

**The claimant believed she was pregnant and was therefore at increased risk of infection from COVID-19 from her usual work at an emergency child-care center for children of essential workers. The work was not suitable under the DUA's COVID-19 Emergency Regulations. The claimant continued to maintain contact with her employer, demonstrating she intended to return to work when possible. As such, the claimant was on standby status and eligible for benefits.**

**Board of Review  
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**Issue ID: 0037 3291 03**

### 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, which was denied in a determination issued on May 6, 2020. 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 in part and reversed in part the agency's initial determination and denied benefits for the period between March 22, 2020, through June 13, 2020, in a decision rendered on July 25, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment as defined in G.L. c. 151A, §§ 29(a) and 1(r), and, thus, was ineligible for 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 obtain additional information about the circumstances of the claimant's leave of absence. 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 unemployment under G.L. c. 151A, §§ 29 and 1(r), during the period between March 20, 2020, and June 13, 2020, because she declined suitable work, is supported by substantial and credible evidence and 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 worked as a Lead Preschool Teacher for the employer, a preschool and daycare, from 12/1/19 through 3/20/20 when she last performed work before filing a new claim for unemployment benefits on 3/22/20.
2. The claimant has been on a leave of absence from 3/20/20 until 6/13/20.
3. The claimant was given the opportunity to continue to work when the employer became an emergency childcare center for essential workers. The claimant chose not to work as of 3/20/20.
4. The claimant was asked to return to work on 6/10/20 with the employer but declined.
5. During the period between 3/20/20 and 6/12/20, the claimant would travel to New Hampshire two weekends a month to visit her grandparents. During this period, the claimant's grandparents were not instructed to self-quarantine by a medical professional or a governmental entity.
6. Prior to declining work with the employer, the claimant did not have a conversation with her grandparents about the possibility of her working at the emergency childcare center.
7. At the time the claimant was offered her position back with the childcare center, she believed she was pregnant.
8. The claimant believed the environment at the emergency childcare center posed a threat to her health and safety because of the information she was hearing on the news that pregnant woman should not be exposed to the virus due to their unborn child. The claimant felt the Owner of the childcare center was not prepared to keep her safe because she was uncertain as to what would happen when she opened up the day care center to all the children.
9. When the claimant later determined that she was not pregnant, there was still work available to the claimant. The claimant did not reach out to the employer because she was still trying to get pregnant. She started looking for other work that would not be high risk or unsafe.
10. The claimant began work at another childcare center in the middle of September 2020.

Credibility assessment:

The claimant's testimony is not reliable nor deemed credible as she provided conflicting information regarding events relevant to her employment. The claimant at the initial hearing indicated she was not allowed to return to work because of the traveling she had done to New Hampshire to visit her grandparents for vacation. She subsequently testified at the remand hearing that she had traveled twice a month

during the period in question to do lawn work, groceries and take care of health care issues of her grandparents. In addition, the claimant contended that she did not return to work with this employer because the employer would not allow her to [sic] due to quarantining and she believed she was pregnant. The claimant indicated however at the remand hearing that her grandparents were not instructed to quarantine and that even after knowing she was not pregnant, she did not attempt to return because she was still trying to get pregnant. The claimant's testimony that she felt unsafe in such an environment cannot be supported as true as she testified that she recently returned back to work for another child care center.

### 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 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 reject the portion of Consolidated Finding # 9 that states there was still work available to the claimant after she determined she was not pregnant, as it is unsupported by the evidence of record. We reject Consolidated Finding # 4 as it is also unsupported by the uncontested evidence of record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Additionally, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment during the period between March 20, 2020, and June 13, 2020.

The review examiner denied the claimant benefits under G.L. c. 151A, § 29, which 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 . . . .

(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.

We must also consider that since the outset of the COVID-19 pandemic in March, 2020, the Governor has declared a State of Emergency in Massachusetts, Congress has enacted new legislation impacting unemployment insurance, the U.S. Department of Labor (DOL) has issued new policy guidance, and the DUA has promulgated new emergency regulations and policy

changes which temporarily modify aspects of unemployment law.<sup>1</sup> All of these actions have impacted the applicability of G.L. c. 151A, § 29, to the matter before us.

The emergency regulations promulgated by the DUA articulate conditions under which a claimant impacted by the COVID-19 pandemic may be eligible for benefits even if they would not otherwise be eligible under G.L. c. 151A, § 29. The relevant portions of these regulations provide, in pertinent part, as follows:

- (a) “Standby” refers to a claimant who is temporarily unemployed because of a lack of work due to COVID 19, with an expected return-to-work date.
- (b) The requirement to search for work is fulfilled so long as the claimant is on standby<sup>2</sup> and takes reasonable measures to maintain contact with the employer.
- (c) The claimant must be available for all hours of suitable work offered by the claimant’s employer.

The emergency regulations also temporarily modified the definition of suitable work<sup>3</sup>:

In determining whether work is suitable the department will consider whether a claimant has a condition that prevents the claimant from performing the essential functions of the job without a substantial risk to the claimant’s health or safety. . . .

As a matter of policy, DUA has clarified that claimants who attest that they are unemployed due to having been impacted by COVID-19 and intend to return to their former employer are automatically considered to be on standby status during the entire period covered by the emergency regulations, March 16 – November 2, 2020. *See* DUA UI Policy & Performance Memorandum 2020.13 (Nov. 2, 2020).

This Board has long recognized the DUA’s experience and technical competence in promulgating its policies and regulations. Consequently, we have generally deferred to the agency in interpreting and enforcing its regulations and policies. *See, e.g.*, Board of Review Decision 0010 9803 91 (July 24, 2014) and Board of Review 0013 7881 86 (April 23, 2015). We again give such deference to the DUA’s interpretation and enforcement of its own COVID-19 emergency regulations as they relate to the instant case.

The review examiner rejected the claimant’s testimony that she believed her health was at risk on the ground that the claimant provided conflicting testimony on her employment status. Such credibility assessments are within the scope of the review examiner’s fact-finding role and will not be disturbed on appeal, unless they are unreasonable in relation to the evidence presented. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Upon review of the record, including the testimony in both hearings, we believe that

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<sup>1</sup> DUA COVID-19 Emergency Regulations, 430 CMR 22.00 *et seq.*, 430 CMR 22.00 effective Mar. 16, 2020 and 430 CMR 22.00 *et seq.*, effective Aug. 8, 2020.

<sup>2</sup> The emergency regulations enacted on August 4, 2020 included the words “standby status” instead of “standby,” but are otherwise identical to the emergency regulations enacted on March 16, 2020, under 430 CMR 22.03(1).

<sup>3</sup> 430 CMR 22.04 (effective Mar. 16, 2020) and 430 CMR 22.05 (effective Aug. 8, 2020).

the review examiner's credibility assessment is based upon inaccurate characterizations of the claimant's uncontested testimony. At both hearings, the claimant testified that she traveled to New Hampshire for the purpose of providing care and assistance to her grandparents. She also provided consistent testimony that her employer required her to quarantine before returning to work because of her travel to New Hampshire.<sup>4</sup> Further, given the employer's quarantine rule, it makes no difference that the claimant's grandparents were not instructed to quarantine by any authority. Finally, the claimant's current employment with a different employer, at a different location, under different circumstances have no determinative bearing on her decision to decline work during the period on appeal. We therefore reject the review examiner's credibility assessment as unreasonable in relation to the evidence presented.

The record before us shows that the claimant was precluded from working between March 20, 2020, and June 13, 2020, as a result of the impact of the COVID-19 pandemic. In March, 2020, the employer re-opened one of its centers as an emergency childcare center for the children of essential workers. Consolidated Finding # 3. Given that the population this childcare center served were children living with essential workers exposed to COVID-19, it is reasonable to believe that employees working there were at increased risk of infection from the virus. At the time she was offered this position, the claimant thought that she was pregnant and had concerns that the employer was not adequately prepared to keep its employees safe in this high-risk environment. Consolidated Findings ## 7 and 8. Based on these factors, the claimant declined work at the emergency childcare center because she reasonably believed working there posed a substantial risk to her health and pregnancy. *See* Consolidated Findings ## 3 and 7.

Further, it is the claimant's undisputed testimony that she contacted the employer intending to return to work after discovering that she was not pregnant, but the employer informed her that there was no longer work available.<sup>5</sup> This evidence is sufficient to demonstrate that the claimant intended to return to work. Therefore, in accordance with the DUA's interpretation of its own regulations, we conclude that the claimant was on standby status pursuant to the DUA emergency regulations for the period beginning March 20, 2020, through June 13, 2020.

While on standby status, the claimant fulfilled the requirement to search for work, as her uncontested testimony indicates that she maintained contact with the employer during the period on appeal.<sup>6</sup> During this period, the claimant also had to be available for all hours of suitable work offered by her employer. Given the risk to her health and pregnancy, the work offered by the employer was not suitable. As nothing in the record suggests the claimant would not be available to perform work if suitable work became available, we see no reason to disqualify the claimant on the grounds that she was not available for work.

We, therefore, conclude, as a matter of law, that the claimant may not be disqualified under G.L. c. 151A, §§ 29 and 1(r), because, pursuant to the DUA's emergency regulations, the claimant was on standby status.

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<sup>4</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).

<sup>5</sup> This evidence is also part of the unchallenged evidence before the review examiner.

<sup>6</sup> This evidence is also part of the unchallenged evidence before the review examiner.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of March 22, 2020, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**

Paul T. Fitzgerald, Esq.  
Chairman

**DATE OF DECISION -December 8, 2020**



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

LSW/rh