of AAA membership that I believe are common knowledge, and, since some of those features are important to the proper resolution of this case, I will briefly take note of them. First, the AAA cards distributed to members are issued to people as individuals, either in the form of single person memberships, or individually to family members who are covered through family membership plans. Each card has on it the name of the specific individual to whom the card was issued; the cards offer towing benefits only to those people whose names are on the cards, only those people may use them, and they may only use them for assistance with cars that they are actually driving. Furthermore, in order to prevent fraudulent misuse of AAA cards by third parties, AAA towers make it a practice of asking to see the card when they arrive at a tow location. What all of this means for the present case is that the evidence in the record inescapably points to the conclusion that the claimant, who was found by the review examiner to have promptly called AAA after walking back to his house, never actually called at all. Instead, someone else — who in all probability was also the person who had actually been driving the vehicle — called and he did so nearly five hours after the time when claimant asserted that breakdown had occurred.

Finally, as if all of the foregoing exercises in absurdity were not enough, we have the matter of the claimant's non-attendance at two remand hearings. This case came to the Board as an employer appeal of the review examiner's decision to award benefits to the claimant. Some of the inconsistencies, improbabilities, and illogicalities in the claimant's version of events were noted in the appeal, and we felt that the case was such that it warranted asking the claimant some additional questions about just what, if anything, actually happened to him on the way to work on his last day at the job. Twice remand hearings were scheduled and twice the claimant no-showed. By doing so, he certainly avoided the need to answer what would no doubt have been challenging questions. However, his non-attendance should not, in my view, come without a price. A negative inference can and should be drawn from it and thereby ought to demolish what was never more than the shakiest of excuses for why the claimant did not get to work on time on that December morning.

I conclude with a statement that Woody Allen once made, which I believe succinctly captures the essence of this case: "Eighty percent of success is showing up."

For these reasons, I respectfully dissent.

BOSTON, MASSACHUSETTS John A. King, Esq.
DATE OF MAILING - January 18, 2015 Chairman

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 – February 19, 2013

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.