

0018 3385 28 (Mar. 30, 2018) – Claimant only sought work by contacting his previous employer and his labor union, making no other work search efforts even though union rules permitted him to accept non-union work. These efforts did not meet the work search requirements of G.L. c. 151A, § 24(b).

Board of Review
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Issue ID: 0018 3385 28

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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective January 22, 2017. He then certified for benefits on that claim. On September 8, 2017, the DUA issued a determination finding the claimant eligible for benefits for the period beginning August 27, 2017, pursuant to G.L. c. 151A, §§ 29(b) and 1(r). The employer appealed the determination to the DUA hearings department. Both parties participated in a hearing on the merits. In a decision rendered on November 2, 2017, the review examiner reversed the agency's initial determination and denied benefits for the period beginning October 14, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 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 notify the parties that G.L. c. 151A, § 24(b), was also an issue in the case and to elicit more information about the claimant's union work search activities. Only the claimant participated in 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 eligible for benefits for the period beginning October 8, 2017, because he only sought work from one employer is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant has work experience as follows: 3.5 years in construction; a few months in retail; 2 years in manufacturing; a year in childcare; and ½ year in food preparation. The claimant studied electronics in school and, as part of his schooling, worked for an electronics manufacturer.
2. The employer manufactures pre-cast concrete. The claimant began working for the employer in 2014 as a full-time laborer.
3. The claimant is a member of a labor union. Since joining the labor union on December 22, 2014, the claimant has not worked at any non-union jobs.
4. Under union membership rules, the claimant is allowed to accept non-union work but is not required to do so.
5. If unemployed, the union places the individual on an out-of-work list. The union member is expected to call once a week to indicate s/he is still seeking work. The member must also continue paying monthly union dues.
6. The claimant opened an unemployment claim having an effective date of January 22, 2017.
7. In August 2017, the plant manager announced to the claimant and others that it had not received blueprints for the next job which meant there was no work from 8/22/2017 – 8/26/2017.
8. The claimant filed and received benefits for the week ending August 26, 2017.
9. The claimant returned to work on August 28, 2017 and worked through September 6, 2017.
10. On September 6, 2017, the claimant injured his finger (outside of work) and was only able to work light duty. Because the employer does not have any light duty jobs, the claimant began collecting disability insurance.
11. On September 8, 2017, the Department of Unemployment Assistance issued a Notice of Approval stating the claimant was eligible for part-time benefits for any week he worked less than full-time hours.
12. The claimant did not file for unemployment benefits for the weeks ending September 2, 2017 through October 7, 2017.
13. The claimant's doctor cleared him to return to work without restriction on October 9, 2017.

14. The claimant asked the employer's human resources representative to return him to work on October 9, 2017. She replied business was slow and she had no work for him.
15. The claimant began certifying for unemployment benefits for the week ending October 14, 2017.
16. Since October 9, 2017, the claimant has called the union weekly to indicate he is still seeking work. The weekly call and payment of monthly dues is all the claimant was required to do to maintain his good standing on the out-of-work list. The claimant continues to maintain his good standing on the union's out-of-work list.
17. Since October 9, 2017, the claimant has also maintained regular contact with the employer asking when additional work will be available. The employer has had no work available to give the claimant.
18. In October, the claimant did not look for non-union work because he believed he would be shortly returning to work with this employer although he did not have a return to work date.
19. The claimant contacted the union about going to school. The union sent him information and he investigated the possibility of attending school.
20. At the end of November and beginning of December 2017, the employer laid off additional workers.
21. On or about mid-December, the claimant spoke with the employer's plant manager about the possibility of returning to work. The plant manager told him there were no jobs coming up in the near future and he did not expect more work until March 2018.
22. After December 25, 2017, the claimant began to actively seek work outside of the union. At the end of December and in January, he applied to: a large department store chain for a job as a stocker or cashier; two fast food businesses for food preparation positions; and a tractor supply store and two automotive parts stores for cashier positions. In February, he applied to: two different fast food franchises and a restaurant for food prep or server positions; another retail store for cashier positions; and he visited an electronics manufacturer for whom he had previously worked asking about work.

Credibility Assessment:

At the reconvened hearing, the claimant testified he began looking for work outside of the union in October. However, at the initial hearing on October 30, 2017, the claimant testified he was not looking for work outside his union. The claimant's testimony at the initial hearing was more persuasive since it was contemporaneous

with the time being discussed. In addition, the claimant not having performed any non-union work since he joined the union in 2014 further suggests he was in the habit of only seeking work through his union and corroborates his testimony.

At the reconvened hearing, the claimant listed several businesses at which he had sought work; and he estimated the periods within which he had done so. However, the claimant did not keep a detailed record (including such information as dates and individuals contacted) of his job search. At the hearing, he listed 3 employers as having been contacted in the October/November time period, and one in November or December. The claimant listed 11 other businesses he contacted after Christmas through the date of the reconvened hearing in February.

In summary, it was clear from the initial hearing the claimant only sought work through his union through at least October. It was not until December that the employer finally informed the claimant there would be no additional work for at least a few months. The claimant's testimony suggests the preponderance of his job search efforts occurred after Christmas. I conclude the claimant began actively seeking non-union work at the end of December.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe that the consolidated findings support the conclusion that, for the period beginning October 8, 2017, though December 23, 2018, the claimant may have been in total unemployment pursuant to G.L. c. 151A, § 29(b) and § 1(r), but that he did not meet the work search requirements of G.L. c. 151A, § 24(b). These same findings also support the conclusion that, beginning December 24, 2017, the claimant met the requirements of all of the above sections of law.

G.L. c. 151A, § 29 authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) "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....

(2) "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.

The original determination in this case was that the claimant was eligible for benefits for the period beginning August 27, 2017, pursuant to G.L. c. 151A, §§ 29(b) and 1(r). The findings indicate that, from August 28, 2017, through September 6, 2017, the claimant worked full-time hours for the employer. Therefore, the claimant cannot be considered to be in either total or partial unemployment for this period of time. For the period of September 6, 2017, through October 8, 2017, the claimant did not perform any work at all but was also not physically capable of performing work in his customary occupation. Therefore, he cannot be considered to be in either total or partial unemployment for this period of time either. Notably, DUA records indicate that the claimant did not request benefits for the weeks of August 27, 2017, through October 7, 2017, and there appears to be no dispute about his eligibility for these weeks.

However, the findings state that the claimant's doctor cleared him to return to work beginning October 9, 2017, and he was once again capable of performing work at that time. The findings also show that the claimant promptly contacted the employer and his labor union to request to return to work at that time, but no work was available. The claimant also resumed requesting unemployment benefits with the week ending October 14, 2017. The findings indicate that the claimant has been capable and available for full-time work since that time, but that neither his employer nor labor union have had work available for him. Therefore, beginning the week ending October 14, 2017, the claimant has been in total unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r).

However, there is still a question as to whether the claimant has made a sincere effort to search for work since that time. In order to be eligible for unemployment benefits, a claimant must be capable of, available for, and actively seeking work for each week in which benefits are claimed. This requirement is taken from G.L. c. 151A, § 24(b), which provides in pertinent part as follows:

[An individual, in order to be eligible for benefits under this chapter, shall] . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any
other occupation for which he is reasonably fitted

Under G.L. c. 151A, § 24(b), claimants are expected to conduct a bona fide work search by contacting a variety of employers using a variety of methods. In this case, the review examiner concluded that, prior to Christmas (the week ending December 30, 2017), the claimant's only work search contacts were the instant employer and his labor union. A member of a labor union may satisfy the requirements of G.L. c. 151A, § 24(b), by notifying the union of their unemployment, staying in good standing with the union, and adhering to any other requirements imposed by the union. However, this exception to the normal requirements of G.L. c. 151A, § 24(b), only applies to claimants whose unions limit them to obtaining work via a union hiring hall or otherwise prohibit them from performing non-union work. *See* DUA Service Representative Handbook § 1052. The findings state that the claimant's labor union allows him to accept non-union work. Therefore, the claimant cannot satisfy the requirements of G.L. c. 151A, § 24(b) solely by requesting work from the instant employer and his labor union, and he is ineligible for benefits for the weeks of October 8, 2017, through December 23, 2017.

The review examiner found that the claimant did in fact begin regularly seeking work from other employers around Christmas. Based on this, and his detailed descriptions of the positions and

efforts he has made since around that time, we conclude that the claimant meets the requirements of G.L. c. 151A, § 24(b), beginning the week of December 24, 2017.

We note that the review examiner did not credit the claimant's testimony that he has been regularly seeking work from other employers since sometime in October, 2017. In choosing not to credit this testimony, the review examiner noted the claimant's testimony to the contrary during the original hearing, his lack of detailed work search logs, and his testimony that he believed that he would promptly be returning to work with the instant employer until being informed otherwise in December 2017. The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). Such credibility determinations are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. Even if we were to reach a different conclusion, we must accept the review examiner's findings, because they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence."). On the record before us, we see no reason to disturb the review examiner's credibility determination.

The review examiner's decision is affirmed in part and reversed in part. The claimant not entitled to benefits for the weeks ending October 14, 2017, through December 23, 2017. The claimant is entitled to receive benefits beginning December 24, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

JRK/rh