



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-114436-A**

CLAIMANT:

EMPLOYING UNIT APPELLANT:

S.S. # XXX-XX-XXXX
 Hearings Docket #

EMP. # XXX-XXXX

Introduction and Procedural History of this Appeal

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

The claimant separated from his position with the employer on July 2, 2009. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on February 11, 2010. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 17, 2010.

Benefits were awarded after the review examiner determined that the claimant left employment involuntarily for urgent, compelling, and necessitous reasons and, thus, was not disqualified, under G.L. c. 151A, § 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to take additional evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant's need for medical treatment in Morocco, including a root canal, constituted an urgent, compelling, and necessitous reason for him to leave employment.

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 banquet houseman, for the employer, a hotel, from February 1, 2008 until he separated from his employment on July 2, 2009.
2. Around May 2009, the claimant asked his manager for permission to take a brief leave of absence from July 2, 2009 through August 6, 2009 to travel to Morocco and visit with family. She verbally granted his request and the claimant purchased an airline ticket for a flight which would leave Boston on July 6, 2009, arriving in Casablanca on July 7, 2009, with a stop in Paris. The return flight was to leave Casablanca on August 6, 2009 and arrive in Boston the same day, with a stop in Paris.
3. The claimant came into work one day before leaving on vacation with a toothache. One of the managers got him some over the counter pain relief medication so that he could continue working.
4. The claimant saw a dentist in the United States, on July 1, 2010, due to a tooth ache. He was given a note to excuse him from work but because work was slow and he was not called in to work that week the note was not given to the employer.
5. On July 2, 2009, the employer confirmed in writing that the claimant was being granted a brief leave of absence, from July 6, 2009 through August 6, 2009. The employer considered a leave of less than 6 weeks to be "brief." The confirmation form stated, in part: that the clamant was responsible for contacting his manager at least 5 days prior to his expected date of return; that there was no guarantee of reinstatement upon his return; that his absence could not exceed 6 weeks; and that if the claimant failed to return on the date specified that his employment might be terminated. The form emphasized the fact that a brief leave of absence could not exceed 6 weeks and that if the claimant did not return in the 7th week his employment might terminate.
6. The confirmation form also stated that if the claimant became eligible for a Personal Leave of Absence during or upon conclusion of his Brief Leave of Absence it was his responsibility to notify his manager to transition the leave. The form further explained that the manager could approve or deny the Personal Leave of absence and that a Personal Leave of Absence could be for up to 3 months, with the brief leave of absence being included in this 3 month period.

7. The claimant took his schedule flight to Morocco on July 6, 2009.
8. While the claimant was in Morocco his toothache either returned or grew worse. The claimant therefore went to see Dr. Mohammed CHEIKHI, who is a surgeon-Dentist, for treatment. Dr. CHEIKHI's office was located at Rond Point du Plateau Avenue Hassan II, Bettana-Sale.
9. The claimant took a bus from where he was staying, in Karya, Morocco, to and from Dr. Mohammed CHEIKHI's office, in Sale, Morocco.
10. The claimant saw Dr. Mohammed CHEIKHI 5 to 6 times. The first time was on July 22, 2009. At that time the doctor filled a tooth cavity. The pain persisted after the tooth was filled. The claimant therefore returned to Dr. Mohammed CHEIKHI office on or about July 26, 2009. At that time he was told that the problem was actually in a [sic] on or about August 4, 2009 at which time Dr. Mohammed CHEIKHI, performed a root canal on the claimant.
11. The claimant was still in pain after the root canal and therefore returned to Dr. Mohammed CHEIKHI for 2-3 follow up appointments. The claimant's last appointment with Dr. Mohammed CHEIKHI was on September 2, 2009. He was given a note at that time stating that dental services were provided him; by Dr. CHEIKHI from July 22, 2009 through September 2, 2009. The type of service provided was not specified.
12. The claimant was given a prescription, on August 24, 2009, for Bactox. It was filled at the Pretemp's Pharmacy. The claimant provided a copy of the prescription for the record. There is evidence on the prescription that payment was made but it is not legible enough to read how much was paid.
13. The claimant paid for the treatments he received from Dr. Mohammed CHEIKHI in cash. He did not get a receipt or other evidence of payment.
14. The claimant needed to get medical treatment in Morocco because treatment he received in the United States, before leaving on vacation to Morocco, failed to fix the problem he had with his tooth. When his tooth pain either continued or got worse while he was in Morocco he needed to get further medical treatment immediately to both alleviate the pain and prevent infection. Even if he had returned to the United States as originally scheduled, the claimant would not have been able to return to work on August 6, 2009. He would have had to remain out of work while getting treated by a Dentist in the United States.

15. The claimant called the Banquet manager, around August 1, 2009 and explained that he could not come back to work, by August 6, 2009, because he needed to get his teeth fixed. He did not specify the nature of his dental problems. He did not state that the problem was serious or an emergency. The claimant was told that the employer needed him to return to work and would not extend his leave. He was told to call back on August 6, 2009.
16. The Banquet Manager did not think tooth pain qualified as a reason to extend the leave. He did not ask the claimant to complete a Family Medical Leave application form or to provide medical documentation substantiating the need for a medical leave of absence. He just told the claimant that he was needed at work and that if he did not return as scheduled he would lose his job.
17. The claimant called the employer on August 6, 2009, from Morocco and explained that he was still in Morocco due to the need to fix his tooth and that he would not be at work that day. He was told that his employment was being terminated due to his failure to return to work as scheduled.
18. The claimant returned to the United States, on September 5, 2009. He went to the employer's human resources department at that time and explained that he was prepared to return to work at that time. He did not indicate that he had had a medical emergency which prevented him from returning to work when expected. He was not asked any questions as to why he had not returned on time. He was told that it was too late as his employment had been terminated.
19. The claimant had an unemployment claim, with an effective date of December 21, 2008. He reopened this claim on September 13, 2009, effective September 12, 2009 and continued it through December 19, 2009.
20. The claimant was paid a benefit of \$261 for each week, from September 12, 2009 through November 28, 2009. He was paid a benefit of \$197 for each of the two weeks ending December 12, 2009 and December 19, 2009.
21. The claimant also received a Federal Supplemental Payment of \$25 for each of the weeks, ending September 12, 2009 and continued it through December 19, 2009.
22. On February 11, 2010, a Notice of Redetermination and Overpayment was issued to the claimant stating that he was disqualified under Section 25(e)(1) of the law for the week ending September 12, 2009 and until he worked for 8 weeks and in each week earned an amount equal to or in excess of his weekly benefit rate. The notice also stated that he was overpaid \$4,098 for the 15 weeks ending September 12, 2009 and continued it through December 19, 2009 and that the overpayment was due to an error without fraudulent intent.

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), provides in pertinent part, as follows:

... An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under this section of law, the claimant has the burden to show that he should receive benefits. In her decision written after the initial hearing, the review examiner determined that the claimant had carried his burden. After review of the testimony and exhibits from the remand hearing, we agree.

Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Commissioner of Dept. of Employment & Training, 412 Mass. 845, 848, 851 (1991).

The findings show that the claimant requested and was granted a leave of absence from July 2, 2009 through August 6, 2009. While on leave in Morocco, the claimant developed serious tooth pain, which required treatment. After seeing a surgeon-dentist, the claimant had a root canal procedure and continued with follow-up visits until his return to the United States in September 2009. By that time, the employer had already ended his employment.

At the initial hearing, the claimant produced no evidence to corroborate his story about the Moroccan medical emergency, and the employer challenged the factual basis of that story on appeal. At the remand hearing, the claimant substantiated his claims of a medical emergency by offering a note from his Moroccan dentist and a prescription filled at a pharmacy in Morocco. The documentation does not specify that this was an emergency or that the claimant had a root canal. Nevertheless, the review examiner accepted the claimant's testimony on the severity of the medical problem, and we see nothing in the record which suggests that we should disturb those findings.

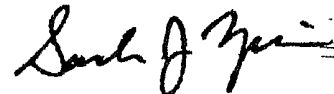
Indeed, the situation was serious enough that the claimant did not wait until returning to the United States to address the problem. He sought medical help and reasonably decided to complete the treatment there, even though his approved leave ended August 6. The review

examiner found that the claimant contacted the employer on August 1 and August 6, 2009 to explain his reason for not returning to work as planned. He requested more time off, but that request was denied, partly because the claimant did not show the employer any evidence that he needed a medical leave. During cross-examination of the claimant at the remand hearing, the employer again pointed out that the claimant had not provided any documentation to the employer before the separation. Had the claimant done so, he might not have been separated. The question, however, "is whether the Legislature intended that certain unemployment benefits should be denied in the circumstances of a case such as this." Goodridge v. Director of the Div. of Employment Security, 375 Mass. 434, 436 (1978). Based on the medical documentation in the record and the review examiner's findings that the claimant needed medical treatment in Morocco and could not return as originally planned, the claimant is entitled to those benefits.

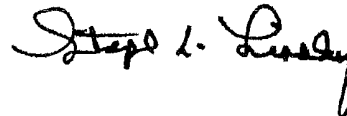
We, therefore, conclude as a matter of law that the claimant's need for medical treatment in Morocco, including a root canal, was an urgent, compelling, and necessitous reason for him to leave employment.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending September 12, 2009 and for subsequent weeks if otherwise eligible. He was not overpaid for the fifteen weeks ending September 12, 2009 through December 19, 2009. In accordance with G.L. c. 151A, § 14(d)(3), no charges for benefits paid under this claim shall be placed on the employer's account.

BOSTON, MASSACHUSETTS
DATE OF MAILING - October 26, 2010



Sandor J. Zapolin
Member



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 - November 25, 2010