

The claimant turned down work from her part-time employer on certain days in order to engage in work-search activities. Given the nature of the part-time work – the employer could not guarantee work for the claimant – we find that it is an “odd job” that should not interfere with the claimant’s work search. Thus, lost time charges will not apply to any days in which the claimant turned down this work in order to conduct work-search activities.

**Board of Review
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Issue ID: 0018 8829 44

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Danielle Etienne, a review examiner of the Department of Unemployment Assistance (DUA), to award partial unemployment benefits, but apply lost time charges. 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 on November 30, 2015. On August 4, 2016, the DUA issued a Notice of Disqualification, stating that, pursuant to 430 CMR 4.04(6), she was subject to lost time charges for refusing additional hours of work from the instant part-time employer. The notice further explained that the amount of money the claimant would have earned would be deducted from her weekly benefit amount. 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 to apply lost time charges in a decision rendered on October 20, 2016. We accepted the claimant’s application for review.

Lost time charges were applied after the review examiner determined that the claimant refused work on eight days and, thus, was subject to a reduction to her benefits, under G.L. c. 151A, §§ 29(b), 1(r), and 430 CMR 4.04(6).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. Neither party 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.

¹ Although not cited by the review examiner, 430 CMR 4.04(6) is the relevant regulation governing the application of lost time charges.

The issue before the Board is whether the review examiner's conclusion that the claimant is subject to lost time charges, under G.L. c. 151A, §§ 29(b), 1(r), and 430 CMR 4.04(6), is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant refused work from the employer on eight occasions so that she could engage in job search activities.

Findings of Fact

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

1. The claimant opened a claim for unemployment insurance benefits with an effective date of November 29, 2015.
2. The claimant worked as a substitute teacher for the employer from February 2013.
3. The claimant is still employed [by] the employer.
4. The claimant's rate of pay is \$80.00 per day for the instant employer.
5. While employed by the employer, the claimant obtained full-time temporary employment with another employer from August 6, 2015 through November 2015.
6. The claimant notified the employer's Coordinator that she would not be available to work due to the full-time temporary employment until the end of November 201[5].
7. For the period beginning December 6, 2015, the employer did not contact the claimant for work.
8. In early December 201[5], the claimant contacted the Coordinator and inquired regarding why the instant employer had not contacted her for work. The Coordinator replied that the claimant's name was on the unavailable list and that she would place the claimant's name on the available list.
9. On December 16, 2015, December 17, 201[5], December 18, 2015, February 11, 2016, March 3, 2016, March 9, 2016, March 10, 2016, March 21, 2016 March 23, 2016, March 31, 2016, [and] April 1, 2016, the employer offered work to the claimant.
10. On December 16, 2015, December 17, 201[5], December 18, 2015, February 11, 2016, March 3, 2016, March 9, 2016, March 10, 2016, March 21, 2016 March 23, 2016, March 31, 2016, [and] April 1, 2016, the claimant refused work from the employer due to the claimant attending various job search events such as job interviews, seminars and networking event[s].

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is subject to lost time charges is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence.

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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. 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.

Also relevant in this appeal is 430 CMR 4.04(6), which provides as follows:

The cash value of time lost for reasons other than failure to furnish full-time work shall be determined by multiplying the average hourly earnings for the week by the number of hours lost. If it is not possible to ascertain the average hourly earnings for the week of such "lost time", such lost earnings shall be computed at four percent of the benefit rate for each hour lost.

We agree with the review examiner's conclusion that the claimant is in partial unemployment while working part-time for the instant employer. Therefore, we will focus our decision on the application of lost time charges to the claimant's unemployment benefits, which is the part of the decision that the claimant is appealing.

The review examiner found that the claimant turned down work offered by the employer on eight days because she was engaging in job search activities, such as job interviews, seminars, and networking events. She also concluded that the claimant should be charged lost time for the days on which she turned down work in order to engage in these work search activities. The effect of the application of lost time charges was that the claimant's benefits were reduced by the amount of money she would have earned each of the days she turned down work (\$80.00 per day).

Pursuant to G.L. c. 151A, § 24(b), claimants must be capable of, available for, and actively seeking work while collecting unemployment benefits. Claimants are required to engage in a

productive job search that is likely to lead to permanent full-time employment. Section 1035B of the DUA's Service Representatives Handbook offers some useful guidance in the situation at hand. That section states that a claimant who performs part-time odd jobs may continue to receive benefits as long as the work does not interfere with an active work search. Given that the claimant's job with the employer is substitute teaching, which is thus part-time work that is not guaranteed, it is similar in nature to an odd job. Since the claimant turned down work with the employer on eight days in order to engage in work search activities to obtain suitable full-time employment,² as required by the agency in order to keep her benefits, we will not impose lost time charges for these days. Had the claimant refused work in order to engage in activities that made her unavailable for work and did not promote her work search, such as vacationing, lost time charges would apply for any such period. Here, since the employer did not establish any specific dates on which the claimant was clearly offered work that she refused for reasons other than engaging in work search activities, no other lost time charges shall apply to the claimant's unemployment benefits.

We, therefore, conclude as a matter of law that the claimant is in partial unemployment while working part-time for the instant employer, and she is not subject to any lost time charges under G.L. c. 151A, § 29(b), G.L. c. 151A, § 24(b), or 430 CMR 4.04(6).

² According to the claimant's undisputed testimony at the hearing, her primary occupation is as a pharmacist.

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision that concluded that the claimant was in partial unemployment. However, we reverse the part of the decision that subjected the claimant to lost time charges. The claimant is not subject to lost time charges because the record before us establishes that she turned down work on certain days in order to engage in work search activities, and this is not a circumstance under which the agency will apply lost time charges, as that would be contrary to G.L. c. 151A, § 24(b), which requires claimants to actively search for work.

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 23, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**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.

SVL/rh