

- DECISION -

Claimant:
MICHAEL L KISNER

Decision No.: 18-BR-15

Date: February 20, 2015

Appeal No.: 1423586

Employer:
MONTGOMERY CO GOVERNMENT

S.S. No.:

L.O. No.: 63

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: March 23, 2015

REVIEW OF THE RECORD

The claimant has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on November 5, 2014. That Decision held the claimant was not fully able, available and actively seeking for work, within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-903*, and therefore ineligible for benefits, from the week beginning September 21, 2014 and until the claimant was meeting the requirements of the law.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner or



evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The claimant appeared and testified. The claimant was afforded the opportunity to present documentary evidence and to make a closing statement. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to conduct its own hearing, or allow additional argument. However, the Board will move into evidence the medical documentation provided by the claimant with his letter of appeal to the Board. The Board enters into evidence as *Claimant's Exhibit B1*, the medical documentation from Dr. Roberta Rothen, dated October 22, 2014, stating that the claimant can work without restrictions.

The Board, after deleting the last sentence, adopts the hearing examiner's Findings of Fact. Those facts are supported by substantial evidence in the record. The Board makes the following additional Finding of Fact:

The claimant was released by his doctor to return to work without restrictions as of October 10, 2014. *See Claimant's Exhibits 1 and B1*.

The Board concludes that these facts warrant a reversal of the hearing examiner's decision.

Md. Code Ann., Lab. & Empl. Art., §8-903 provides that a claimant must be able to work, available to work, and actively seeking work in each week for which benefits are claimed.

The claimant has the burden of demonstrating by a preponderance of the evidence that the claimant is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., §8-903*. A claimant may not impose conditions and limitations on her willingness to work and still be available as the statute requires. *Robinson v. Md. Empl. Sec. Bd, 202 Md. 515, 519 (1953)*. A denial of unemployment insurance benefits is warranted if the evidence supports a finding that the claimant was unavailable for work. *Md.*

Empl. Sec. Bd. v. Poorbaugh, 195 Md. 197, 198 (1950); compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 21 (2002).

Being available for work is one of three elements of §8-903 which must be established in order for a claimant to be eligible for unemployment benefits. A claimant is expected to be willing to work most hours of most days in which work is performed in the usual occupation or business in which the claimant is seeking employment. A claimant is not required to be available to work twenty-four hours per day, seven days per week, but must not unduly restrict the hours or days he or she is willing to work. A claimant is also expected to be prepared to accept an offer of work without limitations such as a lack of transportation or child care. A claimant is not required to have made prior arrangements, but is expected to be able to do so in order to accept an offer of suitable work. A claimant is not expected to violate a religious principle or endanger his or her health or well-being, simply to establish availability for work.

The term "available for work" as used in §8-903 means, among other things, a general willingness to work demonstrated by an active and reasonable search to obtain work. *Plaugher v. Preston Trucking*, 279-BH-84. A claimant need not make herself available to a specific employer, particularly when the employer cannot guarantee her work, in order to be available as the statute requires. *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 22 (2002).

In his appeal, the claimant correctly argues that he has been meeting the requirements of §8-903 of the law. The claimant cites to the evidence of record and provides additional medical documentation in support of his position. *Claimant's Exhibits 1 and B1* establish that the claimant had no substantial restrictions on his ability to work as of October 10, 2014.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based upon a preponderance of the credible evidence that the claimant did meet his burden of demonstrating that he was able, available, and actively seeking work, from the week beginning October 12, 2014, within the meaning of *Robinson v. Md. Empl. Sec. Bd.*, 202 Md. 515 (1953) and §8-903. The decision shall be reversed for the reasons stated herein.

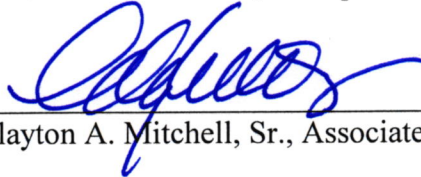
DECISION

The Board holds that the claimant was able to work, available for work and actively seeking work within the meaning of *Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903*. The claimant is eligible to receive benefits from the week beginning October 12, 2014, so long as the claimant is meeting the other requirements of the law.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

MICHAEL L. KISNER
MONTGOMERY CO GOVERNMENT
SUSAN BASS DLLR
MONTG CO GOVERNMENT
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MICHAEL L KISNER

SSN #

Claimant

vs.

MONTGOMERY CO GOVERNMENT

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1423586

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

November 05, 2014

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907.

FINDINGS OF FACT

The claimant, Michael L. Kisner, filed for unemployment insurance benefits establishing a benefit year effective September 21, 2014 with a weekly benefit amount of \$388.00.

Since opening his claim for benefits, the claimant has been seeking work as a CDL driver, in the retail field in home improvement centers and in automobile sales. The claimant is not attending school or training, has no child or elder care responsibilities and has access to reliable transportation. With respect to whether the claimant has any restrictions on his availability to perform work, the claimant was a beer truck driver for this employer, a job that required lifting of hundreds of beer cases daily. He tore his rotator cuff and is limited in the amount of weight he can lift. He has not been released by his physician to return to unrestricted work.

CONCLUSIONS OF LAW

Md. Code Ann., Labor of Emp. Article, Section 8-903 provides that a claimant for unemployment insurance benefits shall be (1) able to work; (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

The claimant had the burden to show by a preponderance of the evidence that he is in compliance with Agency requirements. In the case at bar, that burden has not been met. The claimant cannot perform his previous occupation because of a continuing medical condition. He has not been released by his doctor to return to unrestricted work. Accordingly, a disqualification is warranted and benefits will not be allowed for those weeks in which the claimant demonstrated a material restriction upon availability for work, as discussed above.

DECISION

IT IS HELD THAT the claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits are denied for the week beginning September 21, 2014 and until the claimant is fully able, available and actively seeking work without material restriction.

The determination of the Claims Specialist is affirmed.

B. Taylor, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right to Petition for Review

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by November 20, 2014. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: October 22, 2014
DAH/Specialist ID: WCU1J
Seq No: 003
Copies mailed on November 05, 2014 to:

MICHAEL L. KISNER
MONTGOMERY CO GOVERNMENT
LOCAL OFFICE #63
SUSAN BASS DLLR
MONTG CO GOVERNMENT