

The claimant was in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), between July 5 and September 19, 2020, because she was not capable of working following surgery. Once medically cleared to return to work, she was in partial unemployment. While she declined some hours of work from the instant employer, she did so because she had already accepted suitable work with two other employers at a higher rate of pay.

**Board of Review
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Issue ID: 0067 2621 77

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 30, 2021. 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 beginning July 5, 2020, in a decision rendered on February 5, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment as of the week of July 5, 2020, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 in unemployment from July 5, 2020, through September 18, 2020, because she was not physically capable of full-time work and was not in unemployment thereafter because she declined available suitable work from the instant employer, 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. On September 17, 2018, the claimant started working part-time for the instant employer, a fitness studio, as a Pilates Instructor.

2. The claimant's scheduled hours with the instant employer have varied since the claimant started working for the instant employer.
3. The claimant's supervisors at the instant employer's establishment are the 1st Owner, the 2nd Owner, the Lead Instructor, and the General Manager.
4. The claimant is paid an hourly rate by the instant employer in addition to bonus payments for each class the claimant teaches and another bonus depending on how many clients participate in the class. The claimant's hourly rate prior to January 2022 was \$13.50 per hour. The claimant's rate of pay effective January 1, 2022, is \$14.25 per hour.
5. In addition to teaching fitness classes for the instant employer, the claimant also has the opportunity to teach private lessons to clients.
6. Prior to the claimant filing an initial unemployment claim in March 2020, the claimant was working approximately 25-30 hours for the instant employer's establishment.
7. In addition to working for the instant employer, the claimant also works for the 2nd employer as a Pilates Instructor. The claimant has worked for the 2nd employer for 22 years.
8. Prior to filing an initial unemployment claim effective March 2020, the claimant also worked for a 3rd employer as an instructor.
9. The claimant worked simultaneously for the instant employer, the 2nd employer, and the 3rd employer prior to filing an initial claim for unemployment benefits in March 2020.
10. Prior to filing an initial unemployment claim effective March 2020, the claimant's last date of work for the instant employer was on March 17, 2020. At this point in time, the instant employer temporarily did not have any work available for the claimant due to the instant employer being required to shut down temporarily due to the [COVID]-19 pandemic in compliance with government requirements.
11. The claimant filed an initial unemployment claim effective the week beginning March 22, 2020. The instant employer, 2nd employer and 3rd employer are all base period employers on this claim.
12. The claimant was paid more wages working for the instant employer compared to the 2nd and 3rd employers from the 1st Quarter 2019 until the 4th Quarter 2019. The claimant is paid a higher hourly wages [sic] by the 2nd employer and the 3rd employer compared to the instant employer. The claimant received more hours/classes from the instant employer causing the claimant to be paid more wages from the instant employer.

13. On June 23, 2020, the instant employer reopened the employer's establishment for private lessons including in an outdoor setting.
14. On July 6, 2020, the instant employer reopened the instant employer's establishment to classes including outdoor classes and private lessons.
15. The instant employer requested the claimant to work once the employer reopened.
16. The claimant did not return to work for the instant employer until September 18, 2020.
17. The claimant did not return to work for the instant employer until September 18, 2020, due to the claimant having a surgery in July 2020. The claimant asked the instant employer to take some time off from work while she recovered from the surgery. The instant employer granted this request and held the claimant's job until her return to work in September 2020. The instant employer still had work available for the claimant during his time.
18. The claimant was not able and availability [sic] to work at all from when she had the surgery in July 2020 until her return to work on September 18, 2020, as the claimant was recovering from the surgery. Since September 18, 2020, the claimant has been physically capable of working full-time.
19. The claimant has worked part-time for the instant employer since her return to work on September 18, 2020. The claimant works on Fridays from 3:15 p.m. until 6:45 p.m. teaching three classes for approximately 3 hours per week. The claimant sometimes works additional hours for the instant employer to cover for other employees as needed.
20. The claimant has not been available for all work the instant employer has had for the claimant since July 6, 2020. The claimant has been restricting her work with the instant employer as the claimant has decided to work more hours for the 2nd employer on a part-time basis and also due to other personal issues.
21. The instant employer has had approximately 25-30 hours per week available of work for the claimant since July 6, 2020.
22. The instant employer has requested for the claimant to provide the employer with maximum availability to work for the instant employer. The instant employer is willing to evaluate the employer's schedule to provide the claimant with more work such as personal lessons and work around the claimant's obligations. The instant employer has not received feedback from the claimant with regards to her maximum availability to work.

23. On July 30, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Sections 29(b) & 1(r) of the Law commencing the week beginning July 5, 2020, and until she met the requirements of the Law. As a result of the Notice of Disqualification, the claimant was overpaid \$25,688 in previously received benefits for the weeks ending July 11, 2020, through the week ending March 27, 2021. The claimant appealed the Notice of Disqualification.

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. We reject the portion of Finding of Fact # 20 indicating the claimant declined some available work due to personal issues as inconsistent with the evidence in the record. 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 for an indefinite period beginning on July 5, 2020.

To be eligible for unemployment benefits, the claimant must show that she 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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(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 surgery, the claimant was not physically capable of full-time work from July, 2020, through September 18, 2020. Finding of Fact # 17. As the claimant was not capable of working during this period, we agree that the claimant was not in unemployment during the period between July 5, 2020, and September 19, 2020.

The review examiner then found the claimant ineligible for benefits after September 18, 2020, because she regularly declined offers of work from the instant employer. *See* Finding of Fact

20. While a claimant's decision to decline available work generally impacts her eligibility for benefits, the Board has held that a "claimant who refuses work with a particular employer because she is working other suitable employment does not suffer a disqualification, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r)." Board of Review Decision 0001 1361 33 (Sept. 15, 2014). There is no dispute that the claimant did decline suitable work offered by the instant employer. However, she did so because she had already accepted conflicting offers of suitable work, at a higher rate of pay, from two other employers. See Findings of Fact ## 12 and 20. Under such circumstances, the claimant's decision to decline work from the instant employer does not preclude her eligibility for benefits. See Board of Review Decision 0019 1105 20 (Mar. 21, 2017).

We, therefore, 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) during the period between July 5, 2020, and September 19, 2020. We further conclude that the claimant was in unemployment during the period beginning September 20, 2020, and indefinitely thereafter, during any week in which she earned less than her weekly benefit amount plus earnings disregard.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week of July 5, 2020, through September 19, 2020. The claimant is entitled to receive benefits for the week of September 20, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 25, 2022



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

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