

**- DECISION -**

Claimant:	Decision No.:	3936-BR-11
TAMIKA K JACKSON	Date:	July 08, 2011
	Appeal No.:	1111761
	S.S. No.:	
Employer:	L.O. No.:	63
CHIMES INC	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.

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**- 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: August 08, 2011

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**REVIEW ON THE RECORD**

After a review on the record, the Board adopts the Administrative Law Judge's findings of fact but reaches a different conclusion of law.

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)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the Administrative Law Judge on the basis of evidence submitted to the Administrative Law Judge 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 09.32.06.02(E)*.

The claimant has the burden of demonstrating by a preponderance of the evidence that he is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., § 8-903*. A claimant may not impose conditions and limitations on his 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)*.

A claimant should actively seek work in those fields in which he is most likely to obtain employment. *Goldman v. Allen's Auto Supply, 1123-BR-82*; also see and compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1 (2002)*.

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. *Plaughter 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)*.

Section 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.

A claimant may, in certain circumstances, be held to be able and available for work even if unable to perform his or her last job. The law simply requires that an individual be able to work. Changes in an individual's condition may occur through illness, accident or the passage of years which may require a change in the work habits of an individual. In a case where a claimant cannot perform former work, a determination under Section 8-903 must be made, and the following factors must be considered:

- 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 in 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 is seeking

Therefore, a claimant laboratory technician who could not stand for a prolonged period of time due to an injury met the eligibility requirements of Section 8-903 where she was looking for laboratory work which did not require standing, in addition to clerical and receptionist work for which she had some experience. *Waring v. Burton Parsons, Inc., 847-BH-81*.

The claimant's reclassification by the agency itself was sufficient to show an adequate number of light clerk and/or cashiering jobs available in the economy. *Surguy v. Forest Service, 10-BH-86.*

A claimant who is restricted from performing certain work is not disqualified under Section 8-903 if he shows that he is able to do other work and is, in fact, seeking other work that he is capable of performing during the time he has the restriction. *Connor v. City of Baltimore, 416-BR-87.*

When severe limitations are placed upon a claimant's ability to work, the claimant has the burden of showing not only that she was seeking work, but seeking work that she could do, given her limitations. *Swafford v. U.S. Postal Service, 252-BH-89.*

A claimant need not be able to do every type of work that she has ever done in order to be able to work within the meaning of Section 8-903. Where the claimant remained able to do the type of work which she had customarily performed on a full-time basis, that claimant was not disqualified under Section 8-903 for being unable to perform an additional type of work which she customarily performed on a part-time basis. *Werle v. Giant of Landover, Inc., 2170-BR-92.*

The claimant was able and available to work when she was pregnant; she was not disabled. *Shepard, 637-BR-91.*

The pregnant claimant became unable to perform her duties as a cook which required heavy lifting up to 50 pounds, and therefore left her employment. The claimant continued to seek lighter work for which she was qualified and had experience. The claimant was able to work at a wide range of jobs for which she was qualified and therefore no disqualification was imposed under Section 8-903. However, a disqualification was imposed during the seven-week period in which the claimant was unable to work due to her advanced stage of pregnancy and during her postpartum recovery period. *Hill v. Whitey and Dot's, 718-BH-84.*

The Board is persuaded by the claimant's argument that *Hill, Id.* is the controlling precedent in the present case. The fact that the claimant was pregnant and merely restricted from lifting does not preclude her from performing other duties associated with her job training. In fact, the claimant credibly testified that she increased her hours at her part-time job, of which she performed identical duties as those performed for the full-time employer. The claimant's pregnancy did not restrict her availability or ability to work.

The Board notes that the administrative law judge 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 her burden of demonstrating that she was able, available, and actively seeking work 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.

**NOTE: The claimant's able and available issue is determined weekly. The claimant should contact her local call center to have this penalty lifted if she is now, in fact, able, available and actively seeking full-time employment without substantial restriction, within the meaning of Section 8-903.**

**DECISION**

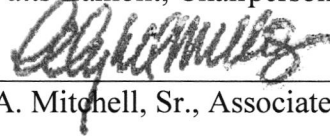
The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning February 27, 2011.

The Administrative Law Judge's decision is reversed.



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Donna Watts-Lamont, Chairperson



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Clayton A. Mitchell, Sr., Associate Member

RD/mr

Copies mailed to:

TAMIKA K. JACKSON

CHIMES INC

SUSAN BASS DLLR

ROBIN BALLESTEROS

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

TAMIKA K JACKSON

SSN #

**Claimant**

vs.

CHIMES INC

**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: 1111761

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

April 22, 2011

**For the Claimant:** PRESENT, ROBIN BALLESTEROS

**For the Employer:** PRESENT, DEBORAH LYNCH

**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 filed for unemployment insurance benefits establishing a benefit year effective November 28, 2010 with a weekly benefit amount of \$307.00.

At the time the Claimant filed for benefits she was under a doctor's care for pregnancy and her doctor determined she was unable to perform heavy lifting, pushing or pulling. The Claimant's job, as a Behavioral Tech, involves working with emotionally disabled individuals who sometimes act out. Acting out might include hitting, kicking and falling to the floor. As a result, it is an essential function of the Claimant's job that she be able to lift up to 50 pounds. For example, she might need to help lift or pull up a client who has fallen down. The requirement to be able to lift up to 50 pounds is typical for this type of work—most of the other agencies serving emotionally disabled individuals also maintain a lifting

requirement for Behavioral Techs The Claimant remains under a doctor's care for her pregnancy and she continues not to be able to lift heavy objects.

### **CONCLUSIONS OF LAW**

Md. Code Ann., Labor & Empl. 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 (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.

Md. Code Ann., Labor & Empl. Article, Section 8-907 provides that an individual may not be denied benefits for any week of unemployment for failure to meet the requirements of Section 8-903(a)(1) of the subtitle to be able to work, available for work, and actively seeking work if the failure results from illness or disability that occurs after the individual has registered for work, provided that no work that would have been considered suitable at the time of the initial registration is offered to the individual after the beginning of the illness or disability.

Pursuant to COMAR 09.32.02.09(B), "A claimant filing sick claims shall furnish a written statement or other documentary evidence of the claimant's health problem from a physician or hospital. The documentary evidence of the health problem shall be updated every 30 days."

COMAR 09.32.02.09(C) requires that, "A sick claim shall be filed and documented within 14 days of the last week before the onset of the illness or inability to work for medical reasons, if the claimant was registered for work during the week for which the claim is filed."

### **EVALUATION OF EVIDENCE**

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

The Claimant had the burden to show, by a preponderance of the evidence, that she is in compliance with Agency requirements. In the case at bar, that burden has not been met.

The Claimant acknowledged that her doctor has restricted her ability to lift heavy objects. The Employer's witness, Deborah Lynch, Human Resources Generalist, testified credibly that the Claimant's job, as a Behavioral Tech, involves working with emotionally disabled individuals who sometimes act out. This could include hitting, kicking and falling to the floor. As a result, it is an essential function of the Claimant's job that she be able to lift up to 50 pounds. For example, the Claimant might need to help lift or pull up a client who has fallen down. Ms. Lynch further explained that the requirement to be able to lift up to 50 pounds is typical for type of work—most of the other agencies serving emotionally disabled individuals also maintain a lifting requirement for Behavioral Techs.

The Claimant did not dispute this testimony. She argued, however, that the entire time she worked for the Employer she never had to lift any heavy objects and the client to whom she was assigned to work one-on-one did not act out, so she never had to lift him.

While that might be so, as Ms. Lynch explained, the Claimant might need to work with other clients, or might need to help a coworker lift or pull their client up from the floor.

Thus the Claimant has not satisfied the requirements of Title 8, Section 903. Nor is she entitled to sick claims under Section 907. In order to qualify for sick claims an individual must be able to work when she enters claim status and later suffer a disabling injury or illness. The Claimant was pregnant, and thus unable to lift heavy objects, at least since October 2010. Since the Claimant was not able and available when she initially filed, the Claimant does not qualify for sick claims.

### DECISION

IT IS HELD THAT the Claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Empl. Article, Section 8-903 and ineligible to file for sick claim benefits pursuant to Section 8-907. The Claimant is disqualified from receiving benefits for week beginning February 27, 2011 and until the Claimant is fully able, available and actively seeking work.

The determination of the Claims Specialist is affirmed.

*N Frieman*

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N Frieman, Esq.  
Administrative Law Judge

### 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**

Any party 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 May 09, 2011. 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: April 11, 2011

DW/Specialist ID: WCU17

Seq No: 004

Copies mailed on April 22, 2011 to:

TAMIKA K. JACKSON

CHIMES INC

LOCAL OFFICE #63

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