The on-call snow-plowing work offered to the claimant became unsuitable when the claimant's domestic circumstances prevented him from accepting the work during two weeks of his claim Declining work during another week subjected him to lost time charges because his reason for declining the work, short notice, was an expected term of employment.

Board of Review
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Issue ID: 0021 5590 48

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 apply lost time charges to the claimant's 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 on December 26, 2016, after he was laid off from his full-time position with the instant employer on December 2, 2016. On May 9, 2017, the agency determined that the claimant was entitled to benefits under G.L. c. 151A, § 25(c), beginning on February 5, 2017, because he refused unsuitable work from the employer. The employer, which provided the claimant with on-call snow removal work after December 2nd, appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner decided the case under G.L. c. 151A, §§ 29(b) and 1(r) and rendered a decision on August 29, 2017. The review examiner awarded partial unemployment benefits to the claimant and applied lost time charges to the weeks ending January 14, 2017, January 28, 2017, and February 11, 2017. We accepted the claimant's application for review.

Lost time charges were applied after the review examiner determined that pursuant to G.L. c. 151A, §§ 1(r), the claimant was subject to the charges, because he did not work due to reasons other than a failure by the employer to furnish work. 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. Only the claimant responded. 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 is subject to lost time charges pursuant to G.L. c. 151A, §§ 1(r), is supported by substantial and credible evidence and is free from error of law, where the record establishes that the claimant refused certain work shifts due to illness in his family and short notice**.**

Findings of Fact

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

1. The effective date of [the] claim is December 25, 2016.

2. The claimant has an established monetary determination with a weekly benefit amount of $198.00 and an earnings disregard of $66.00.

3. From May 16, 2016 to December 2, 2016, the claimant worked full-time [as] a laborer for a landscaping company at $11.00 per hour.

4. From December 2, 2016 to an indefinite recall date, the claimant was on-call for snow removal services at $16.00 per hour.

5. The claimant's wife is a stay-at-home mother.

6. The claimant's son was ill with bronchitis and was seen in the in the [sic] hospital on January 3, 2017 and January 7, 2017.

7. On January 8, 2017, five hours of work was available to the claimant. The employer attempted to contact the claimant regarding work, and the claimant did not respond. The claimant did not work.

8. On January 25, 2017, seven hours of work was available to the claimant. The employer attempted to contact the claimant regarding work starting the day prior. The claimant did not respond due to the call being at 3:00 a.m.

9. On January 26, 2017, the employer sent a letter to the claimant stating that several calls were made to the claimant to be in service by 4:00 a.m., and he did not respond. The letter stated that the office also called and texted the claimant to see if everything was okay, and the claimant did not respond. The employer's letter ultimately stated that the employer considers the claimant to have quit.

10. A couple of days later, the claimant arrived at the office in response to the letter and explained that his family has been sick (including his daughter, which occurred after his son). The employer decided to reinstate the claimant.

11. On February 1, 2017, four and one-half hours of work was available to the claimant, which the claimant worked.

12. On February 8, 2017, four and one-half hours of work was available to the claimant. The employer attempted to contact the claimant regarding work

starting the evening before. The claimant did not respond. The claimant did not work.

13. At 8:22 p.m. that evening, the claimant responded by text explaining tomorrow (February 9, 2017) will be difficult for him due to snow on his street. The employer then offered to pick the claimant up.

14. On February 9, 2017, nine and one-half hours of work was available to the claimant. The employer attempted to contact the claimant regarding work. At 8:28 a.m. the Owner texted the claimant explaining that others have tried calling, and the Owner asked the claimant to call him.

15. At 1:16 p.m., the claimant responded explaining that his wife is ill and he cannot leave his kids with their mother alone. The Owner replied immediately and asked the claimant to call him. The claimant did not call.

16. The employer terminated the claimant's employment due to the claimant's failure to accept available 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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the claimant is not subject to all of the lost time charges applied by the review examiner.

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; . . . 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 [a] 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.

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.

The claimant filed his claim for unemployment benefits on December 26, 2016, and the review examiner found that he separated from the employer on February 9, 2017. Therefore, the period of time before us is between the weeks ending December 31, 2016, and February 11, 2017. Furthermore, the employer provided testimony that the claimant refused work during the weeks ending January 14, 2017, January 28, 2017, and February 11, 2017. Accordingly, we will focus our lost time charges analysis on these three weeks.

The review examiner concluded that the claimant was in partial unemployment during the time period at issue but subject to lost time charges for the three weeks ending January 14, 2017, January 28, 2017, and February 11, 2017, as the claimant refused work in those weeks. The review examiner reasoned that pursuant to G.L. c. 151A, §§ 1(r), lost time charges shall apply if the claimant misses work for any reason other than the employer's failure to furnish work, regardless of whether the claimant had a good cause reason for not going to work. We disagree with this interpretation of the statute.

We think that the overall purpose of Chapter 151A requires us to interpret G.L. c. 151A, § 1(r)(1), to incorporate a requirement that the work lost be "suitable." While it is true that G.L. c. 151A, § 1(r)(1), provides that there should be a penalty for an individual who loses remuneration "for *any* cause other than failure of his employer to furnish full-time weekly schedule of work," the statute does not indicate that a claimant could be subject to a "lost time" penalty if remuneration is lost for refusing unsuitable work. The sister statutory provision, G.L. c. 151A, § 1(r)(2), which provides benefits to those in total unemployment, requires that a claimant not have worked or received any remuneration despite being able and available for suitable work. Thus, if unsuitable work is offered and refused, a claimant may still be in total unemployment.

Here, the review examiner found that the claimant did not work the five hours offered by the employer on January 8, 2017. The review examiner also found that the claimant's son had bronchitis and was seen in the hospital on January 3rd and January 7th. Additionally, the review examiner found that the claimant did not work fourteen hours offered by the employer on February 8, 2017, and February 9, 2017. On February 9th, the claimant explained to the employer that his wife was ill, and he could not leave his young children alone with her. In our view, the claimant's parental obligations towards his sick child constitutes good cause for his failure to report to work on January 8, 2017. Likewise, the parental obligations imposed upon the claimant due to his wife's illness constitutes good cause for refusing work on February 8th and February 9th. The work offered on these three days became unsuitable due to the claimant's domestic circumstances. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 21 n. 1 (1980). In light of the circumstances, the claimant is not subject to lost-time charges during the weeks ending January 14, 2017, and February 11, 2017.

The review examiner found that the claimant refused seven hours of work during the week ending January 28, 2017, because the hours were offered with very short notice to the claimant. The review examiner concluded that the claimant was subject to a lost time charge of $112.00 (7 hours at $16.00 per hour). On appeal, the claimant offered Board of Review Decision 0008 9771

96 (May 15, 2014) to support his contention that the snow removal work offered by the employer this week was unsuitable because the employer provided very short notice to the claimant, and in general the on-call hours were sporadic and unpredictable, unlike his regular full-time hours as a landscaper for the employer.

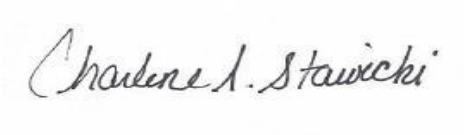
In our view, Board of Review Decision 0008 9771 96 can be distinguished from the instance case. In that decision, the Board concluded that the work offered by the employer and refused by the claimant was unsuitable because she was only offered a short one-hour shift, the job was located a long distance from her home, and she only made $13.00 per hour. Clearly, in that case, the job offered to the claimant was unreasonably inconvenient considering her rate of pay. Here, the totality of the record before us suggests that the claimant accepted to work with the employer with the understanding that his job was a combination of full-time landscaping work during the warmer months and on-call winter snow-removal work. Additionally, the employer's Plowing/Snow Storm Preparation Procedures policy indicates that, if crews are called at the last minute, they are expected to be in service at a reasonable time, which is approximately 45 minutes.[1] The policy also indicates that employees will be paid a minimum of four hours for active plow service per storm, regardless of the actual time worked. Given that, on appeal, the claimant is not arguing that he did not understand and accept the terms of his employment at hire, and he's not disputing that, prior to January, 2017, he had already completed several snow removal jobs for the employer, we cannot conclude that the work offered to the claimant with short notice on January 25th, was unsuitable. Furthermore, at the hearing, the claimant said that he was not given enough notice to get ready for the shift. He did not contend that he could not work that day due to a specific good cause reason, such as a lack of child care (his wife is a stay-at-home mother), or because the pay was not worth the trip due to the commute or the duration of the shift. Since the claimant refused suitable work, we agree with the review examiner's conclusion that he is subject to a lost time charge of $112.00 during the week ending January 28, 2017.

The review examiner's decision is affirmed in part and reversed in part. We agree with the review examiner's conclusion the claimant was in partial unemployment when he filed his claim for benefits on December 26, 2016. We also agree that the claimant is subject to a lost time charge of $112.00 during the week ending January 28, 2017, because he refused suitable work that week. However, we disagree with the review examiner's decision to apply lost time charges to the claimant during the weeks ending January 14, 2017 and February 11, 2017. Since the work refused by the claimant during these two weeks was unsuitable due to the claimant's domestic circumstances, the claimant is entitled to his full weekly benefit amount of $198.00 if otherwise eligible.

Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2018

[1] The Plowing/Snow Storm Preparation Procedures policy, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).



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.

SVL/rh