



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

In the matter of:

Appeal number: **BR-116510**

CLAIMANT APPELLANT:

EMPLOYING UNIT:
New Penn Motor Express, Inc.
c/o TALX Employer Services
P.O. Box 1160
Columbus, OH 43216

S.S. # XXX-XX-
Hearings Docket # 561324

EMP. # 47-051272

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Wayne Robinson, a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from his position with the employer on October 8, 2009. He filed a claim for unemployment benefits with the DUA and was awarded benefits in a determination issued on August 13, 2010. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, a review examiner reversed the agency's initial determination and denied benefits in a decision rendered on November 10, 2010.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment because he was on leave from the instant employer and thus, was subject to disqualification, pursuant to G.L. c. 151A, § 29(a), 29(b) 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 back to the review examiner to make subsidiary findings from the record regarding the nature of the claimant's leave of absence. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the findings.

The issue on appeal is whether the claimant was partially or totally employed after he was laid off from his most recent employer, in light of his "leave of absence" with the instant employer.

Findings of Fact

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

1. The claimant was employed as a full-time tractor-trailer Driver with the employer's transport business. He started in late December of 2004.
2. The claimant submitted a written, signed leave request dated October 8, 2009 to work full-time as a tractor-trailer driver for another company, Warner Brothers. The claimant was going to resign from his job with the instant employer because there was little or no work available, but was persuaded by his union steward to take the leave of absence instead as a way of keeping his job with the employer in case the Warner position did not work out.
3. The claimant was expected to return to work with the instant employer on December 31, 2010. The claimant did not return to the employer because he secured full-time, more suitable employment as a Driver with Warner Brothers, in contrast to working one day per week, performing mostly dock work, with the instant employer.
4. The claimant filed an application for unemployment benefits, because he was laid off from his job.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 29(a), provides, in pertinent part, as follows:

An individual in total unemployment and otherwise eligible for benefits ... shall be paid for each week of unemployment...

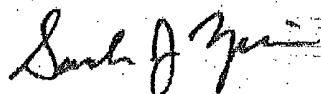
G.L. c. 151A, § 1(r), provides, in pertinent part, as follows:

(2) ... an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever ... and in which, though capable of and available for work, he is unable to obtain any suitable work....

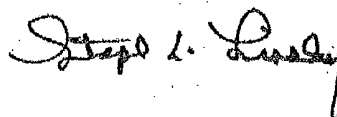
The DUA review examiner concluded at the hearing that the claimant was not capable of and available for work for the week ending December 12, 2009, because he was on a leave of absence with this employer. We remanded the case for subsidiary findings to get into the record that the claimant's "leave of absence" was more of an administrative hold than an actual leave of absence. The consolidated findings bear out that the claimant constructively resigned his position with the employer when he left the employer to take another better job; it was a leave of absence in name only.

The DUA review examiner's decision is reversed. The claimant is entitled to benefits, under G.L. c. 151A, §§ 29(a) and 1(r), for the week ending December 12, 2009 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 4, 2011



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

Chairman John A. King, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT - May 4, 2011

