0012 3564 87 (Oct. 10, 2014) – A laid-off commercial driver and carpenter was not disqualified pursuant to G.L. c. 151A, §§ 29 and 1(r), when he declined to accept additional hours of work from his part-time subsidiary employer. The offered work was not suitable full-time employment, because it was several dollars less per hour than his customary work and outside of his usual occupational field.

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Issue ID: 0012 3564 87
Claimant ID: 10194924

BOARD OF REVIEW DECISION

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 on December 20, 2013, after being laid off by his full-time employer. On February 5, 2014, the agency issued a determination approving the claimant to receive benefits.[1] The employer appealed the determination to the DUA Hearings Department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 19, 2014.

Benefits were denied after the review examiner determined that the claimant did not work full-time for the employer, even though full-time work was available and he had worked full-time in the past, and, thus, he was disqualified, 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 provide evidence, as well as to obtain additional evidence as to the claimant's full-time job and usual occupation. 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 before the Board is whether the review examiner's conclusion that the claimant is not in unemployment beginning December 15, 2013, is based on substantial and credible evidence and free from error of law, where the claimant's full-time job and training related to carpentry

[1] The determination said, in part, "The offer of full-time work is not considered suitable on a full-time basis because it does not permit the continued use of the claimant's highest skill. Therefore, the claimant is in partial unemployment . . . ."

and his job with the employer, with whom full-time hours were available, was subsidiary, part-time work in the human services field.

Findings of Fact

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

1. On 12/20/13 the claimant filed an initial claim for unemployment benefits listing the instant employer and [Employer #2] as interested party base period employers. The claimant filed this claim because he was laid off from his full-time employer. (2)

2. The claimant began working full-time for [Employer #2] on 7/20/10 as a carpenter/driver where he was paid $13.25 per hour, and he was employed in this capacity until being laid off on 12/19/13. (1a) (5a) (5b)

3. The claimant possesses a commercial driver's license and his background and training is as a carpenter.(6)

4. The claimant was made aware of part-time availability with the instant employer after attending a job fair where the instant employer [was] advertising for part-time positions.

5. On 2/20/11 the claimant was hired to work for the instant employer as a residential support specialist on a part-time per diem basis to work Friday night from 11 p.m. to 9 a.m. and Saturday night from 11 p.m. to 9 a.m.; and any other hours that he makes himself available to work. The claimant was paid $10.29 per hour. The claimant began work for the instant employer after he began work with [Employer #2]. (7)

6. The claimant sought out part-time work with the instant employer in hopes of being able to make some additional money. (7)

7. The claimant briefly requested full-time with the instant employer from 11/24/13 through 12/21/13, and the employer was able to give him full-time hours. The claimant believed that he could work both jobs full time. After working a week and a half he realized he could not work both jobs full time and so he informed the instant employer he would go back to part-time after he worked out his present schedule. The employer changed him back to part-time. The claimant did not reduce his schedule so that he could collect more unemployment benefits. (1) (3)

8. The employer has continued to have full-time hours available throughout the claimant's employment and he could have continued to work full-time for this employer. At the time of the hearing the claimant continues to work part-time for the instant employer. The claimant is not interested in full-time work for the instant employer because it does not pay as much as his regular full-time

job, and his background and training and usual occupation [are] in carpentry and driving. (6)

9. According to the computer records in the base period of this claim the claimant earned $25,847.46 with [Employer #2], and he earned $13,062 with the instant employer. (5c,5d)

10. It is the nature of the work with the instant employer that employees are offered additional work with not much advance notice. The employer does not have any record of the dates and hours that were offered to the claimant. (4)

11. The claimant continued to be able and available to work full-time after he filed his claim for unemployment benefits. He did take more hours with the instant employer when he was able to take those hours and he continued to look for suitable full time work in the area of carpentry/driver. (4a)

12. According to the computer records the claimant's benefit rate was computed to be $385.00 per week with an earnings exclusion of $128.33.

13. At the time of the hearing the claimant has served a waiting period with the week ending 12/28/13 and he was paid partial unemployment benefits for the week ending 1/5/14 through the week ending 3/15/14.

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 that the claimant is not entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact. In adopting the findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that, based on the subsidiary and unsuitable nature of the work for this employer, the claimant is in unemployment as of the week beginning December 15, 2013.

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….

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.

In her decision, the review examiner concluded that the claimant was not in unemployment beginning at the start of his claim for unemployment benefits, because he was not accepting full-time work from this employer even though it was available to him. As G.L. c. 151A, § 1(r)(2), indicates, however, a claimant need only be able and available for suitable work. Suitability itself "is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances." Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948). The Legislature has specifically provided that the suitability of employment shall be determined by considering several factors, including the training and experience of a worker and the worker's accustomed remuneration. *See* G.L. c. 151A, § 25(c); Pacific Mills, 322 Mass. at 349-350.

In this case, the review examiner found that, prior to filing his claim for benefits, the claimant was working full-time as a carpenter and driver for another employer. He worked for that employer longer than he worked for the employer in this case, and in that job he used skills which matched his training and background as a carpenter. He was also paid several dollars more per hour and paid more in total in his base period with the full-time employer than with the instant employer. Based on these factors, we conclude that the claimant's work with the instant employer was subsidiary to his full-time work with the other employer. This is, essentially, a classic case of a worker trying to make extra money by working part-time in addition to his regular job. Although the claimant worked for a very short time in a full-time capacity for the employer, he realized that working two full-time jobs was not feasible. He also wanted to focus on obtaining work in his usual and customary occupation. *See* Findings of Fact # 7 and # 8.

In light of the findings that the work for this employer was subsidiary to his full-time work, not in his usual occupational field, and offered less money that his customary work, the fact that the claimant chose not to work full-time for this employer is not disqualifying. An offer of full-time work from the instant employer was, essentially, unsuitable for him. The DUA's Service Representative's Handbook addresses this precise situation. Section 1130, with which we agree, is titled "Full-Time Offer to Part-Time Worker" and states:

> A part-time worker, employed on a subsidiary basis (i.e., as a second job), is laid off from his or her principal job and is offered full-time employment by the subsidiary employer. He or she refuses, saying that the part-time work does not use the same level of skill required by his or her previous full-time employment. Under these circumstances, the work is not considered suitable, because it does not allow the claimant to use his or her highest skill on a full-time basis. Approve this claim under §29(a) and §1(r).

Pursuant to this section of the handbook and our above discussion, the claimant is not disqualified, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r).

Finally, we note that the employer could obtain some relief of charges based on 430 CMR 5.05(1). That section provides as follows:

> Benefits for partial unemployment shall be charged in the same manner as for benefits in total unemployment, except that no charge shall remain against the account of any subsidiary employer who timely protests and who shows to the satisfaction of the Commissioner that it has continued to employ a claimant during the weeks of his claim to the same extent that it had previously employed him. In the event that the subsidiary employer is liable for payments in lieu of contributions, then the principal employer will be charged to the extent possible as provided in M.G.L. c. 151A, § 14(d)(3) prior to any later charges to the account of the subsidiary employer.

Here, the review examiner's findings of fact indicate that the claimant was employed part-time by the employer in his base period. After he filed his claim, the claimant continued to be employed in the benefit year at least to the same extent (and sometimes more) as in the base period. Therefore, the employer may be able to protest some charges to its account. To pursue this possibility, the employer may contact the agency and inquire as to the applicability of 430 CMR 5.05(1).

We, therefore, conclude as a matter of law that the review examiner's initial conclusion that the claimant is disqualified, under G.L. c. 151A, §§ 29 and 1, is based on an error of law, because the offer of full-time work from this employer was not suitable and the claimant, therefore, did not have to accept it.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 15, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 10, 2014

Paul T. Fitzgerald, Esq.
Chairman

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