

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

	Decision No.:	1575-BH-91
	Date:	Dec. 30, 1991
Claimant: Catherine Yancy	Appeal No.:	9011618
	S. S. No.:	
Employer: Gay Kiddie Shop, Inc.	L. O. No.:	9
	Appellant:	REMAND FROM COURT

Issue:

Whether the claimant was able to work, available for work and actively seeking work within the meaning of Section 8-903 of the Labor and Employment Article.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND, THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES

January 29, 1992

— APPEARANCES —

FOR THE CLAIMANT:

Catherine Yancy, Claimant
Steve Shockett, Attorney

FOR THE EMPLOYER:

Gary Shoenemann,
President

CORRECTED DECISION

Note: This is a corrected decision being issued by the Board according to Section 8-511(b) of the Labor and Employment Code. The DECISION paragraph of the previous decision did not match the discussion in the body of the decision. This inconsistency is corrected in this decision. The change affects only the week ending August 11, 1990. The claimant was not able to work for most days of that week, and she should be disqualified for that week also.

EVALUATION OF THE EVIDENCE

This case was remanded to the Board of Appeals from the Circuit Court for Baltimore City for a de novo hearing. At the hearing, the parties conceded that the evidence to be presented would be no different from that taken at the previous hearings. On the motion of the claimant, the Board entered into evidence the entire transcript and proceedings of the previous hearing. No additional testimony or evidence was offered, and the parties, in fact, stipulated to the facts below.

FINDINGS OF FACT

The claimant was employed as a sales clerk and cashier for the employer from 1987 through July 23, 1990. She returned to that employment on September 6, 1990.

The claimant suffered a knee problem which caused her to be unable to perform her work for a time. She underwent an operation on her knee during the week which ended July 28, 1990. She was then unable to work at all until at least August 9, 1990.

The claimant concedes that she was unable to work during this time. The claimant's job remained theoretically available for her, but she was unable to perform this specific job until September 6, 1990. Between August 9, 1990 and September 6, 1990, however, the claimant was able to perform sedentary jobs. Knowing that her old job was available to her, assuming that she adequately recovered, she applied for other jobs in the areas of bookkeeping, secretary and receptionist work. She had approximately six months of experience in these fields, compared to fourteen years of experience in the retail field. The claimant diligently applied at many places of employment for this type of sedentary work. One of these types of work was a referral she was given by an office of the Department of Economic and Employment Development. The claimant did not obtain any of these types of work prior to September 6. By that time, she had physically recovered enough to get her former job back.

CONCLUSIONS OF LAW

The claimant never has been penalized for voluntarily quitting her job under Section 8-1001 of the law (formerly Section 6(a) of the law) because she never intended to quit her job. The employer did not specifically discharge her, but she could not be allowed to work with her physical limitations. The Claims Examiner and the Hearing Examiner were correct in determining that there was no disqualifying separation issue in the claimant's brief separation from this employment.

The real question is whether the claimant was able and available to work within the meaning of Section 8-903 of the law. The claimant concedes that she was not able to work at all until August 9, 1990. The only remaining issue is whether the claimant met the criteria of Section 8-903 of the law between August 9 and September 6.

The first test in determining whether a person is able to work within the meaning of Section 8-903 of the law is whether they are able to perform their previous work. The claimant failed this test, because she was not at the time able to perform her last employment as a sales clerk or a cashier because she was not able to stand during the entire work day.

A person who is unable to perform their previous job may, in certain circumstances, be held to be meeting the requirements of Section 8-903. In such a case, the Board must consider the following:

1. The type of work formerly done by the claimant;
2. The type of work the claimant was capable of performing at the time the claims at issue were filed;
3. The type of work the claimant sought in light of the medical restrictions placed upon him; and
4. The existence of or market for the type of work the claimant was seeking.

Randall v. Employment Security Administration, 5 Unemployment Insurance Reporter (CCH), Md. 8400, Superior Court of Baltimore City, 121376.

In this case, the Board concludes that the claimant was meeting the requirements. She had some experience in the clerical and secretarial field, she was very actively seeking work in this field. In addition, it appears that the agency also believed that this was an appropriate field for the claimant to work in, since the agency referred the claimant to

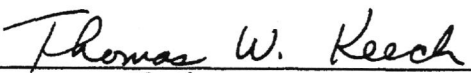
at least one of these sedentary positions. Under all the circumstances, the Board concludes that the claimant was meeting the eligibility requirements of Section 8-903 of the law, beginning with the week ending August 18, 1990 through the week ending September 8, 1990.

DECISION

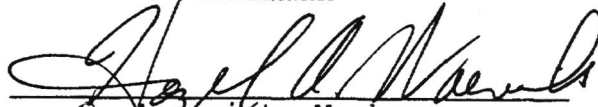
The claimant was not able to work and is therefore disqualified from benefits under Section 8-903 of the Labor and Employment Article for the weeks ending August 4 and August 11, 1990.

For the weeks ending August 18, August 25, September 1 and September 8, 1990, the claimant was able to work within the meaning of Section 8-903.

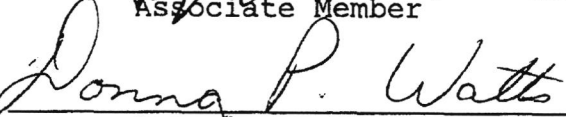
The decision of the Board of Appeals dated December 20, 1991 is modified.



Chairman



Associate Member



Associate Member

K:W:W

kbm

Date of Hearing: November 19, 1991

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Steve Shockett, Esq.

UNEMPLOYMENT INSURANCE - TOWSON
John T. McGucken, Legal Counsel, D.E.E.D.

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— DECISION —

	Decision No.:	1575 -BH-91
	Date:	Dec. 20, 1991
Claimant: Catherine Yancy	Appeal No.:	9011618
	S. S. No.:	
Employer: Gay Kiddie Shop, Inc.	L. O. No.:	9
	Appellant:	REMAND FROM COURT

Issue:

Whether the claimant was able to work, available for work and actively seeking work within the meaning of Section 8-903 of the Labor and Employment Article.

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THE PERIOD FOR FILING AN APPEAL EXPIRES

January 19 , 1992

— APPEARANCES —

FOR THE CLAIMANT:

Catherine Yancy, Claimant
Steve Shockett, Attorney

FOR THE EMPLOYER:

Gary Shoenemann,
President

EVALUATION OF THE EVIDENCE

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Examiner and the Hearing Examiner were correct in determining that there was no disqualifying separation issue in the claimant's brief separation from this employment.

The real question is whether the claimant was able and available to work within the meaning of Section 8-903 of the law. The claimant concedes that she was not able to work at all until August 9, 1990. The only remaining issue is whether the claimant met the criteria of Section 8-903 of the law between August 9 and September 6.

The first test in determining whether a person is able to work within the meaning of Section 8-903 of the law is whether they are able to perform their previous work. The claimant failed this test, because she was not at the time able to perform her last employment as a sales clerk or a cashier because she was not able to stand during the entire work day.

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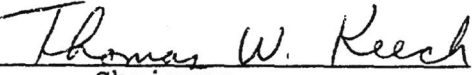
Randall v. Employment Security Administration, 5 Unemployment Insurance Reporter (CCH), Md. 8400, Superior Court of Baltimore City, 121376.

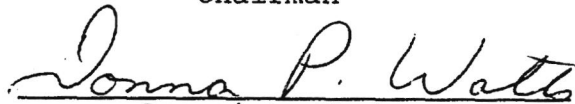
In this case, the Board concludes that the claimant was meeting the requirements. She had some experience in the clerical and secretarial field, she was very actively seeking work in this field. In addition, it appears that the agency also believed that this was an appropriate field for the claimant to work in, since the agency referred the claimant to at least one of these sedentary positions. Under all the circumstances, the Board concludes that the claimant was meeting the eligibility requirements of Section 8-903 of the law, beginning with the week ending August 18, 1990 through the week ending September 8, 1990.

DECISION

The claimant was able to work within the meaning of Section 8-903 of the Labor and Employment Article for the weeks ending August 11, 18 and 25 and September 1 and 8, 1990.

The previous decision of the Hearing Examiner is reversed. The previous decision of the Board of Appeals is reversed, based upon the reasoning above.


Chairman


Associate Member


Associate Member

K:W:W

kbm

Date of Hearing: November 19, 1991

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Steve Shockett, Esq.

UNEMPLOYMENT INSURANCE - TOWSON

John T. McGucken, Legal Counsel, D.E.E.D.

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Department of Economic &
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William Donald Schaefer, Governor

J. Randall Evans, Secretary

William R. Merriman, Chief Hearing Examiner

Louis Wm. Steinwedel, Deputy Hearing Examiner

*1100 North Eutaw Street
Baltimore, Maryland 21201*

Telephone: 333-5040

— DECISION —

Claimant:	Catherine Yancy	Date:	Mailed: 10/1/90
		Appeal No.:	9011618
		S. S. No.:	
Employer:	Gay Kiddie Shop, Inc.	L. O. No.:	009
		Appellant:	Claimant

Issue: Whether the claimant was able, available and actively seeking work, within the meaning of Section 4(c) of the Law.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON

October 16, 1990

— APPEARANCES —

FOR THE CLAIMANT:

Claimant - Present
Represented by:
Alexander R. Martick, Esq.

FOR THE EMPLOYER:

Not Represented

FINDINGS OF FACT

The claimant filed an original claim for unemployment insurance benefits at Towson, effective July 29, 1990.

The claimant has been employed Kay Kiddie Shop, Inc. from June 4, 1987 to July 23, 1990, and she returned to work on September 6, 1990.

Separation information from the employer discloses that the claimant last worked July 26, 1990, had an operation and the doctor estimated a four to five week recovery; that her expected date of return to work was September 6, 1990 and the position was being held for her.

The claimant concedes that she needed an operation to her right knee. She was seen by the doctor on May 4, 1990. She became unable to work on July 24, 1990 on or about which day she had surgery. The claimant was recuperating and was not ambulatory until August 9, 1990.

Medical certification dated August 10, 1990, states that the claimant cannot work, and that she had been unable to work from July 24, 1990 until expected date of return to work of September 6, 1990. Medical certification by the same doctor dated August 23, 1990, released the claimant for full-time work effective August 23, 1990. However, the claimant was not prepared to go back to work and secured additional medical certification from the doctor advising that she may go back to work on September 6, 1990.

The claimant did, in fact, return to work with the same employer on September 6, 1990, but she is working reduced hours due to her continuing physical discomforts.

Since the claimant has other occupational skills of that of secretary or receptionist, she searched for work in these occupations between August 9, 1990 through at least August 31, 1990.

However, the claimant could have returned to work at any time to her customary employment with the Gay Kiddie Shop, Inc., as soon as she would have been released for work for that occupation by her doctor.

The claimant has had fourteen years' experience in the retail business. She has had five months' experience as secretary, receptionist, telephone operator and the like.

CONCLUSIONS OF LAW

The claimant did not quit her job with Gay Kiddie Shop, Inc. The claimant was not discharged by that employer. To the contrary, the claimant requested and was granted a medical leave of absence based upon her inability to continue to perform detailed sales work due to a temporary disability to her right knee, precluding her from prolonged standing.

Counsel correctly points to Section 6(a) of the Statute and the last sentence, "that if an individual leaves his employment because of a circumstances relating to the health of the

individual. . . . the individual must furnish a written statement or other documentary evidence of that health problem from a physician or hospital."

However, it is noted that this requirement is couched in Section 6(a) of the Statute which pertains to voluntarily leaving work. However, the claimant did not voluntarily leave her job, such was an involuntary separation related to reasons of health. Upon production of such medical documentation, the Law requires that the claimant establish whether or not he or she is available for work. Section 4(c) of the Maryland Unemployment Insurance Law provides that any unemployed individual is eligible to receive benefits with respect to any week, only if the Executive Director finds that he is able to work, and is available for work; provided no claimant shall be considered ineligible in any week of unemployment for failure to comply with the provision of this subsection if such failure is due to illness or disability which occurs after he has registered for work and no work which would have been considered suitable at the time of his initial registration has been offered after the beginning of such illness or disability. The requirements of this subsection are specific. First, the illness or disability must have occurred after he registered for work. This claimant's illness or disability began before she registered for work. Further, the subsection has a dual requirement as specified by the inclusion of the word "and" that no work which would have been considered suitable at the time of the initial registration has been offered after the beginning of such illness or disability.

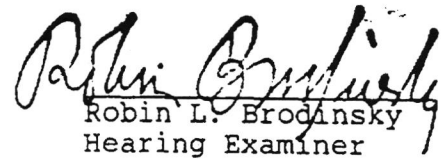
Since the claimant has neither voluntarily or involuntarily been terminated from her employment and the employer has held the position for her with continuing work available to her, to which she could have returned at anytime if she had been medically able to do so, and she has in fact returned to that job, effective September 6, 1990, there has been a continuing offer of suitable work to her after the beginning of her illness or disability.

Therefore, based upon the two-fold requirement as stated in the Statute, the claimant is not able and available for work and is not eligible for waiver or exemption under Section 4(c) of the Statute for sick or disability benefits for this reason, and despite her professed secondary work experience, it is clear that the claimant's primary employment experience and classification is in retail sales, and such suitable work as been available to her throughout the period of her recuperation from her knee surgery. Accordingly, I conclude that the determination of the Claims Examiner was in conformity with the Law, and was reasonably reached, and it shall be affirmed.

DECISION

The claimant was not able and available for work, within the meaning of Section 4(c) of the Maryland Unemployment Insurance Law. Benefits are denied for the week beginning July 29, 1990 to September 6, 1990.

The claimant may be eligible for partial unemployment insurance benefits, if she is working part-time due to reasons which are not associated with or due to a physical illness or disability.


Robin L. Brodinsky
Hearing Examiner

Date of Hearing: September 26, 1990

lr/Specialist ID: 09664

Cassette No: 7885

Copies mailed on October 1, 1990 to:

Claimant

Employer

Unemployment Insurance -Towson (MABS)

Martick and Martick