

Under DUA's emergency flexible policy, the claimant was eligible for benefits when he reduced his schedule to part-time in order to reduce his exposure to COVID-19, as he and his son have underlying health conditions. However, once the claimant's reason for not returning to this full-time schedule was his reluctance to lose his unemployment benefits, he was disqualified.

**Board of Review
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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 reduced his full-time schedule with the employer to part-time hours on March 23, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 4, 2020. 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 November 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 within the meaning of the law while working a reduced schedule of hours 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not eligible for benefits while working part-time, is supported by substantial and credible evidence and is free from error of law, where the claimant first reduced his schedule in March, 2020 due to his concerns over contracting COVID-19, but later did not return to work until August, 2020 because he did not want to lose his unemployment benefits.

Findings of Fact

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

1. The claimant worked as a Concierge/Front Desk person for the employer, a residential building, from January 30, 2019 until the current time.
2. The claimant was hired to work full-time. The claimant works Monday, Tuesday, and Wednesday from 3 p.m. to 11 p.m. and Saturday and Sunday from 7:00 a.m. to 3:00 p.m. The claimant is paid \$17.70 per hour in his position. The claimant receives benefits with the employer.
3. The location where the claimant works is a residential building with approximately 400 units/apartments and approximately 900 individuals who reside in the building.
4. In the claimant's position, he is responsible for providing services to the residents. The claimant is stationed at the front desk area of the building. The claimant works with another employee, sharing the same space, computer and telephone.
5. The building was frequented by visitors, healthcare providers, internet service people, and delivery people. While at the front desk, the claimant accepts deliveries and assists the service providers and the residents.
6. There was more activity at the employer building during the weekdays than on the weekend.
7. There was less activity at the employer building during the evening hours, as there was [sic] less individuals coming in and out of the employer building and there were no deliveries made after 11:00 p.m. on weekdays and weekends.
8. The employer had more than one building. At each location, there was an overnight shift of 11:00 p.m. to 7:00 a.m., weekdays and weekends.
9. The claimant resides with his wife and his children, ages 4-year, 7-year, and 8-years old. The claimant was born in 1973. The claimant suffers with hypertension. The claimant's son was born in 2016. The claimant's son suffers with asthma.
10. In March 2020, the Governor issued an emergency order which closed non-essential businesses due to COVID-19. The employer business was considered essential.
11. The claimant's children's school also closed at that time. The claimant's wife was home to provide child care for their children.
12. In March 2020, the claimant spoke to the President indicating his concern about contracting COVID-19 at work and requesting to reduce his hours of work. The claimant no longer wanted to work his weekday shifts. The President inquired

if the claimant would be too [sic] willing to work weekends, when it was less busy in the employer building, whereupon the claimant agreed.

13. The claimant did not notify the employer of his or his son's medical condition(s).
14. The claimant's hours of work were reduced effective March 23, 2020. Thereafter, the claimant was working Saturday and Sunday from 7:00 a.m. to 3:00 p.m., for a total of 16 hours per week at his same rate of pay. (The claimant maintained his benefits with the employer during the reduction in hours.)
15. On April 5, 2020, the employer sent an email to the staff, including the claimant, indicating that the employer will begin distributing and making available masks on April 6, 2020. It also became mandatory for all individuals to wear a mask when in the employer building.
16. The employer had also put up a roped barrier at the front desk area to maintain social distancing and had placed up some shields/barriers at the front desk. The employer had hand sanitizer and cleaning solution on the work premises.
17. While working the reduced hours, the claimant became aware of two residents who were being quarantined.
18. In May 2020, the claimant was informed that a coworker's wife was quarantined when diagnosed with COVID-19 and the coworker was out of work. When the coworker returned to work after he had quarantined, the coworker informed the claimant that he had been ill, but did not have COVID-19.
19. From March 23, 2020 until the first week in August 2020, the claimant was working 16 hours per week with the employer. The employer had the claimant's regular full-time hours of work available during that period.
20. The claimant filed his claim for unemployment benefits on April 10, 2020. The effective date of the claim is March 29, 2020.
21. On June 4, 2020, a Notice of Disqualification was issued under Section 29(b) of the Law indicating, "Although additional work is available to you, you requested a reduction in your schedule of working hours." "You are not considered to be in partial unemployment and are subject to disqualification pursuant to the above-cited section of the Law until your employment circumstances change." The claimant filed an appeal to that determination.
22. In June 2020, the President asked the claimant about returning to work full-time, whereupon the claimant informed the employer that he was not comfortable coming back to work at that time. The claimant decided to return

to work for the employer during the first week of August 2020, believing that COVID-19 had subsided.

23. The claimant returned to full-time work for the employer, working his regular full-time schedule with the employer at the same rate of pay and benefits. (The claimant worked 40 hours [for] the employer [the] week beginning Monday, August 3, 2020.)

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 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 ineligible for benefits for the entirety of the time that he worked a reduced schedule.

To be eligible for unemployment benefits, the claimant must show that he is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those 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.

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. Under limited circumstances, they may meet these requirements even if they are only available to work part-time hours. *See* 430 CMR 4.45. In this case, because the claimant seeks benefits between March 29, 2020, the effective date of his claim, and the week ending August 8, 2020, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA), which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency

temporary basis as needed to respond to the spread of the COVID-19 pandemic.¹ The U.S. Department of Labor has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual's circumstances.² In response, the DUA adopted several policies, including a policy relaxing its definition of suitable work and expanding the circumstances under which claimants may limit their availability to part-time work.³ Under this policy, employment is not suitable if it poses a substantial risk to the claimant's health or safety, the claimant's health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment, or the claimant has a reasonable belief that one of the above factors applies. Additionally, claimants may limit their availability to part-time employment for COVID-19-related reasons. These policies are effective retroactively to the beginning of the pandemic emergency on March 8, 2020.⁴

In this case, the review examiner denied benefits to the claimant after concluding that he was not in unemployment, as he had refused suitable work from the employer. Specifically, the review examiner noted that a medical professional had not advised the claimant to remain out of work due to COVID-19, and the claimant did not request from the employer the full-time hours available during the overnight shift. We disagree with the review examiner's conclusion and reasoning.

The review examiner found that the claimant suffers from hypertension and his youngest son, who resides with the claimant, suffers from asthma. As a result of these health conditions, the claimant was concerned about contracting COVID-19, and he reduced his employment from full-time to part-time hours during the weekend. Given the widespread concerns regarding the effect of the COVID-19 virus on individuals with underlying health conditions, in our view, the claimant's fear of contracting the virus due to his and his son's underlying health conditions was reasonable. Based on the above, the claimant's regular full-time schedule, which would expose him to a greater number of potentially infected people, became unsuitable. Furthermore, although the review examiner found that the employer had overnight shifts that were less busy than the daytime shifts and would, therefore, be more suitable for the claimant, she did not find that the employer offered that work to the claimant. Because those overnight shifts were never offered to the claimant, we cannot conclude that he refused them.

In light of the above, we conclude as a matter of law that the claimant was in partial unemployment and eligible for benefits as of the start of his claim and through the week ending July 4, 2020, as he did not refuse suitable work during this period of time, and his part-time availability was due to a COVID-19 related reason.

However, the claimant is disqualified from the receipt of benefits as of the week ending July 11, 2020, because he did not establish that his reason for reducing his availability to part-time hours as of this week was due to concerns over COVID-19, or the reasons listed under 430 CMR 4.45. During the continued hearing held on October 8, 2020, the claimant agreed that he informed the employer on July 8, 2020, that he wanted to return to work, but his attorney at the time had advised him not to return because it would affect his unemployment benefits. Based on this admission by

¹ See EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ DUA UI Policy and Performance Memo (UIPP) 2020.14, (Nov. 25, 2020), p. 2-3.

⁴ DUA UI Policy and Performance Memo (UIPP) 2021.02, (Jan. 22, 2021), p. 2.

the claimant⁵, it appears that in July, 2020, for reasons unknown on this record, the claimant was no longer concerned about his exposure to COVID-19, and he was refusing to return to his full-time schedule solely for fear of losing his unemployment benefits.

The review examiner's decision is affirmed in part and reversed in part. We reverse the part of the decision denying benefits to the claimant as of March 29, 2020, and through the week ending July 4, 2020. Pursuant to G.L. c. 151A, §§ 29(a), 29(b) and 1(r), the claimant is entitled to benefits during the above weeks. However, we affirm the part of the decision denying benefits to the claimant beginning the week ending July 11, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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

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

⁵ 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).