

The claimant is exempt from the requirements that she be available for work and accept suitable work specified in G.L. c. 151A, § 29(a) and 1(r)(2) during the period for which she was approved for training benefits under G.L. c. 151A, § 30(c). She is not subject to lost time charges for work she turned down during a partial unemployment week because the number of hours she turned down is unknown, and, therefore, we cannot calculate the amount of lost time charges.

Board of Review  
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Issue ID: 0019 0474 96

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by A. Williams, 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 June 21, 2016, which was approved in a determination issued on August 9, 2016. 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 November 29, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in partial nor total unemployment and, thus, 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 obtain additional testimony and other evidence pertaining to work offered to the claimant after she was cleared to return to work. 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 on appeal is whether the review examiner's conclusion that the claimant was neither in partial nor total unemployment, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), because she refused work offered to her is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant turned down work mainly because she was in school full-time.

### **Findings of Fact**

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

1. The claimant has worked as a Licensed Practical Nurse for the employer, a skilled living facility, from 7/22/15 through the time of filing for unemployment benefits. She has not been separated from her employment.
2. The claimant had been hired to work full-time. In March of 2016, the claimant requested a leave of absence that was denied because she was not eligible for FMLA since she had not been there a full year. The employer offered to keep her on as a full-time employee so she could continue to maintain her insurance while she was on an unpaid medical leave.
3. The employer was not able to guarantee her full-time position upon her return to work, so they offered her to return as a per diem employee. The claimant agreed that after her leave she would return as a per diem employee.
4. The claimant went out on medical leave of absence from 3/21/16 until 6/9/16 due to mental health issues.
5. The claimant returned to work on 6/9/16. She provided the Director with a return-to-work note from her doctor. The claimant's doctor indicated in the note that she could return to work without restrictions as of 6/9/16.
6. The claimant's employment status changed from full-time to a per diem/on call licensed practical nurse on 6/9/16. The claimant was aware that this would be the case prior to her returning, because she had been told by the Director.
7. Between 6/9/16 and 9/6/16 the claimant was offered several different shifts. The Resident Care Director specifically offered just the claimant the following shifts, an evening shift on 7/25/16 which the claimant declined, indicating to the employer she had to move out of her apartment (Exhibit 9, page 1); on 8/23/16, the claimant was offered the morning shifts for 9/3/16 and 9/4/16, 8 a.m. to 12 p.m. (Exhibit 9, page 2) The claimant declined both shifts indicating she started school full-time so her availability was limited; on 8/26/16, the claimant was offered a morning shift on 9/4/16, 9/17/16 and 9/25/16, [and] she was also offered evening shifts for 9/15/16, 9/16/16, 9/17/16 and 9/19/16; the claimant never responded to the text message offering the seven shifts.
8. The claimant did restrict her availability with the refusal of shifts offered between 6/9/16 and 9/6/16.

9. The employer indicated and the claimant was aware of the job duties, hours, wages and location of each of the shifts that were offered between 6/9/16 and 9/6/16.
10. The claimant was approved for training benefits under Section 30 for the period of 9/7/16 through 12/23/16.
11. The claimant is still a per diem employee with this employer.
12. The claimant last work worked per diem on 8/9/16.

### Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the original 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. In adopting these findings, 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.

Also relevant in this appeal is G.L. c. 151A, § 29(b), which 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 remand, the review examiner found that the employer reduced the claimant's schedule from full-time to on-call when she returned from a medical leave of absence on June 9, 2016, because it could not hold her full-time job open while she was away. In her original decision, the review examiner concluded that because the claimant did not accept all of the on-call work offered by the employer, she was not in unemployment and, therefore, not entitled to benefits, under G.L. c. 151A, §§ 29(a), 29(b) and 1(r). We disagree with her conclusion with respect to all of the weeks at issue.

The review examiner's consolidated findings and the totality of the record before us indicate that, between June 9, 2016, and June 26, 2016, the employer did not offer the claimant any work. Since the employer did not offer the claimant any work during this period, and there is no indication in the record that she performed any other work or received remuneration, or that she was not able and available for work, we conclude that, pursuant to G.L. c. 151A, §§ 29(a) and 1(r)(2), she was in total unemployment from the start of her claim through the week ending June 25, 2016. The record before us further indicates that between the weeks ending July 2, 2016, and August 13, 2016, the claimant worked for the employer on June 27, June 29, July 6, July 19, July 15, July 20, July 27, July 28, and August 9.<sup>1</sup> Since the claimant was paid \$25.00 per hour for this work, and she did not work more than two shifts for any of the weeks ending July 2, 2016, July 9, 2016, July 16, 2016, July 23, 2016, and August 13, 2016, we conclude that, pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), the claimant was in partial unemployment during those weeks, as she worked less than a full-time schedule of hours, accepted all available work, and earned less than her weekly benefit rate plus earnings disregard ( $\$635.00 + \$211.67 = \$846.67$ ).

During the week ending July 30, 2016, the claimant worked two shifts for the employer and the review examiner found that she turned down a shift for July 25, because she was moving out of her apartment. When a claimant in partial unemployment turns down some work during a particular week, we typically apply lost time charges pursuant to 430 CMR 4.04(6).<sup>2</sup> Here, because it was not specified how many hours of work were offered to the claimant for the shift on July 25<sup>th</sup>, we cannot calculate the lost time charges and, therefore, will not apply them. Thus, the claimant is entitled to partial benefits during the week ending July 30, 2016. Since the claimant did not work and was not offered any work during the weeks ending August 6, 2016, August 20, 2016 and August 27, 2016, she was in total unemployment those three weeks.

The review examiner found that the claimant last worked for the employer on August 9, 2016. The review examiner also found that the claimant turned down 8:00 a.m. to 12:00 p.m. shifts for September 3, 2016, and September 4, 2016, because she had begun school full-time. We note that the record before us indicates that the claimant began school on September 7, 2016, but based on her testimony, we can reasonably assume that she turned down the shifts for September 3 and September 4, at least in part because she was engaging in activities in preparation for the start of her classes. We conclude that the claimant's refusal of any work offered by the employer during the weeks ending September 10, 2016, (includes the September 4<sup>th</sup> refusal mentioned above) through December 24, 2016, shall not subject the claimant to either lost time charges or a full disqualification, because she was approved for training benefits for the period of September 7, 2016 through December 23, 2016. Approval for training benefits, under G.L. c. 151A, § 30(c), results in a waiver of the availability requirement and the requirement to accept suitable

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

<sup>2</sup> 430 CMR 4.04(6) 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.

work outlined in various parts of the unemployment statute, including G.L. c. 151A, §§ 29(a) and 1(r)(2). 430 CMR 9.01.<sup>3</sup> We are also provisionally awarding benefits to the claimant for the week ending September 3, 2016, subject to further adjudication on her eligibility by the agency.<sup>4</sup>

The review examiner's decision is reversed. The claimant was in partial unemployment and is entitled to benefits, if otherwise eligible, during the weeks ending July 2, 2016, July 9, 2016, July 16, 2016, July 23, 2016, July 30, 2016, and August 13, 2016. She was in total unemployment and is entitled to benefits, if otherwise eligible, from the start of her claim through the week ending June 25, 2016, during the weeks ending August 6, 2016, August 20, 2016, and August 27, 2016, and between the weeks ending September 3, 2016, and December 24, 2016. Finally, we take administrative notice of the DUA's determination to deny Section 30 training benefits to the claimant after December 23, 2016. In light of that determination, after December 23, 2016, the claimant is subject to all of the availability and acceptance of suitable work requirements outlined in the unemployment statute.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 28, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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.

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<sup>3</sup> 430 CMR 9.01 provides, in pertinent part, as follows:

The general goal of M.G.L. c. 151A, § 30(c) is to allow claimants to acquire the new skills necessary to obtain employment. M.G.L. c. 151A, §§ 24 and 25(c) pertaining to worksearch, availability for work, and acceptance of suitable work, are waived if a claimant is otherwise eligible for UI and is enrolled in approved training.

<sup>4</sup> The Board will open an issue at the adjudications level to determine the specific reason(s) why the claimant turned down the shift for September 3, 2016. Once that information is obtained, the agency will decide whether the claimant was in total or partial unemployment, or ineligible for benefits that week.

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