

During the winter months, the claimant, a mason, established that he was able, available for, and actively seeking full-time work during those weeks that his employer did not give him full-time hours.

**Board of Review
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Issue ID: 0021 2921 77

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Matthew Shortelle, 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 was laid off from his position with the employer on December 10, 2016. He filed a claim for unemployment benefits with the DUA, effective January 1, 2017, which was denied in a determination issued on March 14, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner modified the agency's initial determination and awarded benefits only during the weeks ending January 7, 14, and 21, 2017, and during weeks ending February 4, 11, and 18, 2017, in a decision rendered on May 8, 2017. We accepted the claimant's application for review.

Benefits were denied during the other weeks that the claimant had certified for benefits because the review examiner determined that the claimant was not available for and actively seeking work in each week, and, thus, he was disqualified under G.L. c. 151A, § 24(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 evidence about dates and hours that the claimant performed work during the relevant period. The claimant participated in 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, after remand, the review examiner's original conclusion that the claimant was only available for and actively searching for work during six weeks that he certified for benefits 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 assessments are set forth below in their entirety:

1. The claimant owns fifty percent (50%) of the employer, a masonry company, with his wife and acts as the employer's mason.
2. On December 10, 2016, the employer laid the claimant [off] due to a lack of work and the winter weather.
3. At the time of his lay off, the claimant planned to return to work for the employer when work became available and weather permitted on an unknown date.
4. On January 3, 2017, the claimant filed a claim for unemployment benefits with an effective date of January 1, 2017.
5. During the weeks ending January 7, 2017 through January 14, 2017, the claimant did not work for the employer, receive any remuneration from the employer, or perform services for the employer.
6. During the weeks ending January 7, 2017 through January 14, 2017, the claimant did not have any issues limiting his ability to work.
7. During the weeks ending January 7, 2017 through January 14, 2017, the claimant was available for work Monday through Saturday, from 7 A.M. to 5 P.M.
8. During the weeks ending January 7, 2017 through January 14, 2017, the claimant searched for work approximately three days via face to face meetings, the internet and networking.
9. During the weeks ending January 7, 2017 through January 14, 2017, the claimant contacted three potential employers each week.
10. During the weeks ending January 7, 2017 through January 14, 2017, the claimant did not receive any offers of employment.
11. During the week ending January 21, 2017, the claimant worked for the employer twenty (20) hours and earned \$662.00.
12. During the week ending January 21, 2017, the claimant was available for additional employment when not working for the employer.
13. During the week ending January 21, 2017, the claimant was capable of working for any unrelated employer when not working for the employer.
14. During the week ending January 21, 2017, the claimant searched for employment with unrelated employers approximately three days via face to face meetings and networking.

15. It is unknown how many hours the claimant worked for the employer on Saturday, January 21, 2017.
16. It is unknown how much the claimant earned for working on January 21, 2017.
17. It is unknown how many hours the claimant worked for the employer on Sunday, January 22, 2017.
18. It is unknown how much the claimant earned for working on January 22, 2017.
19. During the weeks ending January 28, 2017 through February 18, 2017, the claimant did not work for the employer, receive any remuneration from the employer, or perform services for the employer.
20. During the weeks ending January 28, 2017 through February 18, 2017, the claimant did not have any issues limiting his ability to work.
21. During the weeks ending January 28, 2017 through February 18, 2017, the claimant was available for work Monday through Saturday, from 7 A.M. to 5 P.M.
22. During the weeks ending January 28, 2017 through February 18, 2017, the claimant searched for work approximately three days via face to face meetings, the internet and networking.
23. During the weeks ending January 28, 2017 through February 18, 2017, the claimant contacted three potential employers each week.
24. During the weeks ending January 28, 2017 through February 18, 2017, the claimant did not receive any offers of employment.
25. The Department did not pay the claimant benefits for the week ending January 28, 2017.
26. During the week ending February 25, 2017, the claimant worked forty (40) hours for the employer and earned \$1,325.00.
27. The Department did not pay the claimant benefits for the week ending February 25, 2017, as a result of him exceeding his benefits rate.
28. During the week ending March 4, 2017, the claimant worked twenty (20) hours for the employer and earned \$662.00.
29. During the week ending March 4, 2017, the claimant was available for additional employment when not working for the employer.

30. During the week ending March 4, 2017, the claimant was capable of working for any unrelated employer when not working for the employer.
31. During the week ending March 4, 2017, the claimant searched for employment with unrelated employers approximately three days via face to face meetings and networking.
32. During the week ending March 4, 2017, the claimant did not receive any offers of employment from any unrelated employer.
33. During the week ending March 11, 2017, the claimant worked twenty (20) hours for the employer and earned \$662.00.
34. During the week ending March 11, 2017, the claimant was available for additional employment when not working for the employer.
35. During the week ending March 11, 2017, the claimant was capable of working for any unrelated employer when not working for the employer.
36. During the week ending March 11, 2017, the claimant searched for employment with unrelated employers approximately three days [sic] face to face meetings and networking.
37. During the week ending March 11, 2017, the claimant did not receive any offers of employment from any unrelated employer.
38. On March 14, 2017, the Department of Unemployment Assistance's (the Department) Notice of Disqualification disqualified the claimant for the period beginning January 1, 2017 and for an indefinite period of time thereafter for failing to meet the work search requirements of the Law.
39. During the week ending March 18, 2017, the claimant did not work for the employer, receive any remuneration from the employer, or perform services for the employer.
40. During the week ending March 18, 2017, the claimant did not have any issues limiting his ability to work.
41. During the week ending March 18, 2017, the claimant was available for work Monday through Saturday, from 7 A.M. to 5 P.M.
42. During the week ending March 18, 2017, the claimant searched for work approximately three days via face to face meetings, the internet and networking.

43. During the week ending March 18, 2017, the claimant contacted three potential employers.
44. During the week ending March 18, 2017, the claimant did not receive any offers of employment from any unrelated employer.
45. During the week ending March 25, 2017, the claimant worked approximately twelve (12) hours for the employer and earned \$132.00.
46. During the week ending March 25, 2017, the claimant was available for additional employment when not working for the employer.
47. During the week ending March 25, 2017, the claimant was capable of working for any unrelated employer when not working for the employer.
48. During the week ending March 25, 2017, the claimant searched for employment with unrelated employers approximately three days via face to face meetings and networking.
49. During the week ending March 25, 2017, the claimant did not receive any offers of employment from any unrelated employer.
50. During the week ending April 1, 2017, the claimant worked twenty (20) hours for the employer and earned \$662.00.
51. During the week ending April 1, 2017, the claimant was available for additional employment when not working for the employer.
52. During the week ending April 1, 2017, the claimant was capable of working for any unrelated employer when not working for the employer.
53. During the week ending April 1, 2017, the claimant searched for employment with unrelated employers approximately three days via face to face meetings and networking.
54. During the week ending April 1, 2017, the claimant did not receive any offers of employment from any unrelated employer.
55. The Department paid the claimant benefits for the weeks ending January 14 and 21, 2017; February 4, 11, and 18, 2017; and, March 4, 2017 through April 1, 2017.
56. Around April 5, 2017, the claimant returned to full time employment with the employer.
57. The Department did not pay the claimant benefits for the week ending April 8, 2017, as a result of him exceeding his benefit rate.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject Consolidated Findings ## 15 and 16, because they are inconsistent with Consolidated Finding # 11, which states that the claimant worked 20 hours for the employer on January 21, 2017, and was paid \$662.00. We also reject Consolidated Findings ## 17 and 18, because they are inconsistent with Consolidated Finding # 19, which states that the claimant did not work during the week ending January 28, 2017. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Based upon the new consolidated findings, the review examiner's original decision to disqualify the claimant during certain weeks was in error, as outlined below.

The review examiner rendered his decision under 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

After the claimant was laid off, he certified for benefits in each week from the week ending January 7, 2017, through the week ending April 8, 2017.¹ The burden is upon the claimant to show that in each of these weeks, he was able, available, and actively seeking full-time work.

During the weeks ending February 25 and April 8, 2017, the claimant worked and was paid for forty hours of work. *See* Consolidated Findings ## 26 and 57. Because he worked full-time during these weeks, the agency properly denied his claim for benefits. *See* Consolidated Finding # 27. Not only did his income exceed his benefit rate,² as noted in the finding, but the presumption is that while working full-time, he was not available for, and did not have time to actively seek, other employment, as required by G.L. c. 151A, § 24(b).

During each of the weeks ending January 21, March 4, March 11, March 25, and April 1, 2017, the claimant was partially employed and was paid for 12 or 20 hours of work. *See* Consolidated Findings ## 11, 28, 33, 45, and 50. We must consider whether he met the requirements of G.L. c. 151A, § 24(b), during such weeks. The claimant is a mason.³ During this winter period, the

¹ Exhibits ## 1 and 3–6 establish that the claimant certified for benefits in January and March, 2017. We take administrative notice of records in the DUA's electronic record-keeping system, UI Online, which show that the claimant also certified during February and through the week ending April 8, 2017.

² Where income exceeds the benefit rate, the claimant is not entitled to benefits under G.L. c. 151A, § 29(b).

³ Although not explicitly stated in the consolidated findings, the claimant testified that he is a mason, only gets paid by the employer to perform work as a mason, and that he was searching only for masonry work. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See*

findings indicate that, in each week, he was generally available to work six days, or 60 hours per week, from Monday through Saturday, 7:00 a.m. to 5:00 p.m. *See Consolidated Findings ## 7, 21, and 41.* The review examiner's findings further indicate that, during these weeks, the claimant remained able, available, and actively sought to be employed full-time, either by landing new or supplemental work. *See Consolidated Findings ## 12–14, 29–31, 34–36, 46–48, and 51–53.* Thus, even during these weeks when he remained partially employed, he has met the statutory requirements to remain able, available for, and actively seeking full-time work.

We, therefore, conclude as a matter of law that the claimant was able, available for, and actively seeking work, pursuant to G.L. c. 151A, § 24(b), during all but the two weeks of full-time employment.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the weeks ending February 25 and April 8, 2017. The claimant is entitled to benefits during the weeks ending January 7 through February 18, 2017, and March 4 through April 1, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 19, 2017



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.

AB/rh

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).