

**Board of Review
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Issue ID: 0002 2818 69

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, 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 for unemployment benefits for the week ending February 9, 2013, asserting that he was in unemployment, as defined in G.L. c. 151A, § 1(r)(1)(2), and pursuant to G.L. c. 151A, § 29(a)(b). His claim was allowed in a determination issued on June 17, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied the claim in a decision rendered on September 5, 2013. We accepted the claimant's application for review.

The claim was denied after the review examiner determined that the claimant was not accepting all available work for the week in question and, therefore, was in unemployment, pursuant to G.L. c. 151A, § 29(a)(b). 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 make subsidiary findings on the issue of whether the claimant was in unemployment. Thereafter, the review examiner issued 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 was not in unemployment during the week of 2/9/13, because the employer had a full-time schedule of work available for him, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

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

1. On 2/14/13, the claimant filed an initial claim for unemployment benefits with an effective date of 2/3/13. At the time of filing the claim, the claimant was working full-time as a security guard for the employer's security business. The claimant worked from 12:00 a.m. until 8:00 a.m. on Tuesdays through Saturdays and was paid \$9 per hour.

2. The Governor of Massachusetts declared a state of emergency for the Commonwealth on 2/8/13 due to a substantial snow storm.
3. On 2/8/13, the employer was notified by a client business that it did not require the employer's fire watch services at its location in Lawrence. The claimant usually worked at this client's location. The client cancelled the fire watch services because the business location was not accessible due to unplowed snow.
4. On or about 2/8/13, the claimant spoke with a local police officer about the state of emergency. The police officer told the claimant that he should not go on the road and that under martial law he could be subject to arrest and his car towed if he traveled during the state of emergency.
5. On 2/8/13, the employer notified the claimant that his assignment at the Lawrence location was cancelled for 2/8/13 and 2/9/13. The employer offered the claimant work on 2/8/13 and 2/9/13 guarding a construction site located in Bedford, New Hampshire. The employer did not inform the claimant that the position required him to have a valid guard license. The employer was unaware if the claimant had a valid guard license in New Hampshire. The claimant allowed his New Hampshire guard license to lapse because he worked only in Massachusetts during the previous four years. The claimant declined the work in Bedford because of the state of emergency in Massachusetts and because of what the local police officer had told him. The claimant did not decline the work because he did not have a valid guard license in New Hampshire. The employer did not tell the claimant that it had obtained permission to have its employees drive in Massachusetts during the state of emergency.
6. During the week ending 2/9/13, the claimant worked 24 hours for the employer. The claimant did not work on 2/8/13 and 2/9/13 because he was prohibited from driving on Massachusetts roads due to the state of emergency.

Credibility Assessment: The employer witness testified that a client of her business contacted the Governor's office and obtained permission for all employees of its business to drive on the roads in Massachusetts during the state of emergency. This testimony was not credible. While it is plausible that the Governor may allow employees guarding a federal facility to be exempt from a travel prohibition, it is unlikely all employees of the business would have been given such an exemption. Further, the employer never told the claimant of any such exemption when she spoke with him on 2/8/13. The employer witness testified that she could show proof of having obtained such approval but did not bring any evidence to the hearing because it was not relevant. The failure of the witness to bring evidence to support her testimony on such an important issue diminished her overall credibility.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we decide, contrary to the examiner, that the claimant was in unemployment during the week in question.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, 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....

During the snowstorm that shut down much of the state in February of 2013, many employees were left either without work or without means of commuting to work. For employees not entitled to paid time off, no compensation was available for the lost income, save the unemployment system. At the time of the blizzard, the claimant had a full-time schedule of work for a client of the employer, guarding a construction site in Massachusetts. When the blizzard hit, the client operator of the construction site notified the employer that a guard was not needed, since the access road had not been plowed. The employer therefore called the claimant to notify him that it had alternate work for him at a site in New Hampshire.

The parties disagreed as to what happened in that telephone call. The employer's manager testified that she told the claimant about the New Hampshire job and, in response to his concern about the statewide ban on driving, informed him that her company, a provider of security services, had obtained an exemption to the ban, and that he would be permitted to drive to the work site. She said that the claimant also mentioned that he did not have a guard license valid in New Hampshire, and that she assured him no license was needed for the particular job. According to the employer, the claimant declined to work, citing the dangerous road conditions.

The claimant testified that he refused the job because he had been informed that the roads were closed, and that he could be arrested if he drove. The claimant's testimony was not altogether clear as to whether the employer told him about the exemption to the ban on driving, but he maintained that he believed it was illegal to drive; and, for that reason, he declined the work offered.

In her original decision, the review examiner made a factual error as to whether the employer had acquired an actual exemption to the driving ban. We remanded to address this issue. As set forth in the consolidated findings of fact, the review examiner reviewed the evidence and found that: (1) the employer did not have an exemption; (2) the employer did not tell the claimant that there was an exemption; and (3) the claimant declined the work due to the legal impediment to driving on the roads.

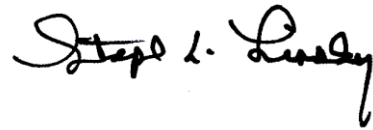
There is no dispute that the employer offered the claimant work in New Hampshire. However, given the review examiner's finding that it would have been illegal for the claimant to drive to the job, he is entitled to the relief contemplated by the statute for his inability to accept the work.

We, therefore, conclude as a matter of law that the claimant is not *per se* disqualified by virtue of having refused the two shifts. Consequently, we apply the statutory formula to decide whether he is entitled to partial benefits.

Under G.L. c. 151A, § 29(b), an employee is entitled to relief if he works less than his accustomed schedule because the employer has not offered a full schedule of work. In most cases, such employees do not seek unemployment compensation because of the "wait week" prescribed by the statute, which may seem to make such a claim largely meaningless. The claimant, however, wished to have the issue decided nonetheless, since a decision in his favor would eliminate the wait week if a future claim arose.

The claimant earned \$216 during the week in question (24 hours at \$9 per hour). His weekly benefit rate of \$176, less the earnings disregard of \$58.67, comes to \$157.33, which is less than his total earnings for the week, thus bringing him within the ambit of the partial unemployment provisions of the statute. The claimant is therefore eligible for wait week credit should he reopen this claim.

The review examiner's decision is reversed.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 13, 2014



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

LH/rh