

BR-125248

CLAIMANT APPELLANT:
Hearings Docket #626397

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Christopher P. Renaud, 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 resigned from his position with the employer on July 14, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 25, 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 December 5, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer, or urgent, compelling, and necessitous reasons, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the claimant had good cause for leaving his employment, when after repeatedly requesting over several months that the employer provide fork truck training and certification as required by federal law, he refused the employer's request that he drive the fork truck without the proper training and certification, and left his job.

Findings of Fact

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

1. The claimant worked full-time as a foreman for the employer from 04/28/92 until his separation on 07/14/12.
2. The claimant quit his job in the middle of his shift on 07/14/12 due to his unwillingness to operate a fork truck without his completion of a training course.
3. The claimant had operated a fork truck without any training or certification throughout the entirety of his employment.
4. In April 2012, during an annual safety meeting, the employer discussed a training program necessary for employees ("hoisters") who operate heavy machinery. The training program was not applicable to general operation of fork trucks.
5. The claimant inquired about training for fork truck usage from April 2012 until his separation in July.
6. On 07/14/12 the vice president asked the claimant to drive the fork truck across the street to unload a trailer. The claimant refused, and left his job at that time.
7. The claimant made no effort to preserve his employment prior to leaving on 07/14/12.
8. The claimant's job was not in jeopardy at the time he left his job.
9. Work remained available to the claimant at the time he left his job.

Ruling of the Board

The Board adopts the review examiner's findings of fact, with the exception of findings of fact #4 and #7, as we discuss below. In so doing, we deem the balance of 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)(1), 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 (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 . . .

The review examiner found that the claimant quit his job in the middle of his shift because he was unwilling to operate a fork truck without completing a training course. The claimant had operated a fork truck without any training or certification before April, 2012, when during an annual safety meeting, the claimant learned about a required training program for employees that operate heavy machinery. We reject the review examiner's finding of fact # 4, as contrary to the facts and the law. Finding of fact #4 contradicts 29 CFR 1910.178(1) which sets forth the OSHA safety requirements for use of fork trucks and requires forklift safety training and certification. Employers must ensure that each powered industrial truck operator is competent to operate a powered truck safely, as demonstrated by the successful completion of training and evaluation. The regulation sets forth detailed rules for the training program and its content. It is most significant that the employer also testified that certification is indeed required for driving the fork truck and that certification is required by the employer's insurance company.¹

The review examiner found that after learning about training and certification for fork truck operators at an employer safety meeting, the claimant asked the employer for training from April 2012 until his separation in July. However, the review examiner disqualified the claimant for his unwillingness to operate a fork truck without training and certification. We reject the review examiner's finding of fact #7, that the claimant made no effort to preserve his employment, as contrary to the facts. The claimant made repeated attempts to preserve his employment when he requested training and certification numerous times. We conclude that the claimant left his employment for good cause after the employer continued to require him to drive a fork truck without training or certification, contrary to OSHA workplace safety requirements.

We, therefore, conclude as a matter of law that the claimant had good cause attributable to the employer for leaving his job in accordance with G.L. c. 151A, § 25(e)(1).

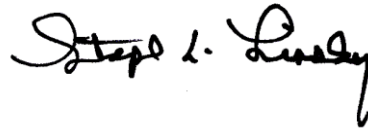
¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 28, 2012, and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman

**BOSTON, MASSACHUSETTS
DATE OF MAILING -**



Stephen M. Linsky, Esq.
Member

**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- May 30, 2013