

**Because the claimant limited her availability to work to 10 hours a week in order to protect her partial unemployment benefit payments and to remain eligible for housing assistance, she was disqualified under G.L. c. 151A, §§ 1(r) and 29. These do not constitute valid circumstances to limit her availability to part-time work.**

**Board of Review  
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**Issue ID: 0020 4029 85**

## **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 award partial unemployment benefits with lost time charges. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse.

The claimant filed a claim for unemployment benefits with the DUA on December 13, 2016. On March 28, 2017, the agency re-determined the claimant's eligibility for benefits and concluded that she was not entitled to benefits, beginning December 18, 2016. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner implicitly concluded that the claimant was entitled to benefits, beginning December 11, 2016, but subjected the claimant to lost-time charges through the week ending April 29, 2017. We accepted the claimant's application for review.

The review examiner determined that the claimant refused work offered by the employer and was, therefore, subject to lost time charges pursuant to G.L. c. 151A, §§ 1(r)(1) and 29(b). 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 the work offered to the claimant. 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 original decision, which concluded that the claimant was in partial unemployment and subject to lost time charges, is supported by substantial and credible evidence and is free from error of law, where, after remand, the record shows that the claimant did not make herself available for full-time work.

### **Findings of Fact**

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

1. The claimant worked for the instant employer as a Licensed Practical Nurse (LPN) on a part-time basis, seven hours per week, beginning on 10/20/15 and she took some relief work as well. The claimant was paid \$21.27 per hour at the time she began working for the employer. On 6/25/17, her rate of pay was increased to \$21.70 per hour.
2. On 12/13/16, the claimant filed an initial claim for unemployment benefits. The benefit year of this claim is effective beginning 12/4/16 with a benefit year end date of 12/2/17.
3. On the claim filed 12/13/16, the claimant established a weekly benefit rate of \$576.00 with an earnings disregard \$192.00.
4. On the claim filed on 12/13/16, the primary base period begins on 10/01/15 and ends on 9/30/16.
5. The claimant worked for the instant employer and several other employers during the base period.
6. The claimant began a full-time position unrelated to the instant employer in October 2016, and she became separated from this employer in December 2016. The claimant did not work for the full time employer during the base period.
7. Since 2013 and during the entire base period, the claimant worked for the instant employer working part-time seven hours per week dispensing medications to a client in the [Location A] facility.
8. As of 12/13/16, when her full-time position ended, the claimant continued to work her original seven hours per week and she was called when needed as relief.
9. The employer communicated available hours to the claimant via text or by telephone.
10. According to the employer's records, the claimant was offered the following and did not accept the hours.

**Dates**

**Hours**

12/22/16	7 a.m. to 3 p.m.
01/02/17	7 a.m. to 3 p.m.
01/12/17	7 a.m. to 3 p.m.
01/21/17	7 a.m. to 3 p.m.
01/22/17	7 a.m. to 3 p.m.
02/04/17	3 p.m. to 11 p.m.

02/04/17	4:30 p.m. to 9:30 p.m.
02/05/17	3 p.m. to 11 p.m.
02/09/17	7 a.m. to 3 p.m.
02/10/17	7 a.m. to 3 p.m.
02/18/17	7 a.m. to 3 p.m.
02/19/17	3 p.m. to 11 p.m.
02/23/17	7 a.m. to 3 p.m.
02/23/17	Noon to 3 p.m. (The claimant accepted this shift. The appointment was subsequently canceled for the client, but the employer offered the claimant to work the shift. She declined because she was attending a wake.
03/04/17	7 a.m. to 3 p.m.
03/18/17	7 a.m. to 3 p.m.
03/19/17	7 a.m. to 3 p.m.
03/19/17	3 p.m. to 11 p.m.
04/04/17	9 a.m. to 12 p.m.
04/14/17	10 a.m. to 1 p.m.
04/15/17	7 a.m. to 3 p.m.
04/20/17	7 a.m. to 3 p.m.
04/30/17	7 a.m. to 3 p.m.
05/04/17	7 a.m. to 3 p.m.
05/08/17	7 a.m. to 3 p.m.
05/10/17	8 a.m. to 11 a.m.

11. On 12/27/16, the claimant informed the nursing supervisor that she had filed a claim for unemployment and as of that date, she was only available for 10 hours per week. The claimant was limiting her hours of work to ten hours in order to be eligible for partial benefits [and] so that she could continue to be eligible for financial assistance for her housing.
12. According to the claimant's medical records, the respiratory issues that the claimant was having in December, 2016, and in January, 2017, were diagnosed on 1/10/17 as an upper respiratory infection and emphysema (which had been diagnosed in 2012).
13. According to the employer's notes, on 12/27/16, the claimant texted the employer, "I have made an unemployment claim and can only work 10 hours a week."
14. According to the employer's notes, on 1/9/17, the claimant texted the employer, "Got a cold. Going to Dr. today. Will get back to you."
15. According to the employer's notes, on 1/12/17, the claimant texted the employer, "I have upper respiratory infection. Dr. not treating until pulmonary evaluation. I will let you know."

16. The doctor did not advise the claimant at any point, as of 12/1/16 [sic], not to work under certain conditions because of her health or a concern for her patients.
17. The employer does not have any rules that employees cannot work if they have had a fever, until the fever has been over for 24 hours. The employer will give its employees a face mask if they have on-going health issues.
18. On 1/20/17, the nursing supervisor notified the claimant of three open positions: two of the positions were for 16 hours per week and one position was for 24 hours per week. She left several voice mail messages for the claimant about these shifts, but did not hear back until 5/4/17.
19. As of 5/4/17, the claimant accepted a 16-hour position with the employer.
20. When the claimant accepted the fixed sixteen-hour position on 5/4/17, her total weekly hours increased to 23 hours per week. The claimant continued to work relief hours in addition to the regular 23 hours of work.
21. The claimant did not accept the 24-hour position because this was on a shift that she never usually worked, 1:30 p.m. to 9:30 p.m.; and she was unsure she could physically make the change. In addition, the claimant generally picked up her twenty-year-old daughter at the daughter's work location and this would conflict with picking her up.
22. According to the computer records, the claimant signed for benefits for the week ending 12/[24]/16 through the week ending 5/20/17.
23. The claimant lives in [Town A], Massachusetts [and] the client in [Location A], Massachusetts was a twenty-minute ride from her home. The employer's location in [Town B], Massachusetts was approximately a forty-minute ride.
24. The claimant was living from pay check to pay check and had to be able to figure how much money she would be making in order to put gas in her car for the following week. If the claimant accepted additional hours in one week, she would not be paid for the additional hours until the next week, and she would not have enough money to purchase the gas she would need to get to work and work the additional hours.
25. The claimant did not attempt to search for alternate transportation solutions.
26. As of 5/4/17, the claimant was not available for full-time work.

[Credibility Assessment:]

Based on the claimant's lack of recall as to why she was limiting her hours, the examiner relied on the employer's testimony and evidence, and the claimant's

answers to other questions as to what was happening in her life at that time, and finds that the claimant was limiting her hours because she had filed a claim for partial unemployment benefits and because she wanted to remain eligible for housing assistance, which was determined by her wages.

Although the claimant answered that she is available for full-time work, based on the evidence and testimony and numerous missed opportunities to take additional hours, it has not been established that she is available for full-time work.

### 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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was in partial unemployment.

The issue to be decided in this case is whether the claimant was in partial unemployment during the weeks that she was paid unemployment benefits. Consolidated Finding # 22 provides that the claimant certified for benefits from the week ending December 24, 2016, through the week ending May 20, 2017. Therefore, we consider the claimant's eligibility for benefits only during these weeks.

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), and 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.

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), and 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 . . . 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.

Although the review examiner did not explicitly state in her original decision that the claimant was in partial unemployment as of the week ending December 24<sup>th</sup>, since lost time charges apply to claimants who are in partial unemployment, we can reasonably infer that the review examiner concluded the claimant was in partial unemployment as of that time. Based upon the consolidated findings after remand, we disagree with this conclusion.

The consolidated findings show that, after filing her unemployment claim on December 13, 2016, the claimant continued to work a permanent schedule of seven hours per week for the employer, in addition to performing on-call relief work. *See Consolidated Finding # 8.* As stated, we are concerned only with the period beginning with the week ending December 24, 2016, through the week ending May 20, 2017, because these are the only weeks that the claimant certified and is potentially eligible to be paid benefits during this claim.<sup>1</sup> Since the claimant continued to work some hours during this period, she would potentially be eligible to receive partial unemployment benefits.

However, the consolidated findings also provide that, beginning in the week ending December 24, 2016, the claimant was offered but declined work for the employer. *See Consolidated Finding # 10.* Moreover, several days later, on December 27, 2016, she notified the employer that she would not work more than 10 hours per week in order to be eligible for unemployment benefits and so that she could continue to be eligible for housing assistance. *See Consolidated Findings ## 11 and 13.*

The purpose of the unemployment compensation statute is to assist those who are voluntarily “thrown out of work through no fault of their own.” Leone v. Dir. of Division of Employment Security, 397 Mass. 728, 733 (1986), *citing Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002, 1003 (1985). Read together, the statutory provisions cited above under G.L. c. 151A, §§ 1(r) and 29, reflect the Legislature’s expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time work. Here, the claimant has not shown that she was available for full-time work. She was causing her own unemployment, beginning with her announcement that she would work no more than 10 hours per week. Although there are certain circumstances when a claimant may restrict her availability to part-time hours, not working in order to get paid unemployment benefits or to preserve housing assistance is not one of them. *See 430 CMR 4.45.*

There are some weeks when the claimant maintained that she was medically unable to accept hours because of an upper respiratory infection. *See Consolidated Findings ## 14 and 15.* Yet, the record includes no medical evidence to support her need to restrict her hours, and the employer would have accommodated her by allowing her to work with a face mask. Apparently, the claimant was not too sick to work, as she continued to work her regular seven hours. *See Consolidated Findings ## 8, 16 and 17.* Therefore, we find these excuses disingenuous.

The claimant also indicates that she was unable to accept more hours because she could not afford to put gas in her car. *See Consolidated Finding # 24.* To state the obvious, if she worked

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<sup>1</sup> We take administrative notice of the DUA’s electronic record of the claimant’s certification history on UI Online, which shows that the claimant was not eligible for benefits during the week ending December 10, 2016, because her earnings exceeded her benefit rate, and she was not eligible during the week ending December 17, 2016, because this was the statutory wait week. *See G.L. c. 151A, § 23.*

more hours at \$21.27 per hour, she could afford to pay for the gas. Nothing in the record suggests that the claimant discussed this predicament with the employer or sought a solution such as an advance to address the cash shortage. She also made no attempt to find alternative transportation. *See* Consolidated Finding # 25.

In the review examiner's credibility assessment, she concludes that the reason the claimant limited her work hours was because she wanted to preserve her partial unemployment benefits and to remain eligible for housing assistance. She further concludes that the claimant was not available for full-time work. Such assessments 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. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). We believe her assessment is reasonable in relation to the evidence presented.

We, therefore, conclude as a matter of law that the claimant was not in partial or total unemployment within the meaning of G.L. c. 151A, §§ 1(r) and 29.

The review examiner's decision is reversed. The claimant is denied benefits during the period from the weeks ending December 24, 2016, to May 20, 2017.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 31, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](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.

AB/SVL/rh