The claimant was not entitled to benefits because the employer offered work to her in her usual position each week, but she declined anything that was more than 45 minutes away from her house. She did not show that the commuting distance rendered the offered work economically unsuitable. Held the claimant was not in total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), because she regularly declined offers of suitable work.

Board of Review
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Issue ID: 0083 6909 22

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 September 8, 2024, which was approved in a determination issued on September 18, 2024. The employer 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 awarded benefits in a decision rendered on October 24, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in partial unemployment and, thus, was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 because the employer did not directly offer her work and there was insufficient evidence to show that any work offered by the employer was suitable, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On November 5, 2023, the claimant began working as a part-time/on-call newborn care specialist for the employer, a night nanny service.

2. The employer did not guarantee any hours of employment a week to the claimant. The agreement was they would send her information about available assignments, and she would request the ones she wanted.

3. The employer paid the claimant $31 an hour for caring for a single baby and $36 an hour for caring for twins.

4. The employer has approximately 50 newborn specialists, which is an insufficient number to cover all the requests it receives for services.

5. The claimant made the employer aware that her availability would be restricted to assignments within a 45-minute commute from her home in [City].

6. The employer's business model is to send out shift lists to all its newborn specialists. These lists provide information about all shifts present [sic] available, some of which would have start dates weeks or months after the assignment was posted. The newborn specialists were free to request any of the available assignments. Each assignment is granted to the first specialist to request it.

7. On or about January 1, 2024, the claimant began working full-time, 8 a.m. to 6 p.m., as a nanny for another employer. While working for this other employer, the claimant continued to request and work overnight shifts with the present employer.

8. On September 7, 2024, the claimant was laid off from her full-time position.

9. On September 10, 2024, the claimant filed a claim for benefits with the Department of Unemployment Assistance (DUA). This claim was effective September 8, 2024. Her benefit rate on this claim is $1,033 and her earnings disregard is $344.33.

10. The claimant did not request or directly refuse any assignments with the present employer which would take place during the week ending September 14, 2014. During this week, she therefore, did not work any hours for the present employer and did not receive any remuneration attributable to this week from it.

11. On September 18, 2024, DUA issued a Notice of Approval, stating that, under MGL c. 151A, Section 29(b) and 1(r), the claimant had accepted subsidiary employment with the present employer during the base period and was currently accepting all work available during the benefits year, making her eligible to receive benefits starting September 8, 2024, for any week in which she is scheduled for less than full-time hours.

12. The claimant did not request or refuse any assignments with the present employer which would have taken place during the week ending September 21,

2014. During this week, she therefore, did not work any hours for the present employer and did not receive any remuneration attributable to this week from it.

13. During the week ending September 29, 2024, the claimant worked 3 shifts, totaling 24 hours for the present employer. She was paid $744 gross for the work she performed during this week.

14. During the week ending October 5, 2024, the claimant worked 2 shifts, totaling 16 hours, for the present employer. She was paid $496 gross for the work she performed during this week.

15. During the week ending October 12, 2024, the claimant worked 3 shifts, totaling 24 hours, for the employer. She was paid $744 gross for the work she performed during this week.

16. The claimant has accepted an assignment which starts in November that provides 4 shifts a week.

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 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 as inconsistent with the uncontested evidence in the record the portions of Findings of Fact ## 10 and 12 that state that the claimant did not refuse any assignments with the instant employer. 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 entitled to benefits.

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. If claimants decline an offer of suitable work, they bear the burden of proving that such work was unsuitable. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted); *see also* Evancho v. Dir. of 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") (citation omitted).

The review examiner concluded the claimant had not refused suitable work beginning the week of September 8, 2024, because the employer did not specifically and definitively offer the claimant shifts as a newborn care specialist. We disagree.

The employer regularly distributes a list of available shifts to its newborn care specialists, including the claimant. This list contains details such as the start date, hours, and location of each available shift. Finding of Fact # 6. By distributing this list, the employer is offering work directly to each of its newborn care specialists. Some of these offers of work remained unfilled, as the employer does not have enough newborn care specialists to cover all the shifts available. *See* Finding of Fact # 4. Moreover, it is evident that the claimant continued to receive these offers of work, as she accepted several shifts from the employer in the weeks following the effective date of her claim. *See* Findings of Fact ## 13–16. Given this record, the review examiner erred in concluding the employer had not offered the claimant work during the period at issue.

Although the review examiner stated that the employer had not offered the claimant work, she also concluded that the work the employer had available was not suitable work. Specifically, the review examiner stated that a determination of suitability could not be made without evidence of when the position was offered, when the work would start, where it would be performed, and what hours the claimant would be required to work. In so doing, the review examiner improperly shifted the burden of proof to the employer. *See* McDonald, 396 Mass. at 470.

As the Board has previously explained, an offer of work in the claimant's usual position is presumed to be suitable. *See, e.g.*, Board of Review Decision 0074 1862 27 (Jul. 26, 2023). Because the employer offered the claimant work in her usual position as a newborn care specialist, its offers are presumed to be suitable. *See* Findings of Fact ## 1 and 6.

To be sure, a claimant may decline an offer of work if the claimant can show something about the particular offer which rendered that work unsuitable. For example, length of commute may render an offer of work unsuitable where the claimant's earnings from such an offer are effectively offset by the required commuting time. *See e.g.*, Board of Review Decision 0008 9771 96 (May 15, 2014) (where the claimant made $13.00 per hour, a lengthy commute for a one-hour shift was not an offer of suitable employment).

In this case, the claimant restricted her availability for work to assignments that were within a 45-minute commute of her home. Finding of Fact # 5. However, she provided no evidence suggesting the shifts offered to her were economically inviable because they were more than 45 minutes away from her home. The claimant stated only that she declined such shifts because she felt that they

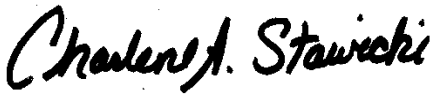
were too far away.[1] Preference for work close to home is not, by itself, substantial evidence that the work offered was economically unsuitable. This is so particularly in this case, where the claimant earned either $31 or $36 an hour for eight-hour shifts. The claimant has not met her burden to show that the employer offered unsuitable work. *See* Findings of Fact ## 3, and 13–15.

We, therefore, conclude as a matter of law that the claimant was not in total or partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), beginning the week of September 8, 2024, because she was declining offers of suitable work.

The review examiner's decision is reversed. The claimant is denied benefits for the week of September 8, 2024, and for subsequent weeks, until such time as she meets the requirements of the G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2025

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

[1] The claimant's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings of fact, is part of the unchallenged evidence introduced at the hearing and placed into the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).