

It was unclear from the record whether the claimant, a part-owner of the employer, was accepting all available suitable work while certifying for benefits. However, the claimant conceded he was unlikely to accept other offers of full-time employment as he was intending to return to work for the employer full-time once the slow season ended. Held he was not in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), because the record indicates he was not conducting an active and reasonable work search.

**Board of Review
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Issue ID: 0076 6888 84

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA effective May 1, 2022, which was denied in a determination issued on May 18, 2022. 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 October 15, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in partial unemployment during the period beginning May 1, 2022, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 unemployment status. Only the claimant attended the remand hearing. 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 was not in unemployment because additional suitable work would have been available to him had he, as part owner of the employer, chosen to lay off the employer's secretary, 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 are set forth below in their entirety:

1. In April, 2007, the employer's establishment was incorporated.
2. The employer's establishment is an oil and gas heating contractor.

3. The claimant owns the employer's establishment equally with the Vice President/Treasurer.
4. The claimant is the President of the employer's establishment.
5. The claimant and the Vice President usually work full time for the employer's establishment as technicians.
6. The claimant is usually scheduled to work Monday through Friday from 8:30 a.m. until 5 p.m. as a technician for 40 hours per week. The claimant sometimes works more hours depending on business needs and until the work is completed.
7. In the role of technician, the claimant is paid \$38.00 per hour and as a w-2 worker.
8. The employer's establishment also employs a part-time secretary. The secretary works approximately 8–12 hours per week for the employer. The claimant can perform the tasks of the secretary.
9. The claimant's last date of full-time work for the employer (as of the date of the initial hearing) was on April 29, 2022.
10. The claimant was only working part-time hours for the employer since after April 29, 2022. The claimant was limiting himself to 6.5 hours per week working in the role of technician as needed and also performing marketing tasks for the employer. The claimant had decided to limit his work to 6.5 hours per week as the claimant is required to report his working hours to the Department of Unemployment Assistance (DUA) when working for the employer in a part-time capacity.
11. The claimant has only been working part-time for the employer since after April 29, 2022, as the employer's establishment is experiencing slowness in business due to the season.
12. The Vice President had continued to work full time for the employer's establishment since May, 2022 as a technician. The Vice President has been working 40 hours per week.
13. The claimant and the Vice President decided that one of them would continue to work full time during the employer's slow season while the other one would only work part-time in the technician role alternating turns. The claimant and Vice President decided this arrangement as the employer's establishment has contributed towards unemployment benefits. The employer's establishment could possibly have more hours for the claimant to work if the claimant and the Vice President decided to share the available work hours.

14. After decreasing his own hours of work, the claimant still employs the secretary on a part-time basis and has decided not to lay the secretary off from work.
15. The claimant was anticipating on returning to work for the employer sometime in October, 2022.
16. The claimant filed an initial unemployment clam effective the week beginning May 1, 2022.
17. The claimant has been physically capable of working full time since May, 2022 with the exception of a 1 ½ week period in May, 2022 when the claimant was not capable of working due to having COVID-19.
18. The claimant has been looking for work weekly with other employers as a technician since filing for unemployment benefits. The claimant looks for work 3 times per week and maintains a work search activity log during most weeks. The claimant prefers to promote his own business at the employer's establishment instead of working for someone else. The claimant does not know if he would accept a full-time permanent job offer with another employer as he is planning on returning to work for the employer in a fulltime capacity sometime in October, 2022.
19. On May 18, 2022, the DUA issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) & 1(r) of the Law commencing the week beginning May 1, 2022 and until he met the requirements of the Law. The claimant appealed the Notice of Disqualification.
20. The last week the claimant requested for unemployment benefits (as of the date of the remand hearing session) was the week ending October 1, 2022. After this week, the claimant stopped requesting weekly unemployment benefits because the claimant subsequently returned to full time work with the employer's establishment.
21. On October 3, 2022, the claimant began working a fulltime schedule for the instant employer.
22. Beginning the week of May 1, 2022, there was anywhere from approximately 4–8 hours per week of work available to the claimant at the employer's establishment.
23. The employer did not have more than 6.5 hours of work available to the claimant during the period between May 1, 2022, and October, 2022 when the claimant returned to a full-time schedule.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Findings ## 22 and 23 as misleading in light of Consolidated Finding # 13, as explained below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, while we agree with the review examiners decision to deny benefits, we believe that the review examiner erred in disqualifying the claimant on the grounds articulated in her decision.

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.

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.

The review examiner initially disqualified the claimant because he was a part owner of the employer and had declined to lay off the employer's secretary in order to secure additional hours of suitable work for himself. *See* Consolidated Finding # 14. In cases where an owner, or part owner, of a company argues that he or she is in unemployment, the agency must closely scrutinize whether the claimant's unemployment was compelled by circumstances affecting the business or whether the claimant voluntarily put himself or herself in a state of unemployment. *See Jahn v. Dir. of Division of Employment Security*, 397 Mass. 61 (1986). While the claimant may have had the authority to assume the secretary's responsibilities, we have previously explained that we decline to endorse a legal theory that may have the effect of encouraging employers to put their workers into unemployment. Board of Review Decision 0022 1384 16 (Jan. 31, 2018). Accordingly, we believe that the review examiner erred in disqualifying the claimant because the employer chose to retain the secretary's services. The proper inquiry is to focus on the amount of work available to the company during the periods the claimant requested benefits. *Id.*

The employer experienced a decrease in the amount of work available during the period between May 1, 2022, and October 3, 2022. Consolidated Findings ## 11 and 21. However, at the remand hearing, the claimant was unable to provide accurate or consistent testimony about how many hours of work were actually available to him during each of the weeks on appeal. Absent such

information, we are unable to determine whether the claimant declined available work in order to remain eligible for benefits on a week-to-week basis. While we are unable to issue a decision on those grounds, we believe an additional remand is unnecessary because the present consolidated findings indicate that the claimant was ineligible on other grounds.

Pursuant to G.L. 151A, § 24(b), an individual seeking unemployment benefits is also required to show that he has made a reasonable, good faith effort to find new employment. Evancho v. Dir. of the Division of Employment Security, 375 Mass. 280, 282–283 (1978) (“the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence”). The Massachusetts Supreme Judicial Court has long held that whether an unemployed person is unable to obtain work is “largely a question of fact as to which the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence.” Id. at 282–283. Accordingly, the DUA requires that, during every week in which he certifies for benefits, the claimant makes an active and realistic work search by utilizing a variety of methods and contacting a variety of employers. *See e.g.*, Board of Review Decision 0018 3385 28 (Mar. 30, 2018).

By his own admission, the claimant was reluctant to accept full-time work with another employer because he knew he would be returning to work full-time for his business beginning in October 2022. Consolidated Findings ## 15 and 18. His position as president of the employer meant that he had a vested interest in continuing to promote his business over performing services as a technician for one of his potential competitors. *See* Consolidated Findings ## 3, 4, and 18. Additionally, the claimant was only searching for other work as an oil and heating technician even though he knew the availability of such work was limited during the industry’s off-season. *See* Consolidated Findings ## 2, 11, and 18. As the claimant understood that he was unlikely to find other work as a technician during this period and chose to prioritize his own business activities over seeking other, full-time work, we can reasonably infer that he was not conducting an active and realistic work search during the period between May 1, 2022, and October 3, 2022. *See* Consolidated Finding # 18. We, therefore, believe that the claimant has not met his burden to show he was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during that period

The claimant returned to work in a full-time capacity on October 3, 2022. Consolidated Finding 21. Accordingly, he was not in unemployment as of that date.

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he was in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), beginning May 1, 2022, and indefinitely thereafter.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week of May 1, 2022, and for subsequent weeks, until such time as he meets the requirements of the law.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 16, 2023



Michael J. Albano
Member

Member Charlene A. Stawicki, 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