

Claimant, who was out on leave, could work with restrictions due to a medical condition. Since the instant primary employer did not have any suitable work to accommodate the claimant's medical's restrictions, but her subsidiary employer could accommodate her, she was in partial unemployment while working part-time for the subsidiary employer, and in total unemployment during the week she did not work at all because no work was available.

**Board of Review
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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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA with an effective date of July 29, 2018. The claimant reopened her claim effective December 16, 2018. On March 29, 2019, the agency issued a notice of disqualification under G.L. c. 151A, §§ 29(a), and 1(r), stating that the claimant was not in unemployment, because, although work remained available to her, she was on a medical leave of absence. The agency further determined that the claimant was not eligible for benefits between October 28, 2018, and February 9, 2019. 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 August 27, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), 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 capability and availability for work. Only the claimant participated in the remand hearing. 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 original decision, which concluded that the claimant was not in 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

the consolidated findings show that, after a period of time following her surgery, the claimant could and did perform light-duty work.

Findings of Fact

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

1. The effective date of [the] claim is July 29, 2018.
2. The claimant's established benefit amount is \$625.00 with an earnings disregard of \$208.33.
3. The claimant worked for the employer, a transportation company, from October of 2012 to the present as a Motor-coach Driver. The employment is full-time as of 2014 and it is her primary employment in the base period. The claimant's average weekly earnings in the base period with the primary, full-time employment is \$1,035.06.
4. The claimant had ongoing subsidiary, per diem employment with another transportation company driving school buses and SPED Vans. The claimant's average weekly earnings in the base period with the subsidiary, per diem employment is \$101.86.
5. On October 28, 2018, the claimant began a medical leave of absence after undergoing hip replacement surgery.
6. The claimant's anticipated return to work date with the primary, full-time employer was February 10, 2019.
7. On December 3, 2018, the claimant's provider cleared the claimant to work for the subsidiary, per diem employer driving SPED vans. The claimant was not cleared to operate buses (motor-coaches or school buses).
8. The claimant did not have a conversation with the instant primary employer, because she was not cleared to operate motor-coaches by her provider.
9. The claimant had a conversation with her subsidiary employer about working with light duty restrictions, which was the operation of the SPED vans and not school buses.
10. The claimant reopened her claim effective December 16, 2018.
11. For the week ending December 8, 2018, the claimant earned \$411.30.
12. For the week ending December 15, 2018, the claimant earned \$400.30.
13. For the week ending December 22, 2018, the claimant earned \$400.30.

14. For the week ending December 29, 2018, the claimant did not work.
15. For the week ending January 5, 2019, the claimant earned \$240.18.
16. For the week ending January 12, 2019, the claimant earned \$412.30.
17. For the week ending January 19, 2019, the claimant earned \$400.30.
18. For the week ending January 26, 2019, the claimant earned \$381.00.
19. For the week ending February 2, 2019, the claimant earned \$457.50.
20. For the week ending February 9, 2019, the claimant earned \$469.50.
21. On February 10, 2019, the claimant returned to work for the primary, full-time employer.
22. The claimant used Indeed to receive job postings for a Driver. The claimant reviewed job postings five times per week. The claimant applied for a few jobs, but most were unsuitable based on licensure or physical ability.

N. B. -- The specific hours worked for the subsidiary employer are not known, due in part because the subsidiary employer is not a party. Additionally, the paystubs for the time period in question do not reflect the hours worked, but do reflect additional pay codes, which may or may not be pay for actual hours worked.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment as of December 3, 2018. We believe that the review examiner's consolidated findings of fact support the conclusion that the claimant was either in partial or total unemployment between the weeks ending December 8, 2018, and February 9, 2019.

The issue before the Board is whether the claimant is eligible for benefits under G.L. c. 151A, § 29, which authorizes that 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

(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.

In his original decision, the review examiner concluded that the claimant was neither in total nor partial unemployment while on a medical leave of absence from her primary employer between October 28, 2018, and February 9, 2019. We remanded the case to the review examiner to obtain additional evidence pertaining the claimant’s capability and availability for work. In light of the returned consolidated findings of fact, we agree with the review examiner’s conclusion that the claimant was neither in total nor partial unemployment between the start of her medical leave of absence on October 28, 2018, and the week ending December 1, 2018, as she was unable to work in any capacity during this period due to her hip replacement surgery. However, we disagree with the review examiner’s conclusion that the claimant was neither in total nor partial unemployment between the weeks ending December 8, 2018, and February 9, 2019, as the claimant was cleared by her doctor to perform work with some restrictions as of December 3, 2018.

After remand, the review examiner found that, upon being cleared to return to work driving SPED vans on December 3, 2018, the claimant informed the subsidiary employer of her availability and began working for them that week. The review examiner also found that the claimant did not inform the instant primary employer that she was cleared to perform work driving vans, as her work with the primary employer consisted of driving motor coaches, which she was not cleared to drive at that time. In his consolidated findings, the review examiner notes that the claimant’s specific hours worked with the subsidiary employer during the time period at issue are unknown, as they are not clearly displayed on the pay stubs submitted by the claimant and entered into the record as Remand Exhibit # 5. However, while the hours may not be clearly displayed on each of the pay stubs, these documents do show that the claimant’s rate of pay was \$15.25 per hour, and, when the claimant’s earnings during the weeks at issue are divided by this pay rate, it is clear that the claimant worked no more than 31 hours per week during this period.¹ This calculation corroborates the claimant’s testimony that she worked up to 30 to 35 hours per week for the subsidiary employer.² Finally, the review examiner found that the claimant was looking for work while out on leave from the instant primary employer.

The claimant’s circumstances are similar to those in Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980). In Fitzgerald, the claimant was a welder who was medically required to cease performing her welding duties due to her pregnancy. Id. at 159–60. She was, however, able and qualified to perform other light-duty work for the employer and applied for

¹ The claimant’s compensation rate, while not explicitly incorporated into the review examiner’s consolidated findings, 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).

² This testimony is also part of the unchallenged evidence introduced into the record.

such work. Id. at 160. The employer had no light-duty work available for the claimant and refused the claimant's request for maternity leave. Id. The Supreme Judicial Court held that the claimant was in unemployment and eligible for benefits, because the claimant was able and available for light-duty work, sought such work, but was unable to obtain such work. Id. at 163.

We believe that the principle enunciated in Fitzgerald applies to the matter before us. Like the claimant in Fitzgerald, the claimant here was unable to continue working for the instant primary employer on October 28, 2018, because she had hip replacement surgery. Subsequently, she was cleared to return to light-duty work, driving vans, on December 3, 2018. The claimant could not return to work with the instant employer at this time, as she drove motor coaches for this employer, which she was not yet medically cleared to do, and there is no indication in the record that this employer had other suitable work available to accommodate the claimant's medical restrictions.

The claimant, however, was allowed to return to work for her subsidiary employer, who had light-duty work for her to perform as a van driver. In addition, while working for her subsidiary employer, the claimant actively sought other suitable light-duty work. The claimant, therefore, has shown that she was in a state of unemployment between December 3, 2018, when she was allowed to return to light-duty work, and February 9, 2019, when she was cleared to return to work for the instant employer.

However, unlike the claimant in Fitzgerald, the claimant here was not in total unemployment between the weeks ending December 8, 2018, and December 22, 2018, or between the weeks ending January 5, 2019, and February 9, 2019, as she was able to perform work for the subsidiary employer and continued that work through February 9, 2019. Since the claimant worked a part-time schedule for the subsidiary employer, she was eligible for partial unemployment benefits between the weeks ending December 8, 2018, and December 22, 2018, and between the weeks ending January 5, 2019, and February 9, 2019, in any week in which she earned less than her weekly benefit rate plus earnings disregard. Since the claimant did not work during the week ending December 29, 2019, and we can reasonably conclude on this record that it was due to the Christmas holiday and not a lack of capability or availability on her part, she was in total unemployment and entitled to her full weekly benefit amount that week.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, §§ 29(a), 29(b) and 1(r), the claimant is eligible for partial benefits in any week in which she works less than a full-time schedule of hours, and her earnings do not exceed her combined benefit rate and earnings disregard. Additionally, she is entitled to her full weekly benefit amount in any week in which she is capable and available for work but unable to obtain suitable work.

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision which concluded that the claimant is not entitled to benefits between October 28, 2018, and December 1, 2018, as she was unable to work in any capacity during these weeks. However, we reverse the part of the decision that denied benefits to the claimant between the weeks ending December 8, 2018, and February 9, 2019, as the record before us establishes that the claimant was either in partial or total unemployment during each of these weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 25, 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.

SVL/rh