Part-time behavioral therapist should not have been disqualified for turning down assignments that required her to drive 1-2 hours during rush hour, without being compensated for travel time, for 2 hours of work. Such assignments were economically unsuitable.

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Issue ID: 0014 3830 98

BOARD OF REVIEW DECISION

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 separated from another employer and was initially awarded benefits, beginning in June, 2014. During her benefit year, she began working on a part-time basis for this employer. In a determination issued by the agency on September 22, 2014, the DUA concluded that the claimant was entitled to partial unemployment benefits in any week that she worked less than a full-time schedule of work. The employer appealed this determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's determination and denied benefits in a decision rendered on November 7, 2014. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment, within the meaning of G.L. c. 151A, § 29(b), because she refused an opportunity to earn additional wages, and, thus was disqualified from receiving further benefits. 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 afford the claimant an opportunity to present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Upon reviewing the recorded testimony from the remand hearings, additional exhibits presented into evidence, and the consolidated findings, we found it necessary to remand the case again for further findings of fact pertaining to the reasons that the claimant refused certain offers of work. The review examiner thereafter submitted a final set of 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 conclusion that the claimant is disqualified for refusing the opportunity to earn additional wages from the employer is supported by substantial and credible evidence and is free from error of law, where the consolidated

findings and record after remand provide that the claimant declined assignments which involved one- to two-hour commutes during rush hour.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits effective 06/15/14.

2. The claimant's weekly benefit rate is $307.00 and her weekly earnings disregard amount is $102.33.

3. On 09/02/14 the claimant began working for this employer. The claimant worked a variable schedule of part-time as needed hours. The claimant typically worked 6-8 hours per week as an $18.00 per hour Behavior Therapist.

4. The claimant frequently asked the employer for more hours of work and when other suitable work was offered the claimant would accept these additional hours.

5. The claimant understood this to be a part-time job to be in addition to full-time employment with another employer.

6. The claimant had informed this employer that she had been attacked by a child in the past and that she was not willing to accept any assignment with violent children.

7. In the course of her employment the claimant refused approximately 19-27 hours of work because the work offered was not suitable. The assignments were not suitable because the commuting times were too great or the child to be seen was possibly violent and the claimant could not accept such a case because of past issues with violent children.

8. The claimant understood that assignments given to her would involve a commute time of 30-45 minutes including any traffic delays. If the claimant was given an assignment during rush hour that would involve a commute of 1-2 hours, the claimant understood that this assignment was not a suitable offer because of the travel time involved.

9. The specific times and details of this refused work of 19-27 hours offered through-out the claimant's employment [are] unknown. The specifics of the commute time for this refused work or if a violent child was involved in a specific offer of work are unknown.

10. The employer did not provide work in the communities the claimant had requested as her first choices. The claimant did accept other work from this employer and the employer attempted to locate assignments for the claimant in areas where she had worked in the past.

11. On 09/22/14, the employer was mailed a "Notice of Approval" informing the employer that the claimant is eligible for unemployment benefits because she was accepting all available work and her weekly gross wages are not greater than the claimant's weekly benefit rate of $307.00 [sic] her earnings exclusion amount of $102.33.

CREDIBILITY ASSESSMENT

The claimant's testimony regarding refusing only assignments that are not suitable because of the commuting time (given traffic considerations) or potential violence by the child was accepted by this review examiner because it was credible.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We set aside those portions of Consolidated Findings of Fact # 4, # 7, and # 8 that characterize offered assignments as "unsuitable," inasmuch as the suitability of the work is a question of law. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). We also set aside the portion of Consolidated Finding of Fact # 9, which states that the specific times of the refused 19–27 hours of offered work is unknown, as this statement is not supported by the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, the consolidated findings do not support the review examiner's legal conclusion, prior to remand, that the claimant's refusal of certain assignments rendered her ineligible for partial unemployment benefits.

This case is governed by G.L. c. 151A, § 29(b), which authorizes benefits to be paid to those in partial unemployment, and G.L. c. 151A, § 1(r)(1), which defines "partial unemployment" as follows:

> "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…For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be

> considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

Also pertinent is the definition of "total unemployment" set forth in G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

> "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*. (Emphasis added.)

In Board of Review Decision 0014 0062 59 (Mar. 9, 2015)[1], we explained that the overall purpose of Chapter 151A requires us to interpret "partial unemployment," under G.L. c. 151A, § 1(r)(1) to incorporate the requirement that the work lost be "suitable," as specified in the definition of "total unemployment" in G.L. c. 151A, § 1(r)(2). Just as a claimant may still be in total unemployment if unsuitable work is offered and refused, a claimant with ongoing, part-time work may still be in partial unemployment if she rejects unsuitable work. As we stated, this is so, in part, because "an individual need only be available for suitable employment which [s]he has no good cause to refuse." Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 21 n.1 (1980) (discussing the relationship between G.L. c. 151A, §§ 24(b) and 25(c), with regard to when a person can refuse work). For this reason, we remanded the present appeal a second time to obtain findings of fact to help us determine whether the hours of work that the claimant turned down were unsuitable. We are satisfied that they were.

When the claimant accepted the job, she informed the employer that she was willing to travel 30 to 45 minutes to an assignment. (Consolidated Finding # 8 and Exhibit 10, p. 3.)[2] As the review examiner found, the claimant understood this to include traffic delays. This is significant. The claimant lived in [Location A], a neighborhood in [City]. Although the employer presented evidence showing mileage and driving times of less than 45 minutes to locations where the claimant declined assignments,[3] there is no indication that these exhibits reflected rush hour driving times. It is evident from Consolidated Finding # 8 and the claimant's testimony during the hearing that she would decline to accept offered assignments in locations that involved rush hour driving times of one to two hours. In light of the traffic patterns in the greater [City] area during normal rush hour, the claimant's estimate of travel time was reasonable. Moreover, since her assignments were short, usually a couple of hours, and the claimant earned only a modest

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[1] Board of Review Decision 0014 0062 59 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

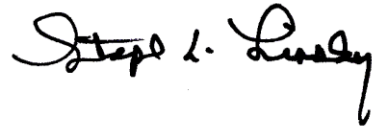
[2] Exhibit 10 is a series of employer documents that include written communications to and from the claimant during the course of her employment. While not explicitly incorporated into the review examiner's findings, these communications are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

[3] *See*, for example, Remand Exhibit # 14, which is a Google Maps printout showing the distance from the claimant's home in [Loction A] to an offered assignment in [Location B] to be 18.4 miles, 34 minutes. *See* Id.

hourly rate of $18 per hour, not including travel time[4], we conclude that these assignments were not suitable. *See* Board of Review Decision 0008 9771 96 (May 15, 2014) (given that the claimant made $13.00 per hour, a one-hour shift at a location far away from her home was not an offer of suitable employment). The fact that the claimant accepted assignments to the same locations when they involved more paid work hours demonstrates that the claimant was willing to accept assignments when they were suitable based upon commuting times. She was not averse to the distance, but rather to the long commuting time in relation to her earnings.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant was not entitled to benefits, pursuant to G.L. c. 151A, § 29(b), was based upon error of law, because the record indicates that the claimant was accepting all suitable hours of work.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 20, 2014, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – August 12, 2015

Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

AB/rh

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[4] *See* Remand Exhibit 11, p. 2, an employer statement summarizing what the employer tells new applicants. The employer tells applicants during the interview that their pay does not include travel time. *See* Id.