Even if it did not make sense financially for the claimant to continue working her home health job due to the fluctuating number of weekly hours, long days, and high commuting expenses, this did not constitute good cause attributable to the employer to resign. However, at the time the claimant quit, her disabled daughter's condition had become worse, her caregiver network had fallen apart, and the claimant was unable to meet the demands of the very long work days away from home that the employer scheduled. She had urgent, compelling, and necessitous reasons for leaving.

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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 deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her position with the employer on July 9, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 22, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 16, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, she was disqualified under G.L. c. 151A, § 25(e)(1). 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 pertaining to the claimant's hours, wages, expenses, and responsibilities in caring for her daughter. 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 decision, which concluded that the claimant was ineligible for benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the record shows that the combination of the employer's inability to assign shorter work days and the claimant's safety concerns for her disabled daughter created circumstances that caused the claimant to resign.

Findings of Fact

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

1. In or about April, 2009, the claimant's daughter (the Daughter) was diagnosed with Lyme disease, bipolar [disorder], POTS syndrome, PTSD and hallucinations.

2. The claimant and her husband separated on an unknown date and the husband moved to Vermont. The claimant's husband did not assist her with providing the daughter care.

3. The claimant worked a varied schedule as a certified nursing assistant for the employer, a provider of nursing home care, from September, 2015 until July 9, 2017.

4. The Owner supervised the claimant.

5. The employer paid the claimant $12.30 an hour, plus an $8 a day allowance for fuel and tolls, and an additional $2 for split shifts if there was a thirty (30) minute break between clients.

6. The claimant agreed to the pay structure at the time she was hired.

7. The claimant was not promised a wage increase.

8. The employer offered the claimant health insurance. The claimant's insurance cost was $205.45 weekly. [T]the employer paid $146.90 and the claimant paid $58.88 a week.

9. During the claimant's employment, when she was not scheduled to work thirty-five (35) hours or more in a week, the employer required the claimant to cover the complete cost of her health insurance.

10. At the time the claimant was hired, she lived in [Town A], Massachusetts and [Town B], Massachusetts.

11. The claimant cleaned the house she shared with the Daughter, did yard work at the residence, made meals for her and the Daughter, took the Daughter to medical appointments and cared for their pets.

12. At the time the claimant was hired, the Owner assigned her three days a week, eight hours a day to a client who lived approximately twelve (12) miles from the claimant's residence in [Town A], Massachusetts. The Owner assigned

the claimant to work in [Town C], Massachusetts on two days a week for eight hours each day.

13. The claimant agreed to work in [Town C], Massachusetts, which was approximately fifty-three (53) to seventy-two (72) miles from the claimant's residence each way, depending on the route she drove. The claimant's commute was approximately one hour and twenty (20) minutes.

14. Over the course of the claimant's employment, she spent approximately $104.00 a week for gas and approximately $15.00 a month for tolls.

15. In November, 2015, the [Town A], Massachusetts client the claimant was assigned to work for passed away. At that time, the employer had one client in [Town A], Massachusetts. The claimant refused the assignment with another [Town A], Massachusetts client because the client had fleas in their home and was unable to control the fleas.

16. After November, 2015, the claimant continued to work a varied full time schedule for the employer, based on the employer's needs. The claimant worked in [Town C], Massachusetts; [Town D], Massachusetts; [Town E], Massachusetts; and, [Town F], Massachusetts. The commute to and from the claimant's home in [Town A], Massachusetts to [Town F], [Town D] and [Town E], Massachusetts was similar to her commute to and from [Town C], Massachusetts when she resided in [Town A], Massachusetts.

17. Over the course of the claimant's employment, until about December, 2015, the Daughter received assistance with her daily living skills from the claimant's neighbor.

18. In or about December, 2015, the neighbor told the claimant the Daughter was no longer welcome in their home.

19. From around December, 2015, until June, 2016, the claimant and her son provided care to the Daughter.

20. On November 21, 2016, the Daughter was determined disabled effective December 1, 2015, and approved for Social Security Income.

21. Over the course of the claimant's employment, she worked eight hour shifts for one client at a time and spilt shifts, i.e. 10 a.m. to 1 p.m. and then 4 p.m. to 6 p.m. for the same client; and 10 a.m. to 1 p.m. and then 1:30 p.m. to 3:30 p.m. for different clients.

22. The claimant worked from sixteen (16) hours a week to seventy-seven (77) hours a week based on the employer's needs.

23. Over the course of the claimant's employment, she asked the Owner to work long shifts or multiple short shifts on one day if the clients lived near each other. The Owner told the claimant she would try her best to accommodate her request but could not guarantee her long shifts or multiple short shifts on one day if the clients lived near each other because of the clients she had available.

24. In March, 2016, the claimant was in a car accident on her way home from work and her car sustained damage. Her insurance deductible to fix her car was $500.00.

25. In November, 2016, the claimant's vehicle broke down and needed repairs. The claimant rented a vehicle and paid out of pocket for the rental vehicle.

26. During the week ending July 1, 2017, the claimant worked thirty and a half (30.5) hours, all split shifts, with a client in [Town D], Massachusetts (the Client 1); a client in [Town C], Massachusetts (the Client 2); a second client in [Town C], Massachusetts (the Client 3); a third client in [Town D], Massachusetts (the Client 4); and a fourth client in [Town E], Massachusetts (the Client 5).

27. During the week ending July 1, 2017, the claimant was scheduled:

    6/25/17: Client 1, 10 a.m. to 1 p.m.; Client 2, 1:30 p.m. to 3:30 p.m.; and Client 3, 4 p.m. to 9 p.m.;
    6/26/17: Client 1, 10 a.m. to 1 p.m.; and Client 4, 1:30 p.m. to 4 p.m.;
    6/27/17: Client 2, 1 p.m. to 3 p.m.; and Client 5, 4 p.m. to 8 p.m.;
    6/28/17: the claimant was not scheduled;
    6/29/17: Client 1, 10 a.m. to 1 p.m.; Client 2, 1:30 p.m. to 3:30 p.m.; and Client 5, 4 p.m. to 8 p.m.;
    6/30/17: the claimant was scheduled to work for Client 1 from 10 a.m. to 1 p.m. and the shift was cancelled; and
    7/1/17: the claimant was scheduled to work for Client 3 and a sixth client and both clients canceled.

28. During the week ending July 8, 2017, the claimant worked thirty-nine and a half (39.5) hours. She was scheduled:

    7/2/17: Client 1, 10 a.m. to 1 p.m.; Client 5, 2 p.m. to 8 p.m.;
    7/3/17: Client 5, 2 p.m. to 8 p.m.;
    7/4/17: Client 1, 10 a.m. to 1 p.m.;
    7/5/17: Client 1, 10 a.m. to 1 p.m.; Client 5, 4 p.m. to 8 p.m.;
    7/6/17: Client 5, 4 p.m. to 8 p.m.;
    7/7/17: Client 1, 10 a.m. to 1 p.m.; Client 5, 4 p.m. to 8 p.m.; and Client 3, 8:30 [p.m.] to 12 a.m.; the claimant was scheduled to work for a sixth client (the Client 6) from 8 a.m. to 2 p.m. and the shift was canceled; and

7/8/17: the claimant was scheduled to work for Client 3 from 12 a.m. to 8 a.m. and 8 p.m. to 12 a.m. and the shift was canceled.

29. During the week ending July 15, 2017, the claimant worked twenty-eight (28) hours. She was scheduled:

    7/9/17: Client 1, 10 a.m. to 1 p.m.; Client 2, 1:30 p.m. to 3:30 p.m.;
    7/10/17: Client 1, 10 a.m. to 1 p.m.; Client 5, 2 p.m. to 8 p.m.;
    7/11/17: the claimant was scheduled to work for Client 6 and the shift was canceled;
    7/12/17: Client 1, 10 a.m. to 1 p.m.; Client 5, 4 p.m. to 8 p.m.;
    7/13/17: the claimant was not scheduled to work;
    7/14/17: Client 1, 10 a.m. to 1 p.m.; the claimant was scheduled to work for Client 6 from 1:30 p.m. to 4 p.m. and 4 p.m. to 8 p.m. and both shifts were canceled; and
    7/15/17: Client 3 8 p.m. to 12 a.m.

30. On July 9, 2017, the claimant met with the Owner about her schedule and wages. The claimant was unhappy she was not paid for mileage for traveling fifty (50) miles to the employer's client locations.

31. The Owner told the claimant she was not paid mileage because the Owner paid her an $8 daily allowance and $2 for split shifts if there was at least a half an hour between shifts.

32. The claimant told the Owner she was unhappy because her schedule during the week ending July 15, 2017 was for twenty-eight (28) hours, all split shifts.

33. The Owner told the claimant the reduction in hours was only temporary until she obtained additional clients.

34. On July 9, 2017, the claimant quit her job because her hours were reduced from a full time schedule to a part time schedule and she was unhappy with her wages.

35. From September 2015 through July 9, 2017, the claimant spent approximately $4,200.00 for vehicle repairs and maintenance.

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 except as follows. In Consolidated Finding # 8, the amounts which the employer and the claimant contributed to her weekly health insurance premium are incorrect. It was undisputed that the total premium was $205.65, with the employer contributing $68.55 and the claimant

paying $137.10.[1] We reject that portion of Consolidated Finding # 16, which states that the claimant worked full-time hours after November, 2015, as it is inconsistent with Consolidated Finding # 22 and unsupported by substantial evidence. We also accept Consolidated Finding # 34, which states the reasons for the claimant's resignation, only insofar as it reflects that the claimant quit because she was unhappy with her hours and wages. As written, the finding is misleading, incomplete, and does not accurately reflect all of the claimant's reasons for leaving her job, as explained more fully below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we do not agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant initiated her separation from employment, this case is properly analyzed under G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of the statute places the burden of proof upon the claimant.

In her original decision, the review examiner's findings focused on the nature of the claimant's shift assignments during her employment, including their length, location, and the period of time between shifts. We remanded in order to obtain more specific information about her assignments in the weeks immediately before the claimant resigned, her commuting and health insurance costs over her entire employment, as well as evidence relating to the claimant's need to care for her daughter.

After remand, the consolidated findings show that, when the claimant was hired in September 2015, she had consistent full-time hours, but that this changed after a client died two months later. *See* Consolidated Findings ## 12, 15, 16, and 22. Thereafter, the number of assigned hours varied considerably. Consolidated Finding # 22. Moreover, in any week that the claimant did not work at least 35 hours, she had to pay an additional $68.55 for health insurance coverage. Thus, in many weeks over the course of her employment, the claimant's net pay was reduced both by the assignment of fewer hours[2] and by the added insurance cost. A substantial decline in wages may render a job unsuitable and constitute good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 (1981) (citation omitted). However, because the claimant's weekly hours varied between 16 and 77 hours, it is fair to say that the claimant experienced a substantial decline in wages in some weeks, but an increase in others. Moreover, the claimant had worked under these

[1] *See* Exhibits ## 7 and 8. 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).

[2] *See* Remand Exhibit # 8, a paycheck, dated December 1, 2016, which shows that a 40-hour work week without overtime generated $480.00 in gross income. This exhibit is also part of the undisputed evidence in the record.

terms since about November, 2015, and she has not established that anything had changed at the time of her resignation.

The claimant presented considerable evidence to show how much money she spent on gas, tolls, repair, and maintenance for her car during the period of her employment. *See* Remand Exhibits ## 14–21. There is no question that her auto expenses were high. However, even if it did not make financial sense for the claimant to continue working for the employer, this does not amount to good cause attributable to the employer to resign. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Here, there is no evidence that the employer deliberately gave the claimant assignments that were far from her home. Rather, the assignments appear to have been driven by client need. *See* Consolidated Findings ## 15, 16, and 23. We believe that the employer acted reasonably under the circumstances.

We also consider that the claimant objected to the assignment of split shifts with several hours of unpaid time between shifts. Again, because such assignments were driven by client needs, we decline to conclude that these assignments amounted to unreasonable employer conduct and good cause attributable to the employer to resign.

However, even though the assignment of split shifts with long gaps between work hours or frequent long commutes does not constitute good cause within the meaning of G.L. c. 151A, § 25(e)(1), the claimant may still be eligible for benefits under the separate provision, which awards benefits to claimants who leave their jobs due to urgent, compelling, and necessitous reasons. Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992).

The claimant's daughter has been diagnosed with physical and mental illnesses that are severe enough to warrant SSI benefits. *See* Consolidated Finding ## 1, 20, and Remand Exhibit # 24. The consolidated findings show that, throughout her employment, the claimant relied upon various caregivers, including her son and neighbors, but a large portion of the daughter's care fell on the claimant. *See* Consolidated Findings ## 2, 11, 17, and 19. These findings fail to capture the whole picture, particularly at the time the claimant decided to leave her job. The record shows that, in May, 2017, two months before her resignation, the claimant informed the employer that her daughter had gotten progressively worse while being home alone, apparently wandered away, was found by a K9 search dog, and had to be hospitalized.[3] She further testified that, a month before she quit, her daughter remained hospitalized in an extended psychiatric care unit without improvement. After the hospitalization, she explained that the neighbor who cared for her moved out of her apartment, the daughter was no longer welcome by others who had cared for her in the past because they did not want to be responsible for her

[3] *See* Remand Exhibit # 22, page 10, an email to the employer in which the claimant describes this incident on May 12, 2017.

safety, the claimant's son had moved to Tennessee, and the claimant's husband, who lived in Vermont, could not provide care due to his own untreated bipolar disorder. The employer did not dispute any of this evidence.

In short, the claimant's working conditions had not changed. But, at the time she decided to quit, her daughter's worsening condition made it unsafe to leave her home alone, and the claimant had lost the support network that had previously enabled her to meet the demands of a schedule with extended commutes and long gaps between shifts. On July 9, 2017, when the claimant resigned, she had just finished a week with two very long work days that included three-hour gaps between shifts, and she was facing a similar schedule for the following week. *See* Consolidated Findings ## 28 and 29. Under these circumstances, we believe the claimant acted reasonably, based upon pressing circumstances, in leaving her job. *See* Manias v. Dir. of Division of Employment Security, 388 Mass. 201, 204 (1983) (child care demands may constitute urgent and compelling circumstances) (citations omitted.).

Lastly, to be eligible for benefits, the claimant must have made reasonable efforts to preserve her employment before leaving. Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2006) (citation omitted). The record shows that she did. On June 30, 2017, the claimant texted her concern about shift assignments due to her commute to the employer, asking for single long shifts or combinations of short shifts without long gaps, even if that meant working four days a week. *See* Remand Exhibit # 22. She also raised the problem of her split shift assignments with the employer just before she resigned on July 9, 2017. *See* Consolidated Finding # 32. The record, however, indicates that the nature of the employer's business rendered it unable to provide the claimant with a work schedule that would accommodate her pressing family circumstances.

We, therefore, conclude as a matter of law that urgent, compelling, and necessitous circumstances rendered the claimant's resignation involuntary. She is eligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 9, 2017, and for subsequent weeks if otherwise eligible.

In light of our holding, benefits shall not be charged to the employer's account, but shall be charged to the solvency account, pursuant to G.L. c. 151A, § 14(d)(3).

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2018

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

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