



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

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August 06, 2014

BOARD OF REVIEW RESULTS

CLAIMANT [APPELLANT]:

EMPLOYER:

Claimant ID #:
Issue ID#:

EAN #: (

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Issue ID:
Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Kathleen Della Penna, 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 was discharged from his position with the employer on November 5, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 8, 2014. 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 January 30, 2014. Benefits were denied after the review examiner determined that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2).

The Board initially denied the claimant's application for review. The claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42. While the case was pending before the district court, counsel for the DUA brought to our attention a provision, under G.L. c. 94C, § 32L (hereafter "Section 32L"), which decriminalizes the possession of marijuana and also prohibits the denial of unemployment compensation benefits in certain circumstances relating to possession or ingestion of marijuana. As the Board had not previously considered the effect of Section 32L on claimant's eligibility for unemployment compensation benefits, the Board revoked its decision and remanded the case to the review examiner for further evidence pertaining to whether the claimant's conduct remained disqualifying in light of Section 32L.

Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon a review of the entire record, including the recorded testimony and evidence from the hearings, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's initial conclusion that the claimant is disqualified from receiving unemployment benefits, because he tested positive for marijuana following an accident on the employer's property, is supported by substantial and credible evidence and is free from error of law.

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 for the instant employer as a shipper/receiver and he was employed from 3/10/04 until his separation on 11/5/13.
2. In July 2013 the company implemented a drug testing policy which states in part:

Definitions:

The term "drug" or "controlled substances" as it is used in this policy includes, but is not limited to, marijuana, cocaine, opiates, amphetamines, Phencyclidine (PC), LSD, heroin or any other controlled substance whose possession, sale or consumption is illegal. This includes prescription medication or over the counter medication that is obtained, distributed, or used illegally or outside the scope of their prescribed use or directions.

General Expectations:

(company name) expects each employee to report to work fit for duty, not to be under the influence of alcohol or illegal drugs while at work, or have the presence of alcohol or illegal drugs in his or her system. Furthermore, (company name) expects the workplace to be free from the presence of alcohol and illegal drugs.

Prohibited Conduct:

The following conduct is prohibited and may result in disciplinary action, up to and including termination of employment:

- Reporting to work or being at work (whether on or off company property) having in one's body the presence of or being under the influence of alcohol or drugs, or being at work in an unfit condition due to misuse of drugs or alcohol. Under the influence is a management determination, based on the judgment and/or observation that an employee's demonstrated behavior or condition is affected by the use of drugs or alcohol and is a threat to the individual or collective safety and productivity.
- Possessing, selling, manufacturing, distributing, purchasing, or receiving illegal drugs while at work, on company business, or on company property.
- Being convicted for the use, possession, sale purchase or distribution of illegal substances off-the job when management determines it would

adversely affect the employee's ability to do his/her job or the company's reputation, products, or services.

Drug and Alcohol Testing:

(company name) may require employees, as a condition of employment or continued employment, to submit to drug and alcohol testing in the following situations:

- Post-incident testing: Employees who have been involved in or contributed to a work-related accident or incident involving bodily injury or property damage may be required to undergo urinalysis testing for illegal drugs and breath analysis testing for alcohol. An employee who is given a post-incident drug or alcohol test shall not return to work until the results of this test have been verified negative.
 - To satisfy the requirements of the Federal Motor Carrier Safety Regulations for truck drivers, or any other federal or state law.
3. On 7/16/13 the claimant signed the Verification of Receipt of the Drug and Alcohol Testing Policy which states:

I acknowledge that I have been given a copy of the Drug and Alcohol Testing Policy. I also understand that many current policies are summarized in the Company Handbook. It is my responsibility to read and comply with all (company name) [sic] including this policy. I will discuss any questions I have about the policies with my supervisor or department manager.

I acknowledge and understand that neither this verification of receipt nor any (company name) policies constitute an express or implied contract for employment with (company name) [sic] is an at will employment relationship, as defined in the Company Handbook.

I recognize that any violation of any (company name) policy may subject me to disciplinary action, up to and including termination of employment.

4. After the date that the Drug and Alcohol policy was implemented and prior to the final incident the claimant was in an accident with a company fork lift, but he was not injured and the equipment was not damaged. The claimant was not sent for a drug/alcohol test.
5. The claimant is aware of an employee that was involved in an accident in which he was injured or company equipment was damaged; he was tested; with positive results; and he was not terminated. The company is aware of this individual and did not terminate him because it was determined that his positive result was due to a medical reason.

6. On 11/5/13 the claimant was involved in an accident in the workplace. He was moving a tractor trailer and hit another trailer while trying to make a corner. The claimant believes he took the corner too tight and he hit the side of another tractor.
7. The claimant reported the accident immediately to his supervisor and he was brought to the company testing site for a drug/alcohol test. Prior to being tested the claimant informed his supervisor that he had smoked marijuana the night before on his own personal time and that he might test positive because of this. (1)
8. On 11/4/13 at approximately 5:00 p.m. the claimant smoked marijuana prior to having dinner. He went about his regular evening routine after eating and did not smoke again. He went to bed at about 9:00p.m. and got up the next morning at 4:30a.m. drove the seven miles to work. He punched in said hello to co-workers and worked several hours before being involved in the accident.(1)
9. On 11/5/13 the claimant does not believe he was impaired. (1)
10. According to company policy the claimant was not allowed back on the job until the company received a negative test result.
11. On 11/12/13 the human resources director was made aware that the claimant tested positive for marijuana. The testing results indicate:

	Result	Screening Cutoff	Confirmation Cutoff
Marijuana	Positive	50ng/ml	15ng/ml
12. On 11/12/13 the human resources director contacted the claimant and informed him that he was being terminated as a result of the positive test result.
13. The claimant disagreed with the company's decision to terminate his employment in that he was aware that the other individual was not terminated.
14. At the time of the accident the claimant was operating a yard horse which is used to tow the tractor trailer only in the company lot. The piece of equipment is not used on the roadways. (2)
15. The operation of the yard horse was a regular part of his job duties. (3)
16. The operation of the yard horse is not governed by the Federal Motor Carrier Safety Act or its regulations, or federal or state law prohibiting drug use by persons operating such equipment

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, Section 32L requires us to reject the review examiner's conclusion that the mere presence of marijuana in the claimant's body in violation of the employer's drug policy is grounds for disqualifying him from unemployment benefits. Further, the consolidated findings do not support a conclusion that the claimant engaged in misconduct beyond failing the drug test (which, for marijuana, is exempted by Section 32L), such that he should be disqualified from benefits.

Since the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(c)(2), which 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

Also relevant here is G.L. c. 94C, § 32L, which was enacted by the Legislature in 2008 and provides, in pertinent part, as follows:

Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense

Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance *including unemployment benefits*

As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid [sic] metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances

or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marijuana

(Emphasis added.)

In this case, the parties do not dispute that the employer's drug policy prohibits, among other things, the mere presence of marijuana in an employee's system while at work as demonstrated by a positive drug test. The parties also do not dispute the positive drug test results or that marijuana had been present in the claimant's system while at work on November 5, 2013.

In her initial decision, the review examiner found that the claimant had reported to work or been at work while having in his body the presence of marijuana, in violation of the employer's drug policy. She concluded that this was deliberate misconduct in wilful disregard of the employer's interest, under G.L. c. 151A, § 25(e)(2).

We are now cognizant that G.L. c. 94C, § 32L expressly provides that the mere presence of marijuana in one's system may not form the basis for denying unemployment benefits. Thus, to the extent that the claimant was terminated merely for failing a drug test and having marijuana metabolites in his system, Section 32L permits him to receive benefits, even though that test result violated the employer's policies.

By the same token, however, Section 32L expressly declines to shield workers who violate "personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marijuana." See paragraph three of Section 32L. In the instant case, the employer's drug policy not only prohibited having marijuana in one's system, but also "being under the influence of alcohol or drugs" while at work, and/or "in an unfit condition due to misuse of drugs or alcohol." The policy defined "under the influence" as occurring when "an employee's demonstrated behavior or condition is affected by the use of drugs or alcohol and is a threat to the individual or collective safety and productivity." Given the language in paragraph three, Section 32L would permit the denial of unemployment compensation benefits for violations of these other aspects of the employer's policies, assuming that the overall circumstances met the disqualification criteria of G. L. c. 151A, § 25(e)(2). Consequently, we remanded the case to find out whether the claimant was impaired at work or under the influence of marijuana when he had the accident that triggered the drug test and his eventual discharge.

After remand, there is no finding, nor does the record indicate, that the claimant was, in fact, impaired or under the influence of marijuana at the time of the incident. The record includes the following undisputed evidence: (1) the claimant had not smoked marijuana since approximately 5:00 p.m. the night before; and (2) after a full night's sleep, the claimant drove seven miles to work, greeted coworkers, and worked without mishap for approximately an hour and a half before the accident.¹ The claimant testified that no one suggested that he was impaired that

¹ The claimant's testimony that he clocked in at 7-7:30 a.m. and the accident occurred before his normal break at 9:00 a.m., is less than the "several hours" found by the review examiner; however, the distinction is not material. While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).


morning, and this testimony was not challenged by the employer. Further, the claimant consistently explained how the accident occurred: while moving a trailer with his yard horse,² he hit the side of another trailer as he was going around a corner attempting to avoid an oncoming driver in yet another vehicle. Nothing about this explanation, which was not contested, indicates impairment. Indeed, the record indicates the claimant has presented credible evidence countering any assertion that the claimant was, in fact, impaired by or under the influence of marijuana while at work, in violation of the employer's policies or in wilful disregard of its interests. Accordingly, we conclude as a matter of law that the claimant is not disqualified under G.L. c. 151A, § 25(e)(2).

We note that this result is consistent with the Board's decision in BR-118149 (May 29, 2012). In that case, a claimant operating an excavator collided with another truck, subsequently tested positive for marijuana, and admitted to the employer that he had smoked marijuana a few weeks earlier at a barbeque. The employer's policy prohibited being at work while impaired by drugs, including marijuana. We held that the positive marijuana test alone did not compel the conclusion that the claimant was either using or impaired by drugs while at work, a holding that is consistent with the requirements of Section 32L. As we did in this case, we remanded that case for a determination of whether, in fact, the claimant had been impaired by marijuana at work. After remand, the review examiner in that case rendered findings supporting a conclusion that the claimant was not impaired at the time of his accident. Therefore, we awarded benefits.

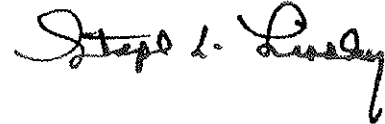
² The employer testified that the operation of the yard horse (which is a vehicle but not one that is used on public roadways) is not governed by the Federal Motor Carrier Safety Act or any U.S. Department of Transportation regulations, which might require termination for failing a drug test. *See Id.*

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 9, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 4, 2014



Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member



Judith M. Neumann, Esq.
Member

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

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

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.

AB/rh

Appendix A

Appeal Filed Date:1/31/2014

Issue ID:(

Issue Type
Discharged

Issue Start Date
11/3/2013

Issue End Date

Decision
Reverse

Additional Notes:

