

**Claimant, who went on a medical leave of absence after an off-duty car accident ,was not in unemployment for the period of time when her physicians restricted her from working. But when the claimant's physicians approved her for full-time work with lifting restrictions, the claimant was in unemployment from that date until she quit, because the employer had no light duty work for her.**

**B Board of Review  
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**Issue ID: 0031 6022 10**

#### 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. We affirm the disqualification from April 15, 2019, through October 6, 2019, but we reverse the disqualification from October 7, 2019, through November 5, 2019.

The claimant last performed work for the employer on April 13, 2019, and filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 23, 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 December 10, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was on a medical leave of absence and was in neither total nor partial unemployment, and, thus, was disqualified pursuant to 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 take additional evidence regarding the claimant's need for a medical leave of absence, including whether and when she became capable of full-time work with or without restrictions. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 did not establish that she was available to work for the employer because she cannot legally drive in Massachusetts, 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 and credibility assessment are set forth below in their entirety:

1. The claimant filed a 2019-01 claim for unemployment insurance benefits. The effective date of the claim is 7/07/19.
2. The employer is a human service staffing agency.
3. The claimant began her employment with the employer on 11/01/18.
4. The claimant last performed work for the employer on 4/13/19.
5. The claimant was a residential counselor for the employer. Prior to 4/14/19, the claimant performed work for several of the employer's clients in Massachusetts. The claimant worked on a per diem basis. The claimant worked at client locations all over Massachusetts.
6. The employer's clients expected the claimant to lift their residents/customers. The employer required the claimant to lift more than twenty-five pounds unassisted.
7. The claimant was in a motor vehicle collision on 4/13/19. The collision injured the claimant. The claimant was not able to work at all in the period 4/13/19 through 10/06/19.
8. The claimant was on a leave of absence from the employer from 4/13/19 through 10/06/19 due to her injuries from the motor vehicle collision.
9. On 10/07/19, the claimant became able to work in positions that did not require her to lift over twenty-five pounds. In the period 10/07/19 to 11/05/19, the claimant was able to lift more than twenty-five pounds with assistance from a lift machine. The claimant asked the employer if it had any light duty assignments that did not require her to perform unassisted heavy lifting. From 10/07/19 to 11/05/19, the employer did not have any such assignments.
10. The claimant submitted a medical note to the employer. The note is dated 7/31/19. The note is on [Hospital A] letterhead. The note indicates that a Medical Director of Sports Medicine wrote it. The note reads, in part, "[The claimant] is a patient of mine at [Hospital A]. I have examined her and it is my medical opinion that [the claimant] should remain out of work until follow-up in 8-10 weeks." The note does not indicate why the claimant must not work.
11. The claimant submitted a medical note to the employer on or around 9/25/19. The note is dated 9/25/19. The note is on [Hospital A] letterhead. The note indicates that a medical doctor wrote it. The note reads, in part, "[The claimant] is a patient in the Adult Primary Care Practice at [Hospital A]. She is evaluated

in the clinic. She can return to work as a residential counselor on October 7th 2019 with the following restrictions: No heavy lifting more than 25 lbs.”

12. The employer e-mailed a list to the claimant in October 2019. The list featured all of the available clients that the claimant could work for. These clients were in Massachusetts. The claimant did not perform work for the employer in October 2019 because she could not lift more than twenty-five pounds and all of the clients had this requirement.
13. In the period 4/13/19 to 11/05/19, the employer held the claimant’s position for her. The employer would have allowed the claimant to return to work in this period if the claimant had submitted a medical note that indicated that she was cleared to return to work without restrictions. The claimant never submitted such a note to the employer.
14. The claimant had a Massachusetts driver’s license. This license expired at some unknown date in the early 2000s. The claimant has had a valid Connecticut driver’s license since 4/13/19.
15. Massachusetts has not allowed the claimant to drive in Massachusetts since 2018. Massachusetts has not allowed the claimant to drive in Massachusetts with her Connecticut driver’s license. Massachusetts requires the claimant to install a breathalyzer device in her vehicle and pay an associated \$900.00 fee in order to drive in MA. Prior to 11/05/19, the claimant could not drive in MA because she had not installed the required breathalyzer test and she did not pay the fee.
16. The claimant never told the employer that she was unable to legally drive in Massachusetts.
17. The employer did not have any clients in Connecticut for the claimant to perform services for. The employer has never had any clients in Connecticut.
18. The claimant resigned from her employment with the employer on 11/05/19. The claimant resigned because the employer did not have any work for her that did not require her to lift more than twenty-five pounds.

[Credibility] Assessment:

In the initial hearing, the claimant testified that she was able to work full-time from 4/19/19 onward in positions that did not require her to lift over twenty-five pounds. Given the totality of the testimony and evidence presented, it is concluded that the claimant was not able to work at all in the period 4/13/19 through 10/06/19 and that she could return to work full-time on 10/07/19 with the restriction that she could not lift more than twenty-five pounds. This conclusion is reached because the claimant did not submit any medical documentation that supports her assertion that she was able to work at all in the period 4/13/19 through 10/06/19. None of the

medical documentation in the record indicates that the claimant could work in any capacity from 4/13/19 onward. The record features a doctor's letter dated 9/25/19 that indicates that the claimant could return to work on 10/07/19 with the restriction that she cannot lift more than twenty-five pounds. The record also features a series of DUA Healthcare Provider's Statement of Capability forms. One of these forms indicates that the claimant could return to work full-time on 10/07/19 with the restriction that she could not lift more than twenty-five pounds whereas another indicates that the claimant could return to work full-time on 10/07/19 with the restriction that she could not lift more than twenty-five pounds. [sic] The claimant also submitted the first page of another Health Care Provider's Statement of Capability that indicates she could return to work on 6/17/19, but she did not submit the rest of the document. The 9/25/19 doctor's letter is accepted as the most viable piece of evidence about the date when the claimant could work with or without restrictions because the series of Health Care Provider's Statements are incongruous.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 and deems them to be supported by substantial and credible evidence. As discussed below, we further believe the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The question before the Board is whether the claimant was in either total or partial unemployment within the meaning of the Massachusetts Unemployment Compensation statute. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total Unemployment is defined at G.L. c. 151A, § 1(r)(2), and 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.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), and provides, in relevant part, as follows:

"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 . . . .

We also note that, where an employee is medically restricted from performing her primary job duties, the employee may be in unemployment if, after making efforts to obtain work which she is

capable of performing, no suitable work is available. Fitzgerald v. Dir. of Division of Employment Security, 382 Mass. 159, 165 (1980).

Initially, the review examiner found that the claimant went on a medical leave of absence from this employer following a motor vehicle accident on April 13, 2019. At some point, the claimant asked the employer for light-duty work that did not require her to perform heavy lifting, but the employer had no such assignments. After remand, the review examiner modified his findings to note that the claimant's medical leave of absence from the employer ended on October 6, 2019, and that she was medically cleared to return to work on October 7, 2019, with restrictions that she could not lift more than 25 pounds. The claimant asked the employer if it had any assignments that did not require her to perform unassisted heavy lifting, but, from October 7, 2019, through November 5, 2019, the employer had no such assignments. *See Consolidated Findings ## 8–9.* On November 5, 2019, the claimant resigned from her employment. *See Consolidated Finding # 18.*<sup>1</sup>

The review examiner further found that the claimant was unable to legally drive in Massachusetts because she owed “\$900.00 in unpaid tickets and fees.” Consolidate Finding # 15.

The review examiner made a credibility assessment that the claimant was medically cleared to return to work, with restrictions, as of October 7, 2019. His credibility assessment carefully considered the various medical documents submitted into evidence by the claimant, and relied on Remand Exhibit # 7, p. 7. 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).

In view of the review examiner's findings, we conclude, as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a), 29(b), and 1(r), from April 14, 2019, through October 6, 2019, because she was medically unable to work. However, when the claimant was medically cleared to return to light-duty work on October 7, 2019, and the employer had no such assignments for her, the claimant was in unemployment from October 7, 2019, through November 5, 2019.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits from April 14, 2019, through October 6, 2019. The claimant is entitled to benefits from October 7, 2019, through November 5, 2019, if otherwise eligible.

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<sup>1</sup> While the review examiner made findings regarding the claimant's loss of her Massachusetts driving privileges due to unpaid fees associated with having to install a breathalyzer device in her personal vehicle, the review examiner's consolidated findings did not include the claimant's Massachusetts driving prohibition among the reasons for the claimant's leave of absence from the employer. The review examiner also found that the employer had no clients in Connecticut, where the claimant currently resides.

The claimant claimed during the hearing that she could have secured a ride from someone else, or taken an Uber, to get to assignments for the employer, but neither the review examiner nor the employer's agent explored this issue more fully with the claimant, and we decline to do so now. Where the employer had no assignments that complied with the claimant's medical restrictions from October 7 through November 5, 2019, we need not reach the claimant's transportation issues.

The Board will ask the agency to investigate and adjudicate the claimant's eligibility for benefits as of her November 6, 2019, separation from employment pursuant to G.L. c. 151A, §§ 25(e). Based upon the finding that the claimant was unable to legally drive in Massachusetts, the Board will also ask the agency to investigate and adjudicate her eligibility for benefits under G.L. c. 151A, § 24(b).



Paul T.

**BOSTON, MASSACHUSETTS**

Fitzgerald, Esq.

**DATE OF DECISION - May 22, 2020**

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  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020<sup>2</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

JPC/rh

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<sup>2</sup> See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.