

Even though the claimant's doctor stated that the claimant's pregnancy did not prevent her from being capable of working full-time, the claimant made herself unavailable for full-time work during certain weeks due to pregnancy-related issues. She is disqualified during such weeks.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, 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 separated from her position with another employer in April, 2017. She filed a claim for unemployment benefits with the DUA, effective April 2, 2017, and was approved to receive partial unemployment benefits in a determination issued on May 9, 2017. 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 July 4, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a), (b), and 1(r), because she had restricted her availability for work for health reasons, and because she was in self-employment. 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 afford the claimant an opportunity to present evidence and to ask specific questions about the claimant's work history and availability for 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 before the Board is whether the review examiner's conclusion, that the claimant should be ineligible for benefits indefinitely beginning April 2, 2017, is supported by substantial and credible evidence and is free from error of law, where the record after remand shows that the claimant had restricted her availability for work only during certain weeks after filing her claim.

Findings of Fact

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

1. The claimant began working as a licensed practical nurse for the employer's nursing care business on 8/8/15. The claimant is paid \$42 per hour.
2. The claimant was hired to work a per diem schedule of hours; the claimant does not have a regular schedule of hours with the employer unless she is assigned to work on a long-term client case. Under these circumstances, the claimant may have a schedule of hours one month in advance.
3. The employer schedules the claimant for work based upon the claimant's availability. The employer expects the claimant to provide the employer notice of her availability, either by text or email.
4. At the time of hire, the claimant informed the employer that she was available for night hours only.
5. Prior to April 2017, the claimant worked an average of 7 hours per week for the instant employer. The claimant's average weekly earnings from this work total \$312.
6. Prior to April 2017, the claimant typically worked 24 hours per week for Privatus Care Solutions. The claimant's average weekly earnings for Privatus Care Solutions total \$1000.
7. Prior to April 2017, the claimant's primary employment was with Privatus Care Solutions.
8. During the week of 4/2/17 through 4/8/17, the employer did not offer the claimant any work.
9. During the week of 4/9/17 through 4/15/17, the employer did not offer the claimant any work.
10. During the week of 4/16/17 through 4/22/17, the employer did not offer the claimant any work.
11. During the week of 4/23/17 through 4/29/17, the employer offered the claimant three 12-hour shifts. These shifts were available on 4/25/17; 4/29/17; and 4/30/17. The offer was extended via a text message sent on 4/23/17. The claimant would have been paid an hourly rate of \$42 for these shifts. The claimant responded to the employer's text message and declined the offer. The claimant wrote: "Thanks, [Name A] although I'm actually admitted to the hospital right now with hyperemesis gravidarum in my first pregnancy, likely I'm not going to be able to work about another month. Will def once I can again! Thanks for asking me!" The claimant did not contact

the employer after sending this text message. The employer did not reach out to offer the claimant additional work until 6/6/17 because the claimant indicated in her 4/23/17 message that she would not be available for one month. The employer next contacted the claimant on 6/6/17 via text message and offered the claimant two 6-hour shifts. The shifts were available on 6/10/17 and 6/11/17. The claimant accepted the work and was paid \$42 per hour; her earnings for both shifts total \$504. After working on 6/11/17, the claimant informed the employer during a telephone conversation that 12-hour shifts were too much for her and due to her pregnancy she would be able to work only 6-hour shifts. On 6/13/17, the claimant sent the employer a text message that reads: "Hi [Name A]. Let me know if any 6 hrs shifts are available with (name) next week. I could definitely pick up one." The employer replied: "Hi...I met with them yesterday. They are doing mostly 12 hour shifts. And they asked that I try to keep [Name B] and [Name C] on as much as possible. But if any ransom (sic) shorter shifts open with them I'll let you know. Thanks." The claimant did not perform any services for the employer after 6/11/17.

12. On 6/29/17, the employer sent a group message via email and text to all employees registered in its Clear Care System. The employer utilizes this system to inform employees of available work. The employer was unaware that the claimant turned off her ability to receive messages from this system. The claimant does not recall when she last received any of the group messages issued by the employer through this system. The claimant typically communicated with the employer through individual text messages.
13. Since 4/2/17, the claimant's physician has not considered the claimant unable to work full-time due to a medical issue.
14. On 8/17/17, the claimant informed the employer that she started her own business, the [Business Name] LLC. The claimant sent the business owner an email in which she described her business as a patient advocacy business that focuses on health insurance options and helping patients locate alternative treatment options and referrals. The claimant proposed that she and the business owner set up a referral arrangement on a percentage payment basis. The employer declined the claimant's offer for such an arrangement.

Credibility Assessment:

In her direct testimony, the claimant denied having told the employer that she was unable to work 12-hour shifts. The employer witness testified that the claimant stated during a telephone call that due to her pregnancy, she was able to work only 6-hour shifts. The claimant's testimony was not credible in light of the text message in which she inquires about the availability of 6-hour shifts and the employer's response, suggesting that the client in question was offering mostly 12-hour shifts but the employer would contact the claimant if any shorter shifts became available. The text messages support the employer's version of events.

Therefore, the employer's testimony was given greater weight on this issue and is reflected in the findings of fact.

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 ultimate 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. However, as discussed more fully below, we disagree with the review examiner's original legal conclusion that the claimant made herself unavailable for work indefinitely, beginning April 2, 2017.

The review examiner disqualified the claimant under G.L. c. 151A, §§ 29(a), (b), and 1(r). 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.

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 [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.

The purpose of the unemployment statute is to provide a weekly unemployment benefit as an economic cushion until a person can again become gainfully employed full-time. Under G.L. c. 151A, §§ 29(a) and 1(r)(2), a claimant who performs no work and earns no wages is deemed to be totally unemployed and is entitled to a full weekly benefit amount. Under G.L. c. 151A, §§ 29(b) and 1(r)(1), a claimant who is performing less than full-time work is partially unemployed and entitled to only a portion of the full weekly benefit amount. These benefits come with the expectation that a claimant is making herself available for full-time work. There are a limited number of circumstances, set forth under 430 CMR 4.45, when a claimant is permitted to restrict that availability to part-time work. However, in the present case, the claimant insisted that she

did not restrict her availability at all. The question before us is whether she has established that she was available for full-time work during each week of her claim.

During the first three weeks of her claim, from April 2, 2017, through April 22, 2017, the employer did not offer the claimant any work. *See* Consolidated Findings ## 8 – 10. Although she was pregnant, the claimant presented documentary evidence from her doctor stating that she was physically able to work without restrictions from March 2, 2017, through at least the date of the medical appointment on June 28, 2017.¹ *See also* Consolidated Finding # 13. Barring any evidence or findings to the contrary, and we see none, we assume that the claimant was available for full-time work during these three weeks, as she asserts.

This changed on April 23, 2017, when the claimant responded to the employer's offer to work three shifts, with a text that said that due to a pregnancy-related condition, she was hospitalized and "likely . . . not going to be able to work about another month." *See* Remand Exhibit 8 and Consolidated Finding # 11. The only reasonable way to read the plain language of this communication is a claimant statement making herself unavailable for any work for the next month. During the remand hearing, the claimant downplayed this medical incident, testifying that she had only been hospitalized over a weekend, was able and available for full-time work once she was released, and was simply waiting to hear from the employer. By omitting this portion of the claimant's testimony from Consolidated Finding # 11, it is evident that the review examiner did not accept it. *See* Consolidated Finding # 11. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (a review examiner is not required to believe self-serving, unsupported evidence, even if it is uncontroverted by other evidence). Since the employer had been notified in writing that the claimant would be unavailable for work for about a month, it was reasonable for the employer to conclude, as do we, that the claimant was unavailable for any work during that period.

The only evidence demonstrating when the claimant became available to work again is the text exchange between the parties during the week of June 4, 2017, wherein the employer asks if the claimant is feeling well and offers her a couple of shifts. *See* Consolidated Finding # 11 and Remand Exhibit 9. The claimant responds, "Yes, thanks I am starting to feel much better [?]. If both the shifts are still available I can take them." Again, the claimant's written words infer that she was not feeling well enough to work prior to that point. Giving the claimant the benefit of the doubt, we conclude that she was available for full-time work during the entire week of June 4, 2017.

However, the consolidated findings show that during the following week, the week of June 11, 2017, the claimant restricted her availability to part-time hours. Consolidated Finding # 11 provides that after working on June 11, 2017, the claimant told the employer in a telephone call that she would only be able to work 6-hour shifts. In making this finding, the review examiner accepted the employer's testimony over the claimant's. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'"

¹ Remand Exhibit 14 is a completed health care provider's statement of capability from the claimant's physician, dated June 28, 2017. While not explicitly incorporated into the review examiner's findings, it 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).

Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980). 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). In light of the explanation in her credibility assessment, we believe the review examiner's assessment was reasonable. Thus, beginning again on June 11, 2014, the claimant had made herself unavailable for full-time work.²

During the remand hearing, the parties agreed that the claimant called the employer's Nurse Case Manager on July 7, 2017, and told her that she was available for full-time work and was looking for any and all work available. Because the parties agreed that the claimant communicated her availability for full-time work in this call, and nothing in the record detracts from the weight of that testimony, we think that the review examiner simply forgot to address it in her consolidated findings.³ Thus, the record shows that the claimant was available for full time work beginning again from July 7, 2017.

In her original decision, the review examiner concluded that, aside from the health reasons, the claimant restricted her availability for work due to self-employment. Consolidated Finding # 14 refers to a start-up business that the claimant had created. There is insufficient evidence in the record to conclude that the claimant devoted any significant time to this business so as to render her unavailable for full-time work.⁴

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29(a), (b), and 1(r), only during those weeks that she remained available for full-time work, and that she was not in unemployment during the weeks that she communicated to the employer that she could not work or would only accept 6-hour shifts.⁵

The portion of the review examiner's decision that disqualified the claimant from receiving benefits during the weeks beginning April 2, 9, and 16, 2017, June 4, 2017, July 9, 2017, and thereafter is reversed. The claimant is entitled to receive benefits for these weeks, if otherwise eligible. The portion of the review examiner's decision that disqualified the claimant from receiving benefits during the weeks beginning April 23 and 30, 2017, May 7, 14, 21, and 28, 2017, June 11, 18, and 25, 2017, and July 2, 2017, is affirmed. The claimant is disqualified from receiving any benefits during these weeks.

² Inasmuch as the claimant presented medical evidence showing that she was capable of full-time work, there is no basis to conclude that she meets any of the conditions for limiting her availability to part-time hours under 430 CMR 4.45.

³ We decline to further delay our decision by remanding the case again simply to ask the review examiner to enter a finding about an undisputed fact in the record.

⁴ The claimant offered unchallenged testimony that the business was registered as an LLC with the Secretary of State, but otherwise inactive.

⁵ Because there is no evidence that the claimant actually turned down an offer to work during the week beginning June 11, 2017, we decline to impose the lost time charge penalty under G.L. c. 151A, § 1(r)(1) and 430 CMR 4.04(6).

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 31, 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/jv