Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0008 9771 96

BOARD OF REVIEW DECISION

0008 9771 96 (May 15, 2014) – A claimant, who could only work weekdays in the morning and until 3:00 p.m. due to childcare responsibilities, had good cause to restrict her work search where her work history showed that work was available within these restrictions. Given that the claimant made $13.00 per hour, a one-hour shift at a location far away from her home was not an offer of suitable employment.

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 filed a claim for unemployment benefits with the DUA, effective May 5, 2013. Benefits were approved in a determination issued on September 27, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by an agent the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 31, 2013.

Benefits were denied after the review examiner determined that the claimant was refusing hours offered by the employer and so she was not in total or partial unemployment, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). 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 allow the claimant an opportunity to testify, as well as to take more specific testimony as to how the claimant obtained her work and what type of work she performed prior to the establishment of her May, 2013 claim. Both parties 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 before the Board is whether the review examiner's initial conclusion that the claimant was not in unemployment, pursuant to G.L. c. 151A, §§ 29(a), 29(b), and 1(r), is supported by substantial and credible evidence and free from error of law, where the consolidated findings of fact show that the claimant was accepting all hours of suitable work from the employer, her schedule was restricted due to her childcare obligations, and she based her newest unemployment claim on ongoing part-time work.

Findings of Fact

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

1. The claimant works as a Certified Nursing Assistant for the employer, a homecare provider. The claimant began work for the employer in 2005.

2. The claimant has five children.

3. At the time she began her employment all of her children were school age.

4. The claimant was hired as an as-needed employee. She was not given a permanent schedule and her assignments changed frequently.

5. The claimant earned $13.00 per hour.

6. When the claimant began her employment she informed the employer she could only work weekdays, from morning until 3 pm, because she needed to care for her children.

7. The employer's administrative workers contact the claimant for work.

8. The claimant received only morning and early afternoon assignments in 2005 and 2006.

9. In 2007 the claimant was assigned to a single patient who she cared for Monday through Friday from 8 am to 2 pm.

10. She also cared for the patient every other Friday beginning at 8 pm and ending at 8 am Saturday.

11. The claimant's husband cared for their children the Friday nights she worked.

12. She worked alternating weeks of 30 and 40 hours.

13. During the five years she was assigned to the patient she did not care for any other patients.

14. On May 9, 2012, the patient passed away.

15. After the patient passed away the claimant continued to work for the employer. She usually was assigned to one patient each day for approximately two hours. She worked approximately 8 to 12 hours per week.

16. The employer did not ask her to work nights or weekends.

17. After May 9, 2012, through the end of 2012, and in 2013, the claimant refused one or two shifts, because the request was made on short notice, the duration

of the assignment was only one hour, and the assignment was in [Town A], while the claimant lives in [Town B]. The exact dates of these shifts are not known.

18. She did not refuse any other shifts.

19. The claimant filed for benefits on May 16, 2012. She was determined to be monetarily eligible with a benefits year beginning May 6, 2012.

20. On May 5, 2013, a new claim for benefits was opened.

21. The effective date of the claim is the week beginning June 9, 2013.

22. The employer witness at the hearing was the employer's hearings agent. He was not present at the employer during the time the claimant worked there. Therefore the claimant's direct testimony regarding the circumstances of her employment is accepted as credible.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review, and as discussed more fully below, the Board adopts the review examiner's consolidated findings of fact with the exception of Finding of Fact # 22. Although the review examiner included this as a numbered finding of fact, the information noted therein is actually a credibility assessment. Thus, we treat it as such and not as a finding of a fact. In adopting the remaining findings as facts, we deem them to be supported by substantial and credible evidence.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

> "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

> "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week….

After the initial hearing, at which only the employer's agent offered evidence, the review examiner concluded that, as of June 9, 2013, the claimant was not in total or partial unemployment. He came to this conclusion based on his findings that the claimant was refusing hours offered to her by the employer.

At the remand hearing, the claimant explained that she restricts herself to certain hours due to childcare responsibilities. Specifically, she can only work weekdays in the morning and until 3:00 in the afternoon. Based on the review examiner's findings that she needed to care for her children, we conclude that the claimant had good cause for restricting herself to the schedule that she did. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 22-24 (noting that domestic responsibilities or personal reasons may constitute "good cause" to restrict availability to certain hours of the day). In addition, the claimant's work history with this employer shows that she has not restricted herself to such an extent that she has removed herself form the labor force. *See* id. at 25. She worked a full-time schedule from 2007 until 2012 and thereafter worked a steady eight to twelve hours per week. Work was available for her even with her restrictions.

Although the claimant is not necessarily disqualified based on her restrictions, she may be disqualified if she is refusing suitable work offered by the employer. Essentially, this was the basis for the review examiner's original decision to deny benefits. However, the consolidated findings of fact show that the claimant did not refuse suitable work. She declined work on two occasions only. The assignments were offered to her on short notice, for an extremely limited amount of time (one-hour shifts), and at locations far away from the claimant's residence in [Town B]. Given that the claimant made $13.00 per hour, a one-hour shift located a long distance from her home was not an offer of suitable employment. Therefore, the claimant is not disqualified on the basis that she is refusing suitable work.

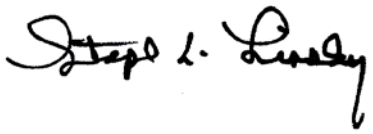
Finally, we note that the claimant is also not disqualified during the weeks in which she remained working for the employer, pursuant to Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984). Under Mattapoisett, a claimant who bases a claim on on-call employment will not be considered to be in partial unemployment, under G.L. c. 151A, §§ 29(b) and 1(r)(1), in any week in which the claimant works on-call and part-time after the establishment of the claim.

In this case, a new claim was opened for the claimant, effective May 5, 2013. This claim was based, for the most part, on employment the claimant had after the claimant established a claim in May, 2012. The review examiner found that after May, 2012, the claimant continued to work as assigned by the employer. She worked with different patients but at a constant eight to twelve hours per week. We conclude that the claimant was working part-time, rather than on-call, with a schedule that had some variation from week to week. The consistent nature of the work indicates that the claimant expected to work each week and did so for a lengthy period of time. Therefore, the claim which was effective May 5, 2013, was not based on part-time, on-call employment. Consequently, Mattapoisett does not apply to this case.

We, therefore, conclude as a matter of law that the review examiner's initial conclusion that the claimant was not entitled to benefits, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), was based on error of law, because the consolidated findings of fact indicate that the claimant accepted all

suitable work available to her and based her newest claim on work which was part-time and variable, rather than strictly on call in nature.

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



BOSTON, MASSACHUSETTS
DATE OF DECISION - May 15, 2014

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.

SF/rh