

BR-124433

CLAIMANT APPELLANT:
Hearings Docket #618814

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Jennifer Rainville, 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 separated from his position with the employer on May 11, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 30, 2012. 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 August 31, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest and, thus, was 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 to make subsidiary findings on the issue of whether the claimant stole from the employer. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant stole from the employer.

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 manager for the employer, a retail auto parts store and repair business, from May 13, 2002 to May 11, 2012, when the claimant was discharged.
2. The claimant worked full-time, 8:00A.M to 5:00P.M., Monday to Friday, and his rate of pay was \$21.50 an hour.
3. The claimant was discharged for allegedly taking \$120.00 from the employer.
4. On May 8, 2012, one of the employer's regular customers, a mechanic, called the claimant to tell him that he was giving one of the employer's drivers \$260.00 in cash for two of his invoices, specifically the \$120.00 for tools and \$134.42 for hoses.
5. The customer gave the driver \$260.00 in cash and the driver then gave the claimant the \$260.00 in cash.
6. On May 11, 2012, the employer's controller was investigating an unrelated matter regarding a cash shortage.
7. The controller saw that an invoice had been voided by the claimant in the amount of \$134.42 on May 8, 2012.
8. The claimant is one of the only employees that were trusted to complete voids in the employer's system.
9. It is unknown why \$134.42 was voided from the employer's system on May 8, 2012 by the claimant.
10. The controller called the customer about his invoices and was told that he had given one of the employer's drivers \$260.00 in cash to pay for two of his invoices.
11. The controller also checked the register tapes for May 8, 2012 and May 9, 2012 looking for the \$120.00 and \$134.42 transactions that would have been rung in from the customer's \$260.00 payment.
12. The controller found two charges in the amount of \$120.00 within six (6) minutes of one another on May 8, 2012; one at 4:06P.M. and one at 4:12P.M.

13. Although each transaction is dated on the employer's register receipts as May 8, 2012, the employer considered the 4:12P.M. \$120.00 transaction to count as a transaction for May 9, 2012.
14. It is typical for the employer to count transactions towards the next day at a certain point each day.
15. It is unknown who completed the two \$120.00 transactions on May 8, 2012 and May 9, 2012.
16. The employer considered one of the \$120.00 transactions to be completed by the claimant for the customer's \$120.00 invoice.
17. When the controller asked the claimant about the two customer invoices, the claimant gave the controller an invoice for \$134.42 that had \$20.00 attached to it that he was keeping in his office.
18. The claimant told the employer that he must have rung in the \$120.00 twice on May 8, 2012 and that is why there were two \$120.00 charges.
19. The employer had a shortage of \$120.00 after the May 8, 2012 and May 9, 2012 transactions.
20. During the employer's meeting with the claimant, the claimant pulled out \$120.00 and offered to pay the employer \$120.00.
21. The claimant did not steal the money from the employer.
22. The employer expected that the claimant would not steal money and only use money from customers to pay for their own invoices. The claimant was aware of this expectation as a matter of common sense. The employer had this expectation to account for its revenue.

Credibility Assessment:

The employer's controller testified on behalf of the employer. She testified that she called the customer to ask him about the invoices because once she started researching an unrelated shortage matter, she began to have questions about the payments for the invoices. The customer told the controller that he gave one the employer's drivers \$260.00 for both invoices and he also spoke to the claimant on the same date and told him the same. The controller learned after doing research that two transactions were done for \$120.00 within six minutes apart from one another but within the six minute time frame is when the employer considered the transaction, to be on two different days, i.e. May 8, 2012 and May 9, 2012. Although two \$120.00 payments were made for two invoices, the controller specifically testified she "never

had an extra \$120.00” in the register. The employer’s system also showed a void in the amount of \$134.42 on May 8, 2012 with the claimant’s initials. When the controller asked the claimant about his findings, the claimant offered no explanation for the \$134.42 void other than it was probably a mistake. He presented the \$134.42 invoice with \$20.00 in cash attached to it. And he told the controller that he probably rang in the \$120.00 invoice twice.

The claimant denies that he stole money from the employer. The claimant contends that the driver only gave him \$140.00 in cash on May 8, 2012. He denies he ever spoke to the customer on May 8, 2012. He believes the driver gave another clerk the remaining \$120.00 and that both he and another clerk entered payment for the \$120.00 invoice on May 8, 2012. The claimant also testified that when he was confronted by the employer about the missing \$120.00 dollars he said he must have rang it in twice. He contends that later that day he found the \$134.42 invoice and attached the remaining \$20.00 he had to the invoice and just left it in his office to possibly be used as a partial payment. The claimant also contends that he probably made a mistake when he voided the \$134.42.

The employer’s testimony and evidence regarding the May 8, 2012 and May 9, 2012 transactions does not show evidence of a direct link that the claimant specifically stole the \$120.00 from the employer. Therefore, the employer’s testimony is considered vague and less credible than the claimant’s testimony.

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

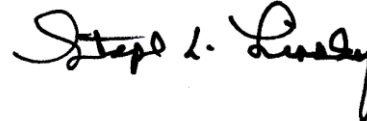
In her original decision, the review examiner ultimately concluded that it was more probable than not that the claimant stole from the employer. There was, however, no finding of fact directly supporting this conclusion. The board remanded the case, directing the review examiner to review the record, as well as her findings and conclusions, and to make an express finding as to whether the claimant stole. In compliance with the board's order, the review examiner reexamined the record and her original findings and conclusion. As a result of this reexamination, the review examiner has now found that the claimant did not steal from the employer. We, therefore, conclude as a matter of law that the claimant did not engage in misconduct. On the basis of her finding as to the claimant's culpability, we conclude that the claimant did not engage in misconduct.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 9, 2012 and for subsequent weeks if otherwise eligible.



Sandor J. Zapolin
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING -



Stephen M. Linsky, Esq.
Member

Chairman John A. King, Esq. did not participate in this decision.

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

LH/jv