Review examiner's credibility assessment unreasonably assigned more weight to the employer's hearsay testimony. The claimant was not obligated to actively search for work during the week on appeal, because she had just been given a definite recall date to return-to-work the following week as a bus driver. Held the claimant is eligible for benefits pursuant to G.L. c. 151A, § 24(b).

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Issue ID: 334-FHJ7-6646

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 filed a claim for unemployment benefits with the DUA, effective August 18, 2024. On November 16, 2024, the DUA issued a determination denying benefits for the week beginning September 1, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 15, 2025. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had not been actively seeking full-time work and, thus, was disqualified under G.L. c. 151A, § 24(b). 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 information regarding the claimant's ability and availability to work full-time, and when the claimant's employer informed her of her return-to-work date. 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was ineligible for benefits pursuant to G.L. c. 151A, § 24(b), because she was not actively seeking employment, is supported by substantial and credible evidence and is free from error of law, where the record after remand shows that she had been notified of a return to work date.

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 the Department of Unemployment Assistance (DUA) effective August 18, 2024.

2. Prior to filing her claim, the claimant most recently worked full-time as a school bus driver for a bus company beginning in December 2020. As of February 13, 2025, the initial hearing date, the claimant was still employed by the employer.

3. In January 2024, the claimant began attending a nursing program part-time at a community college in Massachusetts.

4. The fall 2024 semester began on September 3, 2024.

5. During the fall 2024 semester, the claimant was taking three courses for nine credits.

6. On an unknown date, but approximately two to three days prior to September 5, 2024, the employer notified the claimant by telephone of her return-to-work date.

7. The claimant returned to work on approximately September 5, 2024.

8. During the week beginning September 1, 2024, the claimant was physically capable of work without limitation.

9. During the week beginning September 1, 2024, the claimant's availability for full-time work was restricted by her part-time school attendance and her return to work.

10. During the week beginning September 1, 2024, the claimant was not seeking full-time employment. The claimant did not keep a log of her work search.

11. On November 16, 2024, the DUA issued the claimant a Notice of Disqualification under Section 24(b) for the week beginning September 1, 2024, and subsequent weeks, because the claimant did not meet the eligibility requirements.

Credibility Assessment:

The claimant attended the remand hearing with an interpreter.

The Board of Review's remand order requested the claimant submit additional documentation if available. The claimant did not submit additional documentation to the remand hearing.

The claimant testified in the remand hearing that she was taking three courses for nine credits in the fall 2024 semester. The claimant could not remember what her schedule was. The claimant testified that she was taking one-hour classes on three

days per week, but it was unclear whether she was taking 3 one-hour classes per day on three days per week (totaling 9 hours per week of classes) or 1 one-hour class per day on three days per week (totaling 3 hours per week of classes). The claimant did not clarify her response when asked. However, based on the claimant's testimony that she was taking 9 credits, it is most likely that she was taking 9 hours of classes per week.

The claimant did not have documentation of her return-to-work date or the date which the employer gave her the return-to-work date. The claimant testified that the employer told her by telephone two or three days prior to her return-to-work date. The claimant did not provide a specific date that she was told her return-to-work date and her testimony in this regard seemed to be an estimation. The claimant contended in the remand hearing that she returned to work on September 9, 2024. However, as in the initial hearing, the claimant did not present documentation of her return-to-work date. In pre-hearing questionnaires, the claimant stated that she had returned to work on September 5, 2024. The claimant's responses to the questionnaires were made closer to the week at question than her testimony in the hearing and are therefore deemed to be more credible. Furthermore, a September 5, 2024, fall semester start would coincide with the school year beginning after Labor Day (September 2, 2024) as is typical in Massachusetts schools.

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 Finding # 11 insofar as it states the DUA disqualified the claimant for subsequent weeks after the week beginning September 1, 2024. The record shows that the claimant was only disqualified for the week beginning September 1, 2024. For the reasons discussed below, we reject the portion of Consolidated Finding # 7, which states that September 5, 2024, was the claimant's return-to-work date, and Consolidated Finding # 9, as they are not supported by substantial and credible evidence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We also disagree with the review examiner's legal conclusion that the claimant is not entitled to benefits.

G.L. c. 151A, § 24(b) provides, in pertinent part, as follows:

> [An individual, in order to be eligible for benefits under this chapter, shall] . . . (b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted. . . .

Under G.L. c. 151A, § 24(b), the burden of proof is on the claimant. *See* 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). Claimants are expected to be capable of, available for, and actively searching for full-time work.[1]

During the week ending September 7, 2024, the claimant did not have any limitations on her ability to work. Consolidated Finding # 8. She was capable of working full-time during the week at issue. The questions before us pertain to whether the claimant met the availability and work search requirements of G.L. c. 151A, § 24(b).

In his credibility assessment, the review examiner rejected the claimant's testimony that she returned to work for the employer on September 9, 2024. 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 test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we cannot accept this finding.

Throughout the hearing, the claimant consistently testified that she returned to work on September 9, 2024. Notwithstanding this testimony, the review examiner found that she returned to work on September 5, 2024, due to an earlier answer on a DUA fact-finding questionnaire. It is worth noting that the claimant required a Haitian Creole interpreter for the hearing. Further, the fact-finding questionnaire was actually filled in by a DUA agent while talking with the claimant on the phone. *See* Exhibit 5.[2] The review examiner ignored the portion of the claimant's testimony, which explained that, at the time, she was trying to use Google translate, but the agent was talking fast and she was struggling to understand. Given the claimant's language barrier, we believe that it was unreasonable to assign more weight to the hearsay statements in the fact-finding questionnaire than the claimant's direct testimony that she returned to working her full-time job on September 9, 2024. *See* Consolidated Finding # 2.

This means that, during the week before us, the week ending September 7, 2025, she was not working. Therefore, the statement in Consolidated Finding # 9, which indicates that her return to work interfered with her ability to work full-time, is also rejected.

There is also no reasonable basis to conclude that the claimant's attendance at her nursing program interfered with her availability to work. The claimant was only attending her nursing program on a part-time basis, and she had been doing so since January, 2024. *See* Consolidated Finding # 3. Consolidated Finding # 2 provides that she has worked full-time for the employer since December,

[1] Although not specifically stated in G.L. c. 151A, § 24(b), other provisions of the Massachusetts Unemployment Statute show that unemployment benefits are intended to assist claimants seek and return to *full-time* work. *See, e.g.,* G.L. c. 151A, §§ 29 and 1(r), which provide for the payment of benefits only to those who are unable to secure a full-time weekly schedule of work.

[2] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

2020. From this we can reasonably infer that her part-time nursing program attendance did not render her unavailable for full-time work. Therefore, we also reject the portion of Consolidated Finding # 9, which states that her availability to work was restricted by her part-time nursing school attendance.

As such, the claimant has met her burden to show that during the week ending September 7, 2024, she was available for full-time work.

Next, we consider whether the claimant met the work search requirement. The Supreme Judicial Court defers to the DUA to set the standard for what constitutes an active work search. Grand v. Dir. of Division of Employment Security, 393 Mass. 477, 480–481 (1984). The DUA expects a claimant to make an active and realistic search for work, taking steps that a reasonable person in the claimant's circumstances would take if interested in obtaining work. However, claimants with an offer of new employment or a definite recall date are not required to actively seek work during the four-week period prior to the start/recall date. *See* DUA Adjudication Handbook (revised Mar. 1, 2020), Chapter 4, § 4(A)(1).

It is true that the claimant did not produce a document showing the date that her employer notified her of her exact return-to-work date, as the Board of Review requested in its remand questions. However, this is understandable as it appears that she was not given a written notice. She consistently testified that she had been notified by phone. Specifically, the claimant explained that she received a call about her return-to-work date two or three days before school opened. *See* Consolidated Finding # 6.[3]

The claimant is a bus driver, who drives students to and from school. *See* Consolidated Finding # 2. Unfortunately, in further questioning the claimant about the date she received notice, the review examiner failed to clarify whether he was asking about the school system for whom she drove students or the claimant's nursing school program. As a result, both the claimant's responses and the review examiner's findings are confusing and unclear.[4] Even if the school system opened on September 5, 2024, it is a matter of common sense that, during the first few days, teachers, administrators, and support staff would be busy preparing for the new school year. Bus drivers would not need to report back to work until the students' first day of school, which logically coincides with her actual return-to-work date of September 9, 2024.

If we consider that the employer called the claimant two to three days before September 5, 2024, to provide her with her return-to-work date, the claimant had an actual recall date as of Monday or Tuesday, September 2nd or 3rd. Because she had been provided with a recall date at the beginning of the week, she was excused pursuant to DUA policy from the obligation to actively search for work during the week ending September 7, 2024.

We, therefore, conclude as a matter of law that, during the week ending September 7, 2024, the claimant met the requirements of G.L. c. 151A, § 24(b), to be capable of, available for, and actively seeking full-time work.

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[3] This portion of the claimant's testimony is also part of the unchallenged evidence in the hearing.

[4] Because the confusion was in large part attributable to the review examiner's questioning, and the claimant's testimony about her return-to-work date and notice to return were consistent and clear, we decline to remand this case a second time.

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending September 7, 2024, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 10, 2025

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.

REB/rh