

On remand, the employer presented an email from the claimant showing he chose to undergo elective eye surgery during the week at issue, which directly contradicted the claimant's contentions that he was capable of and available for full time work. As the claimant was not capable of and available for full-time 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: 0079 1344 61

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA effective January 8, 2023. In a determination issued on June 1, 2023, the DUA determined the claimant was not entitled to benefits for the week of January 15, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits for the week of January 15, 2023, in a decision rendered on June 29, 2023. 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 January 15, 2023, and, thus, was not disqualified during that week 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 employer's appeal, we remanded the case to the review examiner to obtain testimony from the employer, as the employer's witness was unable to connect to the initial hearing due to technical issues beyond her control. Only the employer 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 in partial unemployment during the week of January 15, 2023, because the claimant worked less than a full-time schedule during that week, accepted all hours of work offered by the employer, and earned less than his weekly benefit amount (WBA) plus earnings disregard, 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 filed a claim for unemployment benefits with an effective date of January 8, 2023, with a benefit year end of January 6, 2024.
2. The Department of Unemployment Assistance (DUA) determined the claimant to be monetarily eligible for a weekly benefit rate of \$947.00 and an earnings disregard of \$315.67.
3. The claimant works as a full-time laborer for the employer, a construction business. The claimant's hourly rate of pay depends on the job and is generally the prevailing wage. The claimant is paid \$30.00 per hour for "in-house" work, and between \$59.54 and \$70.85 per hour for all other work.
4. The claimant works 40 or more hours per week, Monday through Friday, 6:00 a.m. or 7:00 a.m. to 2:00 p.m. or 3:00 p.m.
5. The claimant certified for benefits for the week of January 15, 2023, through January 21, 2023.
6. During the week of January 15, 2023, through January 21, 2023, the employer offered 40 hours of work.
7. During the week of January 15, 2023, through January 21, 2023, the claimant worked 16 hours for the employer. The claimant was paid for 10 hours at an hourly rate of \$45.11, and 6 hours at an hourly rate of \$61.93, for a total of \$822.68 in gross wages.
8. On January 12, 2023, the claimant emailed the human resources administrator that he was, "going in for [LASIK] on tue [sic]."
9. During the week of January 15, 2023, through January 21, 2023, the claimant worked eight (8) hours on January 16, 2023, no hours on January 17, 2023, and January 18, 2023, eight (8) hours on January 19, 2023, and no hours on January 20, 2023.
10. The employer submitted written responses to a custom fact-finding questionnaire issued by the DUA. In response to the question, "How many days did the claimant miss during the week of 1/15/23 to 1/21/23? How many were due to personal reasons? How many due to the weather?" the employer stated, "17th and 18th was personal issues no weather issues this week."
11. The claimant had earned paid time off available to cover sick and personal time off. The claimant did not request to use his earned paid time off to cover these absences.
12. During the week of January 15, 2023, through January 21, 2023, the claimant was not available for and not capable of working full time hours.

Credibility Assessment:

During the remand hearing, the human resources administrator testified that the claimant missed three days of work the week of January 15, 2023, through January 21, 2023, and that it was because of [LASIK] surgery the claimant had on January 17, 2023. The record of the hearing was left open for the employer to submit the January 12, 2023, email from the claimant regarding [LASIK] surgery, and the claimant's payroll record for the week. Said documents were submitted on August 8, 2023, and entered into the record as exhibits.

During the original hearing, the claimant testified that he was only offered 16 hours of work by the employer, and that he did not refuse any hours or restrict his availability. It was undisputed that the claimant worked 16 hours for the employer and had gross earnings of \$822.68. During the remand hearing, the human resources administrator testified that the claimant did not work three (3) days during the week of January 15, 2023, through January 21, 2023, because he had a medical procedure. The employer submitted an email from the claimant dated January 12, 2023, stating he was, "going in for [LASIK] on tue [sic]." The employer submitted a Weekly Time Card for Employees showing the claimant's hours for January 16, 2023, through January 22, 2023. The Weekly Time Card shows the claimant worked eight (8) hours on January 16, 2023, no hours on January 17, 2023, and January 18, 2023, eight (8) hours on January 19, 2023, and no hours for the remainder of that week. During the original hearing, the claimant was questioned about the employer's response to DUA factfinding in which the employer reported the claimant missed work during this week for personal issues. The claimant denied missing hours for personal issues, stating that he would have put in for sick time. The employer's time card document corroborates that the claimant did not work three days during this week, including January 17, 2023 (Tuesday), January 18, 2023 (Wednesday), and there is no use of paid time off to cover the missed hours.

To the extent that there was a dispute as to whether 40 hours of work were available for the claimant during the week at issue, it was found that such work was available and that the claimant did not work 3 days of available work due to the [LASIK] procedure. The employer's testimony and evidence as to the availability of work and the days worked is considered more credible than that of the claimant's testimony.

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 for the week of January 15, 2023.

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.

Together, these provisions make clear that 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.

There was no dispute that the claimant worked some hours for the instant employer during the week of January 15, 2023. Consolidated Finding # 9. He, therefore, was not in total unemployment within the meaning of G.L. c. 151A, §1(r)(2), during that week.

In her original decision, the review examiner concluded that the claimant was in partial unemployment during the week of January 15, 2023, based upon his testimony that the employer had only offered him 16 hours of work during that week even though was capable of and available for full-time work. See Consolidated Findings ## 2, 7, and 9. However, upon reviewing the testimonial and documentary evidence presented by the employer at the remand hearing, the review examiner has revised her findings.

Following the remand hearing, the review examiner rejected as not credible both the claimant's testimony that the employer had not offered him full-time hours during the week of January 15, 2023, and his testimony that he was capable of and available for full-time work. 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). The review examiner based her assessment on documentary evidence submitted by the employer showing that the claimant had informed the employer that he was undergoing elective eye surgery on January 17, 2023. Consolidated Finding # 8. As this email directly contradicts the claimant's testimony that he did not miss work during the week of January 15, 2023, for personal reasons, we believe that the new findings are reasonable in relation to the evidence presented.

Consistent with this reasonable credibility assessment, the review examiner found that the claimant's decision to undergo elective surgery on Tuesday, January 17, 2023, meant that he was not capable of or available for full-time work during the week of January 15, 2023. *See Consolidated Findings ## 8 and 12.* As the claimant appears to have missed work on Tuesday, January 17, 2023, and Wednesday, January 18, 2023, because of his decision to undergo this procedure, we agree. *See Consolidated Finding # 9.* Absent any indication that he met the criteria for limiting his availability pursuant to 430 CMR 4.45 during the week of January 15, 2023, and we see none, we believe that the claimant has not met his burden to show that he was in partial unemployment within the meaning of G.L. c. 151A, § 1(r)(2).

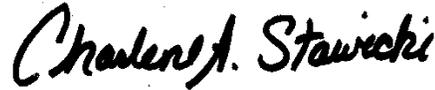
We, therefore, conclude as a matter of law that the claimant was not entitled to benefits under G.L. c. 151A, §§ 29 and 1(r), during the week of January 15, 2023, because he was not in unemployment.

The review examiner's decision is reversed. The claimant is denied benefits for the week of January 15, 2023.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 20, 2023



Paul T. Fitzgerald, Esq.
Chairman



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.

LSW/rh