

0029 1777 04 (Sept. 18, 2019) – The claimant was neither in partial nor total unemployment during the period he was laid off from his full-time employer. He failed to search for full-time work and refused to work more than one shift a week for his part-time employer. Waiting for an indefinite recall date is not a basis for declining to seek full-time work. The claimant also failed to present evidence that he had a medical condition that warranted refusing additional suitable work from his part-time employer.

**Board of Review  
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**Issue ID: 0029 1777 04**

## **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 filed a claim for unemployment benefits with the DUA effective on January 27, 2019. On February 21, 2019, the DUA issued a determination under G.L. c. 151A, §§ 29(b) and 1(r), which stated that the claimant was entitled to partial benefits as of January 27, 2019, because he was accepting all available work. 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 the payment of any benefits in a decision rendered on March 28, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in partial nor total unemployment within the meaning of G.L. c. 151A, § 29(a), 29(b) & 1(r), and, thus, was not entitled to benefits. 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 give the claimant an opportunity to testify and present other evidence. The case was remanded a second time in order to obtain additional evidence pertaining to the claimant's availability for work. Both parties attended the remand hearings. 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 neither in partial nor total unemployment within the meaning of G.L. c. 151A, §§ 29(a), 29(b), and 1(r), is supported by substantial and credible evidence and is free from error

of law, where, after remand, the record shows that the claimant was not available for full-time work after he was laid off from his full-time employer.

### Findings of Fact

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

1. The claimant has worked as a Staff Nurse for the employer, a hospital, from 11/6/17 through the present time. He has not separated from this employer.
2. The claimant had been hired to work full-time, earning \$40.39 an hour. On 11/18/18, the claimant requested to go from full-time work to as needed per diem employee because he wanted to change his career and begin working for his father's construction company.
3. The claimant is called with all available work by the staffing [sic]. Work is offered a month at a time. There was no minimum number of shifts required to continue work with the instant employer. Employees are called according to seniority. The claimant is one of the employees staffing will call first because he is cross-trained to work in a number of different departments in the hospital.
4. The employer contacted the claimant on 12/27/18 for work that was available between 1/13/19 and 2/9/19. The claimant refused all work offered during this time. The rate of pay for this work was \$40.39.
5. The employer contacted the claimant on 1/25/19, for work that was available between 2/10/19 and 3/9/19, leaving him a message asking him to call back for work. The claimant never returned the employer's call. The rate of pay for this work was \$40.39.
6. On 2/14/19, the employer contacted the claimant again for work available between 3/10/19 to 4/5/19. The employer left the claimant a message to call back for work that was available during this time. The claimant never called the employer back. The rate of pay for this work was \$40.39.
7. The claimant knew the instant employer had shifts available he could work. The last shift she [sic] worked for the instant employer was on 5/11/19.
8. The claimant worked the following shifts for the instant employer: 2/6/19, 3 p.m. to 11:30 p.m.; 2/15/19, 12 p.m. to 3:30 p.m.; 2/20/19, 3 p.m. to 10:30 p.m.; 2/26/19, 3 p.m. to 11 p.m.; 3/12/19, 7 a.m. to 1 p.m.; 3/21/19, 3 p.m. to 11:30 p.m.; 3/27/19 3 p.m. to 11:30 p.m.; 4/29/19, 3 p.m. to 11:30 p.m.; 5/4/19, 7 a.m. to 4 p.m. and 5/11/19, 7 a.m. to 3:30 p.m. He did refuse the shifts offered to him between 1/13/19 and 2/9/19; 2/10/19 and 3/9/19; and 3/11/19 to 4/5/19 because he could not mentally handle working in the hospital environment. The claimant could only handle working one shift per

week. There is no specific medical condition that is preventing the claimant from working more than once a week in a hospital environment. The claimant has not sought medical treatment for a health condition.

9. During this time, the claimant had also worked for another hospital per diem. The instant employer was his primary employer.
10. After filing for benefits, the claimant did not accept shifts from [Employer A], Inc. The claimant last worked on 12/12/18 for [Employer A], Inc. before he resigned with that employer. The claimant needed to accept a minimum number of shifts with [Employer A] to remain employed.
11. Between January 27, 2019 and May 13, 2019, the claimant was available for work. The claimant was not looking for full-time work during this time because he planned to return to full-time work with his father's construction company.
12. The claimant reduced his hours with the instant employer because he started his new full-time seasonal job with his father's construction company on 11/19/18. The claimant's rate of pay at the construction company is \$18.75. He worked for his father until 1/25/19, when his father laid him off. The claimant was laid off from 1/25/19 until 5/13/19, when he returned to work for his father full-time.
13. On 1/25/19, when the claimant was laid off by his father's construction company, the claimant had only been told that he would return to work with the company sometime in the early spring months. The claimant did not look for work between 1/25/19 and 5/13/19, when he started back with his father's company.
14. The claimant does not have experience in areas other than nursing and construction.
15. The claimant knew he could have worked full-time hours with the instant employer between his lay off and return back to work dates.
16. The claimant has not picked up any shifts as of 5/12/19.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. We accept the portion of Consolidated Finding # 11, which states that the claimant was available for work between January 27, 2019, and May 13, 2019, only insofar as it reflects that the claimant was available for part-time work. The remainder of that finding states

that the claimant did not look for full-time work during this time, and Consolidated Finding # 8 states that the claimant limited himself to working no more than once per week for the instant employer. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner considered the claimant's eligibility for benefits under G.L. c. 151A, § 29, which authorizes benefits to be paid only to those in "total unemployment" or "partial unemployment." These terms are 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 . . . .

(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.

The purpose of the unemployment compensation statute is to assist those who are voluntarily "thrown out of work through no fault of their own." Leone v. Dir. of Division of Employment Security, 397 Mass. 728, 733 (1986), *citing* Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985). Read together, the statutory provisions cited above under G.L. c. 151A, §§ 1(r) and 29, reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if the individual is unable to obtain full-time work. Those unable to obtain any hours of work during a given week may be in total unemployment and entitled to their full weekly benefit. Those who are only able to work part-time may be in partial unemployment and eligible for partial unemployment benefits.

In this case, the claimant sought benefits after his full-time employer laid him off on January 25, 2019. *See* Consolidated Finding # 13. The question before us is whether he was in total or partial unemployment in the next few months until he returned to this full-time job on May 13, 2019. *See* Consolidated Finding # 13.

During this period, he only worked part-time, picking up about one shift per week with the employer.<sup>1</sup> *See* Consolidated Finding # 8. Consolidated Finding # 15 states that the claimant could have worked full-time hours for the employer between his layoff and the return to work date for his father's construction company and that the claimant knew this. The review examiner further found that the claimant did not look for full-time work between January 27, 2019, the effective date of his claim, and May 13, 2019, because he planned to return to work full-time when recalled by his father's company, and because he felt that he could not mentally handle

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<sup>1</sup> Consolidated Finding # 9 indicates that the claimant was picking up additional hours of work at another hospital. We are not told how many. However, because the review examiner found that the employer's work to be the claimant's primary employment at this time, we can reasonably infer that the claimant also worked part-time for this other hospital, even fewer hours than for the employer.

working in the employer's hospital environment more than one shift per week. *See* Consolidated Findings ## 8 and 11. During most of these weeks, he refused shifts which the employer offered to him. *See* Consolidated Findings ## 4 and 8.

There are a limited number of circumstances, set forth under 430 CMR 4.45, when a claimant is permitted to restrict his availability to part-time work. Waiting indefinitely to be recalled by an employer, when the return to work date is unknown, is not one of those circumstances.<sup>2</sup> A medical condition might constitute a basis for restricting availability to part-time work, but the claimant has not presented sufficient evidence from which we could conclude that he has such a medical condition. *See* 430 CMR 4.45 (1)(b) and (3).

Because the claimant has failed to show that he was available for full-time work during the relevant period, we conclude as a matter of law that he was not in partial or total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 27, 2019, through May 11, 2019.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 18, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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)

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<sup>2</sup> The DUA waives the requirement to be available for work or to actively seek work if a claimant is temporarily unemployed due to a brief layoff not to exceed four weeks and with a definite date to return to work. *See* DUA Service Representative Handbook, § 1051. Here, the claimant sought benefits for more than three months and did not have a return to work date.

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