

**Home health aide is entitled to partial unemployment benefits following a reduction from 56 to 28 hours per week, where she asked for more work, but the employer has not offered any.**

**Board of Review  
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**Issue ID: 0028 2469 64**

## **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 filed a claim for unemployment benefits with the DUA, effective November 18, 2018, which was approved in a determination issued on January 29, 2019. 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 March 5, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had not shown that she was accepting all hours of work offered to her, and, thus, she was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 resolve conflicting information in the employer's testimony and fact-finding questionnaire. 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 original decision, which concluded that the claimant did not meet the statute's definition of being in unemployment because she had not accepted all hours of work offered to her, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings now provide that the claimant was not offered more hours.

### **Findings of Fact**

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

1. The claimant has worked as a Home Health Aide for the employer, a home health agency, from 1/26/17 through the present time. She has not separated.
2. The claimant had been hired to work per diem, earning \$15.00 an hour. (Exhibit 7)
3. The hours of employees are based upon the preauthorization of Mass Health. Mass Health determines the number of hours a patient can be seen.
4. At the beginning of her employment, the claimant began working 56 hours a week with her patient.
5. As of 11/18/18, Mass Health determined that the patient required fewer hours. The claimant's hours were reduced to 28 hours a week based on the preauthorization for her patient.
6. The claimant reached out to the Receptionist for more hours but was told that there were no other hours available for the claimant at that time. The claimant was never offered any additional work by the employer after her hours were reduced.
7. The claimant filed a new claim for benefits on 11/28/18 as a result of the reduction in her hours.

#### Credibility Assessment:

Although the employer contended that they had offered the claimant more hours, this contention is not deemed credible since the employer witness at the remand hearing had no documentary evidence and no testimony to provide to support such a contention. The claimant's direct testimony that she asked the Receptionist for additional hours when her hours were reduced and that she had been told by the Receptionist that there were no other hours available is deemed credible in the absence of any testimony from the Receptionist or rebuttal testimony from the only employer witness at the hearing.

#### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and the record 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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we believe the consolidated findings after remand do not support the review examiner's legal conclusion that the claimant is ineligible for benefits.

In order for the claimant to be eligible for unemployment benefits beginning November 18, 2018, the effective date of her claim, she must have been in a state of unemployment as that term is defined under the unemployment statute. G.L. c. 151A, § 29, authorizes benefits be paid only to those in ‘total unemployment’ or ‘partial unemployment’. These terms are in turn defined by G.L. c. 151A, § 1(r), which provides in relevant part as follows:

(1) “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 purposes 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 full-time weekly schedule of work shall be considered as wages . . . .

(2) “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.

Read together, these provisions award benefits to individuals who are capable and available for work, but are unable to obtain full-time hours. If a claimant is able to work some hours during the week, those earnings may reduce or eliminate the benefit amount for that week, depending upon the amount earned.

Because the claimant continues to work for the employer, but with reduced hours, she has not been in total unemployment, as defined by G.L. c. 151A, § 1(r)(2). Rather, the issue to be addressed on appeal is whether she has been in partial unemployment.

The review examiner’s original decision disqualified the claimant after hearing testimony at the original hearing only from the employer. Based upon that testimony, the review examiner found that the employer had offered additional hours to the claimant to work for another patient, but the claimant declined the additional work.<sup>1</sup> We remanded for further evidence and included a specific request that the employer produce documentary evidence to substantiate that the claimant had declined work. After remand, the review examiner has now found that the employer reduced the claimant’s hours from 56 to 28 per week on November 18, 2018, the claimant tried to obtain more hours, but she was told none were available. *See Consolidated Findings ## 4–6*. She further found that the employer has never offered the claimant additional work, and the employer’s payroll representative confirmed that the claimant continues to work only 28 hours per week. *See Consolidated Finding # 6*.<sup>2</sup>

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<sup>1</sup> *See* Finding of Fact # 6 in the original hearing decision, entered into the record as Remand Exhibit 1.

<sup>2</sup> While not explicitly incorporated into the review examiner’s findings, this portion of the payroll representative’s testimony 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).

In rendering these consolidated findings, the review examiner relied upon the claimant's testimony, concluding that it was more credible than that offered by the employer during the original hearing. 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). For the reasons articulated in her credibility assessment, we believe her assessment is reasonable and see no reason to disturb these findings.

Consequently, the record now shows that the claimant's hours were reduced to less than a full-time schedule of work, and, although she is capable and available for more hours, none have been made available to her. We, therefore, conclude as a matter of law that the claimant is in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive partial unemployment benefits beginning November 18, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – May 21, 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](http://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