



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

BR-117836 (Oct. 31, 2011) DC 400.1

A majority of the board awarded benefits under G.L. c. 151A, § 25(e)(2), because the claimant's inability to control his alcoholism triggered his drunk driving, the loss of his license, and caused him to lose his job. Claimant's inability to control his alcoholism rendered the separation involuntary and constituted mitigating circumstances within the meaning of the Supreme Judicial Court's Shephard decision.

**CORRECTED DECISION
[Corrections in brackets]**

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 October 24, 2010. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 10, 2010. 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 February 17, 2011. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant caused his own unemployment and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence about the role that alcoholism may have played in the claimant's separation. Only the claimant 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.

The issue on appeal is whether the claimant's separation was attributable to his inability to control his disease of alcoholism and, if so, whether it constitutes mitigating circumstances for awarding unemployment benefits.

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 employer, a supply company, as a commercial driver from 2005 – 10/24/10 when he could no longer perform the duties of his position due to loss of his commercial driver's license.
2. A commercial driver's license is a requirement of the claimant's position. Other employees who have lost their licenses have retained positions with the employer working in the warehouse.
3. On 9/24/10, the claimant received a ticket for reckless driving. The claimant had been drinking prior to receiving the ticket. As a result of the ticket, the claimant's commercial driver's license was going to be suspended on 10/24/10.
4. On 10/23/10, the claimant notified his supervisor that his license was being suspended on 10/23/10. The claimant asked if he could work in the warehouse. The supervisor told the claimant that it was slow and that there was no work available. The supervisor told the claimant that without the license, the claimant could not work for the employer.
5. Prior to the loss of licensure, the claimant had applied for Family Medical Leave due to alcoholism.
6. The claimant is eligible for re-hire if positions were [sic] available.
7. In 2001, the claimant initially sought help for issues with alcohol and was diagnosed as alcohol dependent.
8. On 9/29/10, the claimant admitted himself to an intensive outpatient program. The claimant participated in a program which included four nights weekly for three and half hours per night for seventeen sessions. The claimant completed this program and began an aftercare program with weekly meeting. The claimant has remained and is currently sober.

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.

The review examiner rendered his decision under G.L. c. 151A, § 25(e)(1), which provides in relevant 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent, . . .

Specifically, the review examiner concluded that claimant, not the employer, caused his separation from employment, because the claimant's reckless driving caused the claimant to lose his driver's license and his job. Ordinarily, when a claimant's actions trigger a "... statutory impediment that bars his employment [he] leaves his employment 'voluntarily' within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment." Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002 (1985) (rescript opinion). Underlying the Olmeda decision is the principle that the claimant is not entitled to unemployment benefits, because he brought the unemployment on himself. Id. Where this occurs, even though an employer terminates the employment relationship, the separation is deemed to be a voluntary quit, under G.L. c. 151A, § 25(e)(1). This was the basis for the review examiner's decision to deny benefits.

In Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987), the Supreme Judicial Court considered whether alcoholism mitigated the wilfulness of the misconduct for which the claimant was discharged. See Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (in order to evaluate the claimant's state of mind, we must take into account the presence of any mitigating factors). Thus, where alcoholism was a factor in an event that caused the separation from employment, the Supreme Judicial Court also analyzed the separation under G.L. c. 151A, § 25(e)(2).

G.L. c. 151A, § 25(e)(2), provides, in relevant 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, . . .

As we stated in BR-110099 (March 11, 2011), we do not read Shepherd to mean that an assertion of alcoholism is an absolute defense to disqualification under G.L. c. 151A, § 25(e). There must be sufficient evidence that *at the time of the wrongful conduct*, the claimant suffered from the disease of alcoholism, was unable to control the addiction, and that both factors caused the wrongful behavior and the discharge. If the claimant establishes this foundation of evidence, the burden shifts to the employer to show that the claimant's misconduct was done deliberately or wilfully. Id.

In the present appeal, the review examiner found that the claimant had been diagnosed as alcohol dependent as early as 2001. Additionally, the claimant testified without contradiction that he had been in remission until approximately a year and a half prior to the incident, when he started drinking again because his father passed away and his son was sent to war in Iraq.¹ He further testified that he had gone back to Alcoholics Anonymous, had tried unsuccessfully to control his drinking, and that he was under the influence of alcohol when, on September 24, 2010, he was stopped for reckless driving and arrested for drunk driving. Id. Remand Exhibits #4 and #7 provide medical documentation to support his testimony that during the period of the misconduct, the claimant suffered from chronic alcohol dependency. That this incident occurred in the context of an arrest for drunk driving makes the nexus between the wrongful conduct and alcohol self-evident.

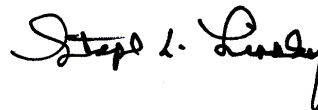
Since the employer has offered no evidence to show that the claimant's misconduct was deliberate or wilful, we conclude that the claimant's inability to control his alcoholism was involuntary and that it constituted mitigating circumstances within the meaning of Shepherd.

Therefore, we conclude as a matter of law that the claimant did not voluntarily leave his employment, and he may not be disqualified under G.L. c. 151A, § 25(e)(1). We further conclude that the claimant has shown circumstances which mitigate a finding of deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending [November 20, 2010], and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman



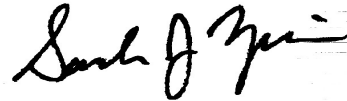
Stephen M. Linsky, Esq.
Member

¹ The claimant's testimony about his alcohol dependency, while not explicitly incorporated into the review examiner's findings, 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).

*** DISSENT ***

The Board concludes that the connection between the claimant's wrongful conduct and alcohol is self evident. The claimant's wrongful conduct here, however, was unrelated to his employment. The claimant was not at work when he drove recklessly and lost his commercial driver's license. I agree that Shepherd is not an absolute defense to disqualification, but I would interpret the decision to require a direct nexus between the wrongful conduct and the claimant's separation from employment. Only then is it appropriate to consider whether the conduct was caused by a claimant's uncontrollable compulsion to drink and whether the claimant is taking steps to overcome this compulsion. In this case, the Olmeda decision is controlling and the claimant should be denied benefits under G.L. c. 151A.

For the foregoing reasons, I respectfully dissent.



Sandor J. Zapolin
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING - [October 31, 2011]

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 30, 2011]