

**The review examiner reasonably rejected as not credible the claimant's testimony that he was available for full time work because the claimant was only accepting on call work from the instant employer and admitted he would not have accepted full-time work from any other employer. As the claimant was narrowly limiting his availability for work, he was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).**

**Board of Review  
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**Issue ID: 0059 9195 31**

### Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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, effective April 3, 2020, which was denied in a determination issued on January 9, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination, awarding benefits for the weeks of June 21, 2020, and July 12, 2020, through December 12, 2020, in a decision rendered on October 8, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in partial unemployment during the week of June 21, 2020, and during the period between July 12, 2020, through December 12, 2020, and, thus, was not disqualified during these weeks under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's unemployment status during the period on appeal. 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 is entitled to benefits for the week of June 21, 2020, and for the period between July 12, 2020, through December 12, 2020, because he earned less than his weekly benefit amount plus earnings disregard during each of those weeks, 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 opened a claim effective May 3, 2020, with a benefit year end of May 1, 2021. The claimant's weekly benefit rate is \$415.00, and the earnings disregard is \$138.33, totaling \$553.33.
2. On August 7, 1991, the claimant began working as a reserve deputy sheriff for the employer, a law enforcement department.
3. The claimant was employed on-call and was not guaranteed hours in any week.
4. The employer offers the claimant road and hospital detail jobs. These shifts are offered through the employer's smartphone application.
5. The claimant's rate of pay varies between \$30 to \$58 per hour, depending on the assignment. The claimant is paid bi-weekly.
6. The claimant was diagnosed with prostate cancer in 2009. It metastasized in 2019.
7. During the week ending June 27, 2020, the employer offered its employees, including the claimant, 86 hours of additional work through its application. The claimant did not bid on any of these available hours.
8. During the week ending July 18, 2020, the employer offered its employees, including the claimant, 55 hours of additional work through its application. The claimant did not bid on any of these available hours.
9. During the week ending July 24, 2020, the employer offered its employees, including the claimant, 79 hours of additional work through its application. The claimant did not bid on any of these available hours.
10. During the week ending August 1, 2020, the employer offered its employees, including the claimant, 92 hours of additional work through its application. The claimant did not bid on any of these available hours.
11. During the week ending August 8, 2020, the employer offered its employees, including the claimant, 41 hours of additional work through its application. The claimant did not bid on any of these available hours.
12. During the week ending August 15, 2020, the employer offered its employees, including the claimant, 78 hours of additional work through its application. The claimant did not bid on any of these available hours.
13. During the week ending August 22, 2020, the employer offered its employees, including the claimant, 20 hours of additional work through its application. The claimant did not bid on any of these available hours.

14. During the week ending September 5, 2020, the employer offered its employees, including the claimant, 48 hours of additional work through its application. The claimant did not bid on any of these available hours.
15. During the week ending September 12, 2020, the employer offered its employees, including the claimant, 12 hours of additional work through its application. The claimant did not bid on any of these available hours.
16. During the week ending September 26, 2020, the employer offered its employees, including the claimant, 29 hours of work through its application. The claimant did not bid on any of these available hours.
17. During the week ending October 10, 2020, the employer offered its employees, including the claimant, 63 hours of additional work through its application. The claimant did not bid on any of these available hours.
18. During the week ending October 17, 2020, the employer offered its employees, including the claimant, 17 hours of additional work through its application. The claimant did not bid on any of these available hours.
19. During the week ending October 24, 2020, the employer offered its employees, including the claimant, 68 hours of additional work through its application. The claimant did not bid on any of these available hours.
20. During the week ending October 31, 2020, the employer offered its employees, including the claimant, three hours of additional work through its application. The claimant did not bid on any of these available hours.
21. During the week ending November 7, 2020, the employer offered its employees, including the claimant, 26 hours of additional work through its application. The claimant did not bid on any of these available hours.
22. The hours of work were both for hospital and road details. Most of the available shifts were for road details.
23. During the week ending December 12, 2020, the employer did not have work available for the claimant.
24. The claimant's last road detail assignment was on May 19, 2019.
25. As a result of having cancer, the claimant cannot stand for long periods and needs to use the bathroom frequently.
26. The claimant did not bid on road details shifts because he has cancer and cannot not stand for long periods and needs to use the bathroom frequently.
27. The claimant had the following earnings from the employer:

| <b>Week End Date:</b> | <b>Gross Amount Earned from the Employer:</b> |
|-----------------------|---|
| 6/27/2020             | 0   |
| 7/4/2020              | 578.21  |
| 7/11/2020             | 480.00  |
| 7/18/2020             | 0   |
| 7/25/2020             | 0   |
| 8/1/2020              | 0   |
| 8/8/2020              | 0   |
| 8/15/2020             | 0   |
| 8/22/2020             | 0   |
| 8/29/2020             | 0   |
| 9/5/2020              | 0   |
| 9/12/2020             | 0   |
| 9/19/2020             | 240.00  |
| 9/26/2020             | 0   |
| 10/3/2020             | 486.70  |
| 10/10/2020            | 0   |
| 10/17/2020            | 0   |
| 10/24/2020            | 0   |
| 10/31/2020            | 0   |
| 11/7/2020             | 0   |
| 11/14/2020            | 240.00  |
| 11/21/2020            | 240.00  |
| 11/28/2020            | 240.00  |
| 12/5/2020             | 480.00  |
| 12/12/2020            | 0   |

28. During the week ending July 4, 2020, the claimant worked fifteen (15) hours and earned \$476.55. During that week, the claimant also earned \$101.66, a bonus which was calculated based on the number of hours he had worked for the federal government.
29. During the week ending June 27, 2020, through the week ending December 12, 2020, the claimant was not available for full-time work, due to his medical condition, medical appointments, and him being on vacation in July and August 2020.
30. During the week ending June 27, 2020, through the week ending December 12, 2020, the claimant limited his availability to working on call, hospital shifts for the employer.

31. During the week ending June 27, 2020, through the week ending December 12, 2020, the claimant looked for work with the instant employer on its smartphone application. He looked at the application three times per week.
32. During the week ending June 27, 2020, through the week ending December 12, 2020, the claimant did not search for work with any other employers.
33. The claimant would not have accepted a full-time job with another employer between June 27, 2020, and December 12, 2020, because he was not looking for a job with any other employers. The claimant was limiting himself to specific shifts with the instant employer.
34. During the week ending June 27, 2020, through the week ending December 12, 2020, the claimant did not maintain a weekly work search log.

#### Credibility Assessment:

During the hearing, the claimant testified that he was available for full-time work. However, his testimony is not accepted as credible. First, the claimant's availability was limited to on call hospital shifts with this employer due to his medical condition, medical appointments, and time off. Second, the claimant did not search for full-time work with any other employer. Given that he was not making himself available for full-time work with other employers, that he had restrictions related to his medical condition, and that he did not accept many hours of work available to him through the employer (the only employer he was looking for work with), it is not credible that he was genuinely available for full-time work.

In its remand order, the Board of Review asked whether the claimant would have accepted full-time work if offered by another employer (Question 1a). Based on the above, it is not credible that the claimant would have taken full-time work with another employer. Moreover, the claimant was not looking for that.

#### 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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was entitled to benefits during each of the weeks at issue.

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.

Thus, 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.

Following remand, the review examiner rejected the claimant’s testimony that he was available for full-time work as not credible, because the claimant testified that he was not searching for work with any other employer and would not have accepted full-time work with another employer. *See Consolidated Findings ## 33 and 34.* 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). Upon review of the record, we have accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

While the claimant’s medical condition impacted his ability to accept certain road detail work offered by the instant employer, there is no indication from the record that it impacted his availability for other full-time work. *See Consolidated Findings ## 6, 25, and 26.* However, the claimant’s decision to narrow his availability only to limited suitable work offered by the instant employer between June 21, 2020, and December 12, 2020, effectively removed himself from the general labor force during that period.

Accordingly, we conclude as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner’s decision is affirmed in part and reversed in part. The claimant is denied benefits for the period between June 21, 2020, and December 12, 2020.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 21, 2023**



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  
(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