A claimant who objected to the employer not paying him for lengthy commute times, and who quit because of that complaint, did not carry his burden to show that his benefit year job was unsuitable, where his pay and hours were on par with his prior work and he did not stay in the job long enough to reasonably assess whether the lengthy commutes would be detrimental to him.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0025 2128 95

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 affirm.

The claimant resigned from his position with the employer on November 17, 2017. He thereafter continued to certify for unemployment benefits on a claim he filed in September of 2017, and which was effective September 17, 2017.[1] On June 26, 2018, the DUA sent the employer a Notice of Approval, allowing the claimant to receive unemployment benefits. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 23, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence, especially as to whether the job he accepted with the employer was suitable. Both parties attended the remand hearing, which was conducted over the course of two days. 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 the review examiner's decision that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant resigned his position after

[1] We have reviewed the claimant's claim history on the DUA's UI Online electronic record-keeping system and note the start of the claimant's unemployment claim.

approximately two weeks of work due to his concern that he would not be compensated for long commute times.

Findings of Fact

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

1. The employer is a construction firm. The claimant worked as a full-time laborer for the employer. The claimant worked for the employer from 11/06/17 to 11/17/17.

2. The employer hired the claimant to perform insulation work for it. The employer paid the claimant $20.00 per hour.

3. The claimant lived in [Town A], MA when he worked the employer.

4. The employer will not pay workers for travel time if a commute to a worksite is less than one hundred miles from the worker's home. The employer will not pay any mileage if the commute is less than one hundred miles from the worker's home.

5. The employer will pay workers for travel time if a commute to a worksite is more than one hundred miles from the worker's home. The employer will pay for workers to stay in a hotel if the worksite is more than one hundred miles from the worker's home.

6. Upon hire, the employer told the claimant that he must travel for work. The employer told the claimant that it will pay for a hotel for him to stay in if his assigned worksite is more than one hundred miles from his home.

7. Upon hire, the employer did not tell the claimant about any pay or accommodations for travel less than one hundred miles from his home. Upon hire, the employer did not tell the claimant that it will not pay for his travel time if his commute to a worksite is less than one hundred miles from his home. Upon hire, the employer did not tell the claimant that it will not pay any mileage for a commute that is less than one hundred miles from his home.

8. Upon hire, the claimant assumed that the employer would pay him for work-related travel if the assigned destination was not local to his home. The claimant assumed that the employer would also pay mileage for these journeys.

9. The claimant worked at a site in [Town B], MA in the first week of his employment. The claimant did not expect the employer to pay him for his commute time to and from this site because it was local to his home.

10. After the claimant began his employment, he learned that the employer would not pay him for any work-related travel to worksites that were within one hundred miles from his home.

11. The employer assigned the claimant to work at a site in [Town C], MA for the second week of his employment. The employer told the claimant that he must work at that site on Monday 11/13/17, Tuesday 11/14/17, Wednesday 11/15/17, and possibly Thursday 11/16/17.

12. The employer booked a hotel for the claimant to stay at while he worked at the [Town C], MA site. The hotel was in [Town D], MA. The supervisor told the claimant that the employer had made a mistake. The supervisor told the claimant that the hotel was not over one hundred miles from the claimant's home.

13. The claimant worked at the [Town D], MA site on 11/13/17, 11/14/17, 11/15/17, and 11/16/17.

14. The employer assigned the claimant to drive its van to its [Town E], NY headquarters on Friday 11/17/17. The claimant drove the van to [Town E], NY on 11/17/17. The claimant's supervisor then drove the claimant back to MA.

15. The employer scheduled the claimant to work at its [Town E], NY location on Monday 11/20/17, Tuesday 11/21/17, and Wednesday 11/22/17. The employer booked a hotel in NY for the claimant to stay at.

16. The claimant's supervisor told the claimant about a reserve account for prevailing wage work. The supervisor told the claimant about this in the second week of his employment. The employer had assigned the claimant to work on a prevailing wage project for the next week. The pay rate on this project was $45.00 per hour. The supervisor told the claimant that the employer would set aside the money that he earned beyond his normal $20.00 hourly rate. The supervisor told the claimant that the employer would transfer this money into an account and that the claimant could later access it for weeks when he worked less than full-time. The supervisor explained that if the claimant quit, the employer would give the money in the account to the claimant. The supervisor explained that if the employer discharged the claimant, the employer would not give the money in the account to the claimant.

17. The supervisor's description of a reserve account was inaccurate. The employer has plans in which workers can divert some earnings into retirement accounts and a supplemental unemployment plan. The employer never explained these plans to the claimant.

18. Before the claimant left his employment, he did not tell the employer that it should pay him for work-related commutes that were less than one hundred miles. The claimant did not ask because he did not want to upset the employer.

19. On 11/17/17, the claimant told his supervisor that he quit his employment. The claimant decided to leave his employment because he believed upon hire that the employer would pay him for non-local work-related travel. He also decided to leave his employment because he did not agree with the reserve account that the supervisor described to him.

20. The claimant worked for a certain business (Business X). Business X is a chemical company. The claimant worked for Business X from 1989 to 8/29/09. This employment ended because Business X closed. Business X later reopened and the claimant worked for it from April 2013 to September 2017. This employment ended in September 2017 because Business X closed again. The claimant worked as a full-time polycarbonate reactor operator for Business X. Business X paid the claimant $20.87. The claimant worked up to seventy hours per week. The claimant chose to work overtime. The available overtime depended on the demand for Business X's product. The claimant worked at one site. The claimant did not travel for Business X.

21. The claimant worked at Business X's location in [Town F], MA. The claimant lived in [Town G], MA for much of his employment with Business X. The claimant lived in [Town A], MA in the last two years of his employment with Business X.

22. The claimant did not have any other employment between his work for Business X and his work for the employer.

23. The claimant completed a five-week weatherization course in May 2012. The course taught the claimant about insulation work.

24. The claimant worked for a certain business (Business Z). Business Z was an insulation company. The claimant worked for Business Z for two weeks between his two periods of work with Business X. The claimant worked with insulation.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact, except for the location noted in Consolidated Finding of Fact # 13. Read together with the other findings and the documentary evidence, the record is clear that the second job site was in [Town C], not [Town D], Massachusetts. We deem the remaining findings to be supported by

substantial and credible evidence. As discussed more fully below, we agree that the claimant has not shown that he is eligible to receive unemployment benefits following his separation from the employer.

There is no dispute that the claimant resigned his benefit year position with the employer after working for approximately two weeks. Therefore, his separation is governed by G.L. c. 151A, § 25(e)(1), 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 . . . .

Under this section of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. The review examiner concluded that the claimant did not carry his burden. After reviewing the full record and thoroughly considering the consolidated findings of fact, we agree.

The review examiner found that the claimant quit on November 17, 2017, "because he believed upon hire that the employer would pay him for non-local work-related travel," and "he did not agree with the reserve account that the supervisor described to him." Consolidated Finding of Fact # 19. We first consider the issue of the reserve account.

During the remand hearing, the employer clarified that what the claimant had been told was not correct. Consolidated Finding of Fact # 17. Indeed, the supervisor's description of what happened with prevailing wage work seems ill-informed, especially the notion that if an employee is discharged, the worker loses money put into such an account. *See* Consolidated Finding of Fact # 16. We think that the incorrect information given to him by the supervisor did not create good cause for the claimant to resign. First, the claimant had yet to work a prevailing wage job, so he had not been affected by such a policy. Second, if he had begun work on such a job, he could have seen how he received his compensation and then raised his concerns, if he still had any, to the employer. The claimant made no attempt at all to verify what the supervisor told him, even where, as the claimant himself testified, he thought that what the supervisor was telling him could not be proper. Thus, not only had he not been affected by what the supervisor allegedly told him, but he made no effort to correct what he saw as wrong. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). Therefore, he has not shown that the supervisor's description of the prevailing wage work and the reserve account created good cause for him to resign.

We next address the claimant's complaint with the work-related travel. It is implied that the claimant objected to this aspect of his employment, because he felt that a job which did not pay him for long travel times was not suitable. When suitability of a job is at issue, it is the "claimant [who] bears the burden of proving that the employment he was offered was unsuitable." McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted). A claimant can carry his burden to show that he quit his job for good cause attributable to the employer, if he shows that the job was unsuitable or became unsuitable after a

period of time. *See* Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n.3 (1981); Jacobsen v. Dir. of Division of Employment Security, 383 Mass. 879, 880 (1981).

In Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*, the Appeals Court noted that, even if a claimant had initially thought that the job would be suitable for him, "the job may have been objectively unsuitable from the start." Thus, our focus is not so much on the claimant's personal feelings or subjective belief as to whether he could do the job, but whether, objectively speaking, the job's pay and requirements were suitable for a person in the claimant's position. The suitability of a particular job may be dependent on various factors. *See* G.L. c. 151A, § 25(c) (noting factors to be considered include health, safety, morals of claimant; prior education and training; travel distance and costs; and remuneration); Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 349-350 (1948).

We conclude that the claimant has failed to show that the job with the employer was unsuitable for him. At hire, the claimant was told that he would receive accommodation or compensation if a job site was more than one hundred miles from his [Town A] home. Consolidated Finding of Fact # 6. It did not inform him of any compensation he would receive if the job site was less than one hundred miles from his home. In fact, the employer does not pay a worker anything for such a commute. *See* Consolidated Findings of Fact ## 4 and 7. Although he was given no indication that he would receive compensation for these commutes, the claimant nevertheless assumed that he would pay him for work-related travel which was not close to his home. Consolidated Finding of Fact # 8. Where the employer did not tell him that he would be compensated for commutes less than one hundred miles, we think it was an unreasonable assumption for the claimant to make that he would receive such compensation.

We view the terms of his prior job and the terms of his job with the employer to be substantially similar. Both jobs offered him full-time hours,[2] and both offered him similar rates of pay. At his most recent long-term job, the claimant worked up to seventy hours per week,[3] was paid $20.87 per hour, and commuted from his home in [Town A], Massachusetts to [Town F], Massachusetts. Consolidated Finding of Fact # 20. With this employer, the claimant worked thirty-two hours and fifty hours in the two weeks he worked, *see* Exhibit # 2, pp. 2–7 and 17–22, he was paid $20 per hour for his work, and he was required to travel from his home to work sites which could be quite far from his home. *See* Consolidated Findings of Fact ## 2 and 6.[4]

As to the commute, the claimant testified that his travel time from [Town A] to [Town F] for his prior job was fifty-three miles.[5] Although his commute from [Town A] to [Town C] for the job with this employer was certainly longer than that, the claimant has not shown that he made any

[2] We note that the claimant's hours with this employer varied. But it was too early for the claimant to conclude that his hours with this employer would be substantially less than his hours with Business X.

[3] The record does not support a conclusion that the claimant always worked seventy hours per week. Indeed, Consolidated Finding of Fact # 20 suggests that such a workload did not happen all the time.

[4] The parties did not dispute that the claimant was informed at hire that he was going to have to travel for the job. The employer offered testimony that its job advertisement informed applicants that work would be all over New England and beyond.

[5] 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).

attempt to see how often he would have to travel farther than the fifty-three miles he was used to commuting. His first job site was in [Town B], which was fairly close to his home. Consolidated Findings of Fact # 9. There was potentially going to be work all over New England, and, therefore, some job sites would presumably be close and convenient, and others be farther away and less convenient. But the claimant did not stay in this job long enough to see how much of a burden the commute would be. He had yet to be adversely affected by the employer's actions in assigning him to job sites in [Town B] and [Town C]. His complaint was about non-compensated commute times. However, he had no problem driving to [Town B] for work without compensation, and the employer paid for a hotel in [Town D], Massachusetts for the period of time he worked at the [Town C] job site so that he would not have a daily commute. Although the [Town D] hotel situation was apparently a mistake, the employer's policy had yet to actually affect the claimant. Moreover, he did not testify that he had medical issues which would affect him if he needed to travel for long periods of time. He did not testify that he had other concerns, such as with family care obligations, which would prevent him from being gone for long days. Thus, we think that the claimant has not shown that the uncompensated commute time alone rendered the job objectively unsuitable for him, after only working there for about two weeks. *See* Jacobsen, 383 Mass. at 880 (a voluntary separation, after a reasonable trial period, from a job which is not suitable may not disqualify claimant from receiving benefits under 25(e)(1)).

The claimant offered testimony during the hearing that he contacted the Attorney General's office regarding the employer's practices of not compensating him for work-related travel under one hundred miles. We note that the review examiner made no findings about this, possibly indicating that he did not find it credible.[6]

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is supported by substantial and credible evidence and free from error of law, because the claimant failed to carry his burden to show that a job he worked for about two weeks was unsuitable. He is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning November 12, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

[6] The claimant testified that he received information from the Attorney General's office that the employer was required to compensate him for commutes longer than the commute to his first job site, which, in this case, was twenty-one miles. Although he provided no legal guidance to support his assertions of what the law is, we have reviewed some relevant regulations in this area, including 454 CMR 27.04(4). That regulation lays out when travel time counts as "hours worked," such that it should be compensated. Most importantly, the regulation provides that ordinary travel time "between home and work is not compensable working time." In this case, there is no fixed home base or central office which the claimant must report to each day. He must report to various work sites in new locations all the time. Prior to the actual start of work each day, he must travel from his home to the job sites, whether they are close (such as [Town B]) or farther away (such as [Town C]). Under the regulation, the employer is not required to compensate him for this travel, or commute, time. The claimant has presented no other legal authority which would conflict with this interpretation of the regulation.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

SF/rh