

Claimant funeral director was eligible for benefits while on a medical leave of absence during the COVID-19 pandemic. Where the claimant’s medical providers excused him from work at the employer’s workplace due to heightened risk of exposure to COVID-19, the claimant remained on standby status and was capable of performing alternate work from home.

**Board of Review
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Issue ID: 0047 8004 15

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 on July 4, 2020, which was denied in a determination issued on August 11, 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 3, 2020. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant was not “in unemployment” because he was on a medical leave of absence, the employer had work available for him, and he remained employed while on the leave of absence 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. Neither party responded. 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 while on a medical leave of absence, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the instant employer, a funeral home, as a Director and embalmer, beginning March 1, 2021⁷ [sic]. The claimant is paid \$1,300.00 per week.

2. On June 20, 2020, the claimant was placed on a medical leave of absence due to metastatic melanoma.
3. A return-to-work date was not set.
4. On July 4, 2020, the claimant filed his claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA) with an effective begin date of June 28, 2020.
5. The claimant has not yet been released to work.
6. The claimant, while on medical leave remains employed by the instant employer.
7. On August 11, 2020, the DUA issued a Notice of Disqualification to the claimant determining that the claimant was on an indefinite medical leave of absence granted by his employer and since work remains available to him he was not in unemployment and subject to disqualification beginning June 21, 2020 and indefinitely thereafter until he meets the requirements of the Law.

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 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 findings of fact except as follows. The portion of Finding of Fact #2, which states that the claimant was on a medical leave of absence, effective June 20, 2020, due to metastatic melanoma is unsupported by the medical evidence in the record. *See Exhibits 8 and 9.* In adopting the remaining findings, we deem 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," and thus not entitled to benefits, while he was on his medical leave of absence.

To be eligible for unemployment benefits, the claimant must show that he was in a state of unemployment. 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.

Where the review examiner found the claimant was on a medical leave of absence and the employer had work available, the review examiner disqualified him from benefits and concluded that he was not in total or partial unemployment.

The review examiner's conclusion, however, overlooked the medical evidence in the record that indicates that the claimant could not work as a funeral director or embalmer due to risk of exposure to COVID-19. *Compare* Finding # 2 and Exhibits 8–9 (medical notes dated June 18, 2020, and July 8, 2020, respectively).¹ Both medical notes stated, in relevant part, that the claimant “is at an increased risk for infections while receiving treatment and it is not safe for him to work at this time.” The claimant's appeal for the hearing also emphasized that his working conditions placed him at “risk [for] exposure to COVID-19 and other infectious remains as an embalmer.” *See* Exhibit # 4.

To alleviate hardships caused by COVID-19, the DUA promulgated emergency regulations. The DUA's emergency regulations articulated 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 are under 430 CMR 22.03(1), which provided, 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 status 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. 430 CMR 22.04 provided, in pertinent part:

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. . . .

Standby status was initially limited to four weeks automatically and eight weeks at the employer's request. However, the DUA has waived the limited standby periods, and has determined, as a matter of policy, that a claimant could have potentially remained on standby status for the entire

¹The claimant's medical restrictions from working due to increased risk of exposure to COVID-19, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

period from March 16, 2020, through November 2, 2020. *See* DUA UI Policy and Performance Memorandum 2020.13 (Nov. 2, 2020). Additionally, the DUA has, as a matter of policy, clarified that claimants who attested that they were unemployed due to having been impacted by COVID-19 and intended to return to their former employer were automatically considered to be on standby status. *See Id.*

We believe the review examiner's findings and the medical evidence in the record support the conclusion that the claimant was on standby status while on his leave of absence, because he was out of work due to COVID-19. Following the expiration of the emergency regulations on November 2, 2020, the DUA has adopted additional temporary policy changes, as authorized by the federal government, which also pertain to the circumstances here.

In response to the COVID-19 pandemic and, as authorized by the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISSA), the U.S. Department of Labor (DOL) has stated that individuals may be considered available for work if they are available for any work for all or a portion of the week claimed, provided that any limitation upon their availability does not constitute a withdrawal from the labor market.² The DUA announced that, if an individual is in total unemployment while on any type of unpaid leave of absence, the claimant is not subject to disqualification under G.L. c. 151A, §§ 29, 1(r), or 24(b), as long as the reason for the claimant's inability to work is related to COVID-19 and the claimant remains available for some type of suitable work. *See* UIPP 2020.14 (Nov. 25, 2020), p. 3.

The claimant before us works for the employer as a funeral director and embalmer. Both of these roles involve tasks which could place the claimant at heightened risk of infection from COVID-19. As a funeral director, the claimant comes into contact with numerous mourners who attend wakes and funerals. As an embalmer, the claimant works with bodies that could contain substances that could also cause infection.

Pursuant to the emergency regulations and DUA policy, the claimant was relieved of the requirement to accept this work, because, under these circumstances, the available work was not suitable. We further note that the letters in evidence from the claimant's medical providers did not restrict the claimant from all forms of work. The claimant was capable of performing work from home, but he could not safely perform his funeral director or embalming duties on the employer's premises.

We, therefore, conclude as a matter of law that the claimant was in unemployment while on a leave of absence from June 20, 2020, pursuant to G.L. c. 151A, §§ 29(a), 29(b), and 1(r), 430 CMR 22.03(1) and 22.04, and subsequent DUA temporary policies.

² *See* UIPL 10-20, 4(b).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 27, 2020, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 26, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

JPCA/rh