

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033



William Donald Schaefer, Governor
J. Randall Evans, Secretary

BOARD OF APPEALS

Thomas W. Keech, Chairman
Hazel A. Warrick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

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|-----------|---|---------------------|
| | Decision No.: | 354-BR-89 |
| | Date: | May 4, 1989 |
| Claimant: | Richard W. Burkner | Appeal No.: 8901742 |
| | S. S. No.: | |
| Employer: | Turners Taxi, Inc. ATTN: George Turner, Sr., Pres. | L. O. No.: 4 |
| | Appellant: | CLAIMANT |

Issue: Whether the claimant failed, without good cause, to accept available, suitable work within the meaning of Section 6(d) of the law and whether the claimant is able to work, available for work and actively seeking work within the meaning of Section 4(c) of the law.

—NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE 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 AT MIDNIGHT ON June 3, 1989

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD & REMAND

Upon review of the record in this case, the Board of Appeals affirms the decision of the Hearing Examiner with regard to Section 4(c) of the law, but reverses the disqualification under Section 6(d) of the law. The Board also remands this case to the Appeals Division for a hearing and decision regarding the claimant's separation from employment under Section 6(a), (b) or (c).

The claimant was employed by Turner's Taxi, Inc. on and off for a number of years until on or about January 15, 1989. The Hearing Examiner's disqualification of the claimant for failing to accept suitable work (on or about January 13, 1989) is incorrect because: (1) the claimant was not in claim status at the time of his separation from the employer (see, Sinai Hospital of Baltimore v. D.E.E.D., 309 Md. 28, 522 A.2d 382 (1987)); (2) because the issue of the claimant's leaving employment on January 13, 1989 is more appropriately decided under Section 6(a), (b) or (c) (see, e.g. Flowers v. TSI Infosystems, Inc. 224-BR-83); and (3) because such a determination was in fact issued in February, 1989, finding the claimant had been discharged by the employer for reasons that did not warrant a disqualification under Section 6(b) or 6(c).

The employer's letter of appeal, dated February 13, 1989, failed to specify what benefit determination(s) it was appealing and an appeal was set up by the Appeals Division only on the Section 4(c) issue. That was the only issue scheduled before the Hearing Examiner in this case. At the hearing, the employer indicated for the first time (only upon inquiry by the Hearing Examiner) that it intended to appeal both the Section 4(c) and Section 6 determinations.

In addition, the claimant neither was given notice that Sections 6(a), (b), (c) or (d) would be considered at the hearing, nor did he waive such notice.

Therefore, a hearing on the employer's appeal of the benefit determination regarding Section 6(b) and 6(c) should be scheduled, and one of the issues should be whether the employer filed a timely appeal. In order to determine this, the Hearing Examiner may subpoena an official from the local office to testify regarding when the determination was mailed and when the last date to appeal occurred, as that information is not contained on any documents in the record at the present time.


DECISION

The claimant did not fail to accept suitable work within the meaning of Section 6(d) of the Maryland Unemployment Insurance Law. No disqualification is imposed under this section of the law.

The claimant was not able and available for work within the meaning of Section 4(c) of the Maryland Unemployment Insurance Law. He is disqualified from the week beginning January 15, 1989 and until the claimant is able and available for work without restrictions.

This case is remanded to the Appeals Division for a hearing and decision under Section 6(a), (b) and (c) and Section 7(c)(3) of the law.


Chairman


Associate Member

K:H

kmb

COPIES MAILED TO:

CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - HAGERSTOWN

STATE OF MARYLAND
APPEALS DIVISION
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
(301) 383-3040

STATE OF MARYLAND
William Donald Schaefer
Governor

- DECISION -

Date Mailed: March 15, 1989

Claimant: Richard W. Burkner

Appeal No.: 8901742-EP

S.S. No.:

Employer: Turner's Taxi, Inc.

L.O.No.: 4

Appellant: Employer

Issue:

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

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY COURT OR WITH THE APPEALS DIVISION, ROOM 518, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

March 30, 1989

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON

NOTICE. APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

Richard-W. Burkner - Claimant

George Franklin
Turner, Sr. -
President

FINDINGS OF FACT

The claimant filed an original claim for unemployment insurance benefits at Hagerstown, effective March 20, 1988.

The claimant had been employed by Turner's Taxi, Inc. on and off for a number of years. The claimant had a history of attendance problems with this employer, resulting in several separations and rehires over the years. The claimant was a taxi driver. Taxi

drivers work twelve-hour shifts either daytime or nighttime. In November of December, 1988, the claimant was working the day shift. He was off between Christmas and New Year's due to illness.

The employer provides "free rides for drunks" on New Year's Eve. The claimant was requested to work. He was told that he would either man the phones or drive, as needed. It developed that the claimant was needed to drive. He declined on the basis that it was his understanding that he would only man the telephones. Angry words were exchanged between the claimant and the employer. The claimant still refused to drive. The claimant returned to the job about two days later. He was permitted to return to work on the condition that he work the night shift, and that, after a couple of weeks, he would be permitted to return to the day shift. The claimant began working the regularly scheduled night shift from 6 p.m. to 6 a.m. When working the night shift, a driver receives an hourly rate, plus a bonus. On January 14, 1989, the claimant became ill and visited his physician at the Washington County Hospital. The claimant remained off from work for three days. The physician diagnosed the claimant's condition as diabetes. The doctor instructed the claimant to reduce his hours of work to eight hours per day and to maintain a regular diet and exercise. The doctor informed the claimant that day work was preferable, but the doctor did not state that it was mandatory. The claimant returned to the employer with a medical certificate which requested the employer to permit the claimant to work an eight-hour day. The employer then advised the claimant that the only work he had available was night work from 6 p.m. to 2 a.m. The claimant refused to work these hours on the grounds that he had previously assigned to day work, was promised to be reinstated to day work, and that his doctor wanted him to work day work.

CONCLUSIONS OF LAW

Based upon the claimant's classification as a taxi driver, I conclude that the claimant has restricted his availability for work to day shift only. Since taxi drivers must be available to work either days or evenings, such restriction is disqualifying under Section 4(c) of the Maryland Unemployment Insurance Law. Therefore, the claimant must be disqualified for benefits until such time as this restriction no longer exists.

In addition, the claimant refused suitable work because of a personal preference for daytime work, when no medical restriction was noted. It is, thereupon, further concluded that the claimant failed, without good cause, to accept suitable work when offered within the meaning of Section 6(d) of the Maryland Unemployment Insurance Law. Since the claimant has failed to establish mitigating circumstances as to why he was physically unable to accept such suitable work, only the maximum disqualification as is permitted under this sub-section may be imposed.

DECISION

It is held that 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 from the week beginning January 15, 1989 and until the claimant is able and available for work without restrictions.

It is further held that the claimant has failed, without good cause, to accept suitable work within the meaning of Section 6(d) of the Maryland Unemployment Insurance Law. Benefits are denied for the week beginning January 15, 1989 and until the claimant becomes re-employed, earns at least ten times his weekly benefit amount and thereafter becomes unemployed through no fault of his own.


Robin L. Brodinsky
Hearing Examiner -

Date of hearing: 3/7/89
amp/Specialist ID: 04456
Cassette No. 1979
Copies mailed on March 15, 1989 to:

Claimant
Employer
Unemployment insurance - Hagerstown (MABS)