

0014 0062 59 (Mar. 9, 2015) – A claimant, who turned down a number of hours per week from the employer at a location which she reasonably believed caused her health problems, was entitled to partial unemployment benefits. In light of other statutory provisions and applicable case law, we interpret G.L. c. 151A, § 1(r)(1) to permit a claimant to refuse unsuitable work.

Board of Review
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Issue ID: 0014 0062 59
Claimant ID: 10277053

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 from July 13, 2014 through September 26, 2014. 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 in July of 2014, and the effective date of her claim is July 13, 2014. On August 15, 2014, the DUA determined that the claimant was not eligible to receive benefits as of July 13, 2014, because work was available to her, and she requested a reduction to her schedule. 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 October 14, 2014.

Benefits were denied after the review examiner determined that the claimant asked for a reduction to her scheduled hours due to health concerns; but, since G.L. c. 151A “does not provide for a good cause reason to reduce one’s hours,” she was disqualified, under G.L. c. 151A, §§ 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 take additional evidence as to why the claimant decided to give up certain shifts offered to her and whether her unemployment claim was based primarily on “on-call” or per diem work. 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 before the Board is whether the review examiner’s conclusion that the claimant is not in partial unemployment from July 13 to September 26, 2014, is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant declined to work certain shifts because she believed that environmental conditions at

that specific work location were having a negative impact on her health and the claimant had continuous, ongoing work which was not obtained on an as-needed basis.

Findings of Fact

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

1. The claimant worked for a home health agency from April 3, 2013 to September 26, 2014 as a Home Health Aide.
2. In 2014, the claimant generally worked at two locations tending to five or six clients.
3. Employees obtained clients when offered by the employer. Once assigned, the client generally remained with the employee until the client or the claimant no longer wished or could not continue the relationship. The claimant did not receive daily or weekly calls from the employer.
4. All clients were generally allotted seven hours per week and scheduling was arranged between the employee and the client.
5. In the beginning of the claimant's employment, the claimant worked approximately thirteen (13) hours per week for the first few weeks, which increased to approximately eighteen (18) for the next few weeks; then to approximately twenty-eight (28) for the next several weeks; then decreasing to approximately twenty-one (21) for the next several weeks, with some fluctuation through the end of 2013.
6. In June of 2014, and after a year of working under certain conditions in one location, at which the claimant tended to five clients, the claimant determined that for health reasons, she can no longer continue working at that location.
7. The location is a nursing home located at [Address] in Springfield, Massachusetts. The facility houses over two-hundred residents.
8. The claimant believed there to be bed bugs at the facility. The claimant dealt with the issues by wearing extra layers of clothing, such as a fleece jacket, and she would leave her pocket book in the car. The claimant also never sat down in the facility. The claimant found that the facility had poor ventilation and due to wearing extra layers, the claimant sometimes overheated.
9. The claimant found the work to be stressful. The claimant sought treatment for stress/anxiety on March 14, 2014 and June 4, 2014. When being seen, the claimant did not attribute her stress/anxiety to the work location. The claimant's medical provider offered no advice on the working conditions due to being unaware.

10. For the week ending January 18, 2014, the claimant worked fifty-one (51) hours. For the week ending February 1, 2014, the claimant worked thirty (30) hours. For the week ending February 8, 2014, the claimant worked thirty-five (35) hours. For the week ending February 15, 2014, the claimant [worked] thirty-five (35) hours. For the week ending February 22, 2014, the claimant worked thirty-five (35) hours. For the week ending March 1, 2014, the claimant worked thirty (30) hours. For the week ending March 8, 2014, the claimant worked thirty-five (35) hours. For the week ending March 22, 2014, the claimant worked thirty-five (35) hours. For the week ending March 29, 2014, the claimant worked thirty-five (35) hours. For the week ending April 5, 2014, the claimant worked thirty-five (35) hours. For the week ending April 12, 2014, the claimant worked thirty-five (35) hours. For the week ending April 19, 2014, the claimant worked thirty-five (35) hours. For the week ending April 26, 2014, the claimant worked thirty-five (35) hours. For the week ending May 3, 2014, the claimant worked thirty-five (35) hours. For the week ending May 10, 2014, the claimant worked thirty-five (35) hours. For the week ending May 17, 2014, the claimant worked thirty-eight (38) hours. For the week ending May 24, 2014, the claimant worked forty (40) hours. For the week ending May 31, 2014, the claimant worked forty (40) hours. For the week ending June 7, 2014, the claimant worked thirty-three (33) hours.
11. The claimant worked forty hours or more per week on three occasions, between thirty-five and forty on one occasion and thirty-five hours or less on all other occasions.
12. After June 6, 2014, the claimant stopped working at the facility and as a result, her hours decreased.
13. For the week ending June 14, 2014, the claimant worked fifteen (15) hours. For the week ending June 21, 2014, the claimant did not work. For the week ending June 28, 2014, the claimant worked seven (7) hours. For the week ending July 5, 2014, the claimant did not work. For the week ending July 12, 2014, the claimant worked thirteen (13) hours. For the week ending July 19, 2014, the claimant did not work. For the week ending July 26, 2014, the claimant worked seven (7) hours. For the week ending August 2, 2014, the claimant worked seven (7) hours. For the week ending August 9, 2014, the claimant worked fourteen (14) hours. For the week ending August 16, 2014, the claimant worked seven (7) hours. For the week ending August 23, 2014, the claimant worked seven (7) hours. For the week ending September 6, 2014, the claimant worked fourteen (14) hours. For the week ending September 13, 2014, the claimant did not work. For the week ending September 20, 2014, the claimant worked thirteen (13) hours. For the week ending September 27, 2014, the claimant did not work. For the week ending October 4, 2014, the claimant worked fourteen (14) hours.
14. The claimant filed a claim for benefits on July 18, 2014 with an effective date of July 13, 2014.

15. The claimant last worked on or about October 3, 2014 due to her one remaining regular client of seven hours per week desiring to have a different Home Health Aide.
16. The claimant had two other base period employers. One was on-call, starting in June of 2010 and the last day working being in May of 2014 having earned \$2,604.56 in the base period. Another was part-time starting on December 1, 2012 and ending on July 31, 2013 having earned \$1,267.61 in the base period.
17. With the instant employer, the claimant earned \$16,784.50 in the base period.

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 is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment beginning July 13, 2014. Given that the claimant reasonably thought that the work conditions were causing her serious health concerns, she was not required to accept the work any longer, and she could still be considered to be in partial unemployment.

The review examiner found that in 2014, the claimant generally worked 30 to as much as 51 hours per week. Although she decided to reject certain work beginning June 6, 2014, she still continued to work for the employer consistently until she finally stopped working altogether in October of 2014. Therefore, for the period at issue before the Board, from July 13 to September 26, 2014, the issue is whether the claimant was in partial unemployment under G.L. c. 151A, §1(r)(1). *Compare* G.L. c. 151, § 1(r)(2) (providing that "total unemployment" covers situation in which individual has no remuneration or work in a given week).

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...For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

The claimant has the burden to show that she is in partial unemployment and, thus, entitled to benefits. The review examiner concluded that, although the claimant may have had good reason

to reject ongoing work at the rest home, the law “does not provide for a good cause reason to reduce one’s hours.” This legal conclusion is erroneous.

We think that the overall purpose of Chapter 151A requires us to interpret G.L. c. 151A, § 1(r)(1), to incorporate a requirement that the work lost be “suitable.” While it is true that G.L. c. 151A, § 1(r)(1), provides that there should be a penalty for an individual who loses remuneration “for *any* cause other than failure of his employer to furnish full-time weekly schedule of work,” the statute does not indicate that a claimant could be subject to a “lost time” penalty if remuneration is lost for refusing unsuitable work. The sister statutory provision, G.L. c. 151A, § 1(r)(2), which provides benefits to those in total unemployment, requires that a claimant not have worked or received any remuneration despite being able and available for suitable work. Thus, if unsuitable work is offered and refused, a claimant may still be in total unemployment.

Similarly, if a claimant has ongoing, part-time suitable work (and thus could be in partial unemployment) but rejects other unsuitable work, the claimant may still be in partial unemployment. This is so, in part, because “an individual need only be available for suitable employment which he has no good cause to refuse.” See Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 21 n. 1 (1980) (discussing the relationship between G.L. c. 151A, §§ 24(b) and 25(c), with regard to when a person can refuse work).

Here, the claimant can still be in partial unemployment if the nursing home work was or became unsuitable for her in mid-2014. See Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948) (noting that work can become unsuitable over a period of time if circumstances change). We think that the findings of fact indicate that the claimant reasonably believed that the work was causing her health problems. See Carney Hospital v. Dir. of Division of Employment Security, 382 Mass. 691 (1981). The review examiner found that the claimant needed to work with extra layers of clothing to protect her from bed bugs. She could also not sit down. There was poor ventilation, and the claimant became overheated while working.¹ Prior to giving up the shifts at the nursing home, the claimant saw a doctor for her anxiety regarding working in the nursing home. Given these working conditions, it was not unreasonable for the claimant to conclude that they were causing her harm. Therefore, the shifts at the nursing home had become unsuitable for the claimant and she had no obligation to continue to work them. Since the claimant accepted all suitable work available to her, she was in partial unemployment since July 13, 2014.

A claimant in partial unemployment, however, is not always entitled to receive benefits. If a claimant bases her claim primarily upon “on-call” work and continues that work into the benefit year, the person will not be in partial unemployment in a week in which she performs any services. See Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984). Although the review examiner’s initial decision described the claimant’s work with the employer as “per diem,” we conclude that a per diem or on call working relationship was not actually established here. The review examiner found that the claimant did not receive ongoing calls from the employer offering her work. On the contrary, the number of hours the claimant worked in 2014 was remarkably consistent, with only minor variations here and there. This

¹ The claimant testified at both the initial and remand hearings that she fainted at work due to the overheating problem.

indicates that the claimant had ongoing part-time (indeed, almost full-time) employment with the employer in her base period. Thus, even though the employer was her primary employer in the base period, and her claim is based primarily on the wages earned from the employer, the claimant is not subject to the rule announced in Mattapoisett, because the record shows that the work was not truly on call in nature.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant was not in unemployment beginning July 13, 2014, is not supported by substantial and credible evidence or free from error of law, because (1) the work offered by the employer at the nursing home became unsuitable for the claimant by June of 2014, and so (2) the claimant did not have to accept it any longer, thus establishing that (3) the claimant accepted all suitable work available to her since the start of her claim.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning July 13, 2014, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 9, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, 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)

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