

During her medical leave, the employer had no light duty work available for the claimant. However, she was capable of, available for, and actively seeking other work. Therefore, she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during that time and is eligible for benefits.

**Board of Review
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Issue ID: 0069 7838 92

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 went on a medical leave of absence from the employer on April 13, 2021. She had filed claims for unemployment benefits with the DUA with the effective dates of May 17, 2020, and May 16, 2021. Benefits were denied indefinitely as of April 11, 2021, in a determination issued on August 10, 2021. 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 the agency's initial determination and denied benefits in a decision rendered on January 20, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while out on a leave of absence and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), between April 11, 2021, through September 13, 2021, when the claimant returned to work from her leave of absence. 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 evidence pertaining to the claimant's leave of absence. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record and information from the DUA's UI Online computer database.

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, where the claimant was capable of working in some capacity with restrictions while on leave, but the employer had no suitable light duty work available for her.

Findings of Fact

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

1. On 12/31/10 the claimant began fulltime employment as a Staff Accountant for another employer [Employer B] earning a salary of approximately \$60,000.00 per year. On 5/15/20 the claimant was laid-off from her full-time accounting job.
2. In addition to her fulltime job, the claimant also worked part-time hours for this instant employer's market ([Employer A]).
3. On 8/27/19 the claimant began working 15-20 hours per week at the market as a non-union Crew Member earning \$17.49 per hour. The employer temporarily adjusted hourly rates for the pandemic and the claimant's hourly pay was temporarily adjusted to \$21.49 per hour.
4. At hire, the claimant understood that her position at the grocery market job required her to be regularly lifting items from 10-70 pounds.
5. On 5/23/20 the claimant filed a claim for unemployment benefits effective 5/17/20 after being laid-off from her fulltime accounting job. The weekly benefit rate was \$848.00, and the weekly earnings disregard amount was \$274.33. The claimant filed to reopen this claim on 9/20/20.
6. The claimant applied for TOPS Section 30 training benefits, and she was approved from 9/22/20 through 7/23/21 to attend fulltime school at [College] in the Graphic Design Associate Degree in Liberal Arts program.
7. The claimant collected unemployment benefits for many weeks and [Employer B] paid all required unemployment charges until it was no longer the primary interested party employer for the claims.
8. 4/10/21 was the last day the claimant worked at her part-time job before her non-work-related injury.
9. On 4/13/21 the claimant broke her right wrist in a non-work-related accident. The claimant had her right arm in a cast for approximately 11 weeks. The claimant was capable of working but not of lifting more than five pounds while her wrist was healing.
10. The claimant is left-handed, and she was always medically cleared to perform work that did not involve lifting things that weighed more than five pounds.
11. The claimant was always medically cleared to perform secretarial or other office type of work, not involving lifting items of five pounds or more. The claimant could perform office work in person or remotely. The claimant was always capable of writing and typing and other such work, despite her wrist injury.

12. The claimant requested light duty accommodations from her market employer so she could continue to work in her part-time job at the grocery market. The claimant was told that there was no light duty work available as her position required lifting and the employer was concerned that the claimant working while in a cast would pose a risk of liability to the employer.
13. The claimant would have been capable of working at the market with a no heavy lifting accommodation of more than five pounds, but this request was denied.
14. The claimant did not request to work remotely for the market employer because she knew there was no remote grocery market work available from this employer.
15. On 4/16/21, the claimant's request for a no heavy lifting accommodation was denied by the store Captain (Store Manager).
16. The claimant requested a medical leave of absence to preserve her part-time job at the market.
17. The part-time employer market granted the claimant's request for a medical leave of absence for an indefinite period of time. The approved unpaid leave of absence began on 4/16/21 and was indefinite in duration.
18. On 5/28/21, the claimant filed a new unemployment claim effective 5/16/21 with a weekly benefit rate of \$571.00 and a weekly earnings disregard amount of \$190.33. For this claim, [Employer A] is the primary base period interested party employer.
19. The claimant never stopped searching for work while filing for unemployment benefits. The claimant was performing work search activities 3-4 days each week.
20. The claimant applied for work at [Employer C], [Employer D], [Employer E], and [Employer F].
21. The claimant was seeking data entry work and jobs involving writing, typing, and answering telephone calls.
22. The claimant focused her search using on-line job search portals.
23. At the start of her claim, the claimant was not keeping a job search log as she had been told by DUA, via e-mail, that keeping a job search log was temporarily not required due to the [COVID]-19 pandemic. Later, when told job search logs were again required, the claimant started keeping a job search log.

24. On 8/10/21, the claimant was sent a Notice of Disqualification because she was on an employer approved unpaid indefinite leave of absence and was allegedly not in unemployment.
25. The claimant requested a hearing on the 8/10/21 determination.
26. The claimant obtained a medical release and she returned to her part-time job at the market on 9/13/21.
27. The claimant began new part-time variable hours of work at [Employer F] in September of 2021.
28. The claimant applied for a new period of TOPS Section 30 training beginning 9/9/21 and that case is currently pending. The claimant is still pursuing a Graphic Arts Degree at [College].
29. The claimant supplied her work search logs for the period beginning 6/21/21 through 8/12/21.

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.

G.L. c. 151A, § 29, 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. . . .

The claimant began a leave of absence from the instant employer on April 16, 2021, after suffering a broken wrist in an off-duty accident. *See Consolidated Findings ## 9 and 17.* The claimant's injury affected her ability to work for the instant employer, since her right arm was in a cast for approximately 11 weeks, and she was medically restricted from lifting more than five pounds while her wrist healed. *See Consolidated Finding # 9.* The claimant's job with Employer B required

lifting, the employer did not have any light duty work available for her, and the employer was also concerned that working with a broken wrist could pose a risk of liability. *See Consolidated Finding # 12.* However, the claimant is left-handed, she was always medically cleared to perform work that did not involve lifting more than five pounds, and she was capable of performing office work in person or remotely, including typing or writing. *See Consolidated Findings ## 10–11.*

The instant employer granted the claimant’s request for a leave of absence that began on April 16, 2021, and continued until she was able to return to work for the employer on September 13, 2021. *See Consolidated Finding # 26.*

An employee is not disqualified from receiving benefits if she is temporarily disabled from doing the employer's work, while capable of and available to do other work and making serious efforts to find other work. Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163–64 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work).

During her leave of absence, apart from her lifting restriction, the claimant was capable of working and available to perform light duty work through September 13, 2021, when she was medically released from her lifting restrictions and returned to work for the instant employer. *See Consolidated Findings ## 10–11 and 26.* The claimant was also actively looking for work during this time period. *See Consolidated Findings ## 19–23.* Based on these consolidated findings, the claimant is not disqualified from the receipt of benefits.

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), and she is entitled to benefits during her medical leave of absence.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits from April 11, 2021, through September 11, 2021, if otherwise eligible.

N.B.: We note that the review examiner’s initial decision created an overpayment of \$4,962.00, since the claimant had received benefits from the week ending April 17, 2021, through the week ending May 15, 2021. Review of the DUA’s UI Online database shows that the claimant was approved for a waiver of this overpayment on April 23, 2022 (*see Issue ID# 0076 4631 43*). Where the claimant has already received payment for those weeks and the overpayment arising from the review examiner’s decision has been waived, the Board’s decision effectively awards benefits beginning on May 16, 2021, and continuing through September 11, 2021.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 25, 2023



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JPCA/rh