

**The claimant was not in total unemployment after filing his claim, as he was not actively searching for work three times a week up until his surgery, and was not capable of working during the weeks after surgery.**

**Board of Review  
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**Issue ID: 0028 6226 85**

## **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 separated from his position with the employer on December 18, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 16, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 13, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total unemployment, as he was on a medical leave of absence and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 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 obtain additional evidence pertaining to the claimant's employment status and ability to work. Only the claimant 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 not in total unemployment, as meant under G.L. c. 151A, §§ 29(a), and 1(r), is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked as a Forman (sic) Carpenter for the employer, a commercial builder, from April 2010 until December 18, 2018.

2. The claimant worked 40 hours per week for the employer at a rate of \$48 dollars per hour. The claimant was a union employee.
3. The employer's business would become slow during the months of November through to the beginning of January.
4. In August 2018, the claimant was diagnosed as having arthritis in his hip and needing hip surgery. The claimant did not schedule the surgery at that time, deciding to wait until the employer's business slowed.
5. Beginning November 2018, the employer's business became slow, whereupon the claimant's weekly schedule fluctuated from 20 to 40 hours per week, until his last day at work on December 18, 2018.
6. In December 2018, the claimant asked the Owner if he could take a medical leave to undergo surgery for his hip. The claimant indicated that his recovery should take approximately 3 months.
7. The claimant's request to take time off to undergo surgery was granted by the employer. The claimant was not required to complete any paperwork with the employer to take his leave.
8. The claimant's last day at work for the employer was December 18, 2018. During that last week of work, the claimant worked on December 17, 2018 and December 18, 2018, for a total of 12 hours.
9. The employer did not have work available for the claimant after December 18, 2018, as it was the employer's slow period.
10. The claimant was not provided with a return-to-work date with the employer.
11. The claimant was a member of the union. The claimant reported to the union hall at or around the last week of December 2018 to pay his dues. At that time, the claimant notified the union representative that he was available for work, which was noted, and the claimant was also instructed to make attempts to solicit work on his own.
12. Thereafter, approximately two days each week, the claimant was networking with individuals about available work, whereupon he either did not receive a response to his inquiry or there was no work available.
13. The claimant was not paid by the employer during the period of his absence from work.
14. The claimant underwent surgery for "End-stage arthritis, right hip" on January 10, 2019. The claimant has yet to return to work after his surgery.

15. On January 16, 2019, a Notice of Disqualification was issued to the claimant under Section 29(a) & 1(r) of the Law, indicating, “you are on an indefinite medical leave of absence granted by your employer, since work remains available to you, it is determined that you are not in unemployment and are subject to disqualification.” The disqualification period indicated was the period beginning 12/23/2018, and indefinitely thereafter.
16. Following his surgery, the claimant is currently still unable to perform any work, and will be required to attend physical therapy. The claimant will not be seeing his orthopedic specialist for evaluation until February 22, 2019.
17. On or about February 27, 2019, the claimant had a discussion with the Owner requesting that he provide documentation regarding the availability of work after the December 18th date. During that discussion the claimant indicated that he anticipated his recovery time to be 3 months from the time of surgery, and that he would be returning to work at that time. The Owner indicated that work should be available at that time.
18. On April 23, 2019, the claimant saw his medical provider. The claimant was cleared to return to work full-time, regular duties without restriction, effective May 1, 2019. The claimant has yet to speak directly with the employer about returning.

### 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. 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.

The findings establish that the claimant was separated from his employment on December 18, 2018. Under Massachusetts law, in order to be eligible for benefits after a separation from employment, a claimant must show that he is either in total or partial unemployment. Since the claimant was not working part-time after filing his claim in December, 2018, the only question is whether he was in total unemployment. G.L. c. 151A, § 29(a), authorizes benefits be paid to those in “total unemployment.” This term is in turn defined by 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’s unemployment claim is effective as of December 23, 2018. Since his surgery was not until January 10, 2019, his capability for work within the meaning of G.L. c. 151A, § 1(r)(2), during the weeks ending December 29, 2018, January 5, 2019, and January 12, 2019, is

not in question.<sup>1</sup> Additionally, since there is nothing in the record indicating that the claimant was otherwise unavailable for work during this period, the only issue is whether he was actively searching for work. We note that, while G.L. c. 151A, § 1(r)(2), itself does not specifically reference that a person must be seeking work in order to be in total unemployment, in order for a claimant to show that he is “unable to obtain any suitable work,” it is appropriate to examine a claimant’s efforts at obtaining, or searching for, work.

The review examiner found that the claimant notified his union hall representative that he was available for work during the last week in December, 2018, and, at that time, the claimant was told to search for work on his own. After speaking to the union, the claimant began searching for work approximately two days per week by networking with other people. Section 1052 of the DUA Service Representative Handbook provides that union members who are restricted to searching for work exclusively through a union hiring hall will be considered to be actively searching for work as long as they adhere to the reporting and availability requirements of the union. Here, because the claimant is allowed to search for work on his own, the above provision does not apply to him, and so, in order to be eligible for benefits, he must perform a work search in accordance to the requirements imposed on all claimants, which is that, among other things, he look for work on at least three days per week. *See* DUA Service Representative Handbook, § 1050(A). Since the claimant did not look for work at least three days per week during the weeks ending December 29, 2018, January 5, 2019, and January 12, 2019, he did not meet the work search requirement under G.L. c. 151A, § 1(r)(2), and is ineligible for benefits during these weeks.

Furthermore, the claimant is ineligible for benefits as of the week ending January 19, 2019, and indefinitely thereafter, as he failed to meet several of the requirements under the above provision after the week ending January 12<sup>th</sup>. In addition to his failure to perform an adequate work search, the claimant was not physically capable of working between January 10, 2019, and May 1, 2019, when he was cleared to work. Moreover, by April 24, 2019, the date of the remand hearing, the claimant testified that he had stopped looking for work with other employers, as he was hoping to return to work for the instant employer when they had work available for him.<sup>2</sup>

We, therefore, conclude as a matter of law that the claimant is not eligible for benefits, as he has not established that he is in total unemployment, as meant under G.L. c. 151A, §§ 29(a), and 1(r)(2).

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<sup>1</sup> We note that although the claimant had his surgery during the week ending January 12, 2019, the surgery fell on a Thursday, and so the claimant was capable of working during four days, or the majority of that week, which is sufficient to establish his capability under G.L. c. 151A, §§ 29(a) and 1(r)(2).

<sup>2</sup> 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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending December 29, 2018, and for subsequent weeks, until he meets the requirements of G.L. c. 151A, §§ 29(a), and 1(r)(2).

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 20, 2019**



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](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.

SVL/rh