

**-DECISION-**

Claimant:  
ERIC C RUSSELL

Decision No.: 5247-BH-11

Date: October 03, 2011

Appeal No.: 1106449

Employer:

S.S. No.:

L.O. No.: 60

Appellant: Claimant

Issue: Whether there is good cause to reopen this dismissed case within the meaning of COMAR 09.32.06.02N.

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: November 02, 2011

**- APPEARANCES -**

FOR THE CLAIMANT:

FOR THE EMPLOYER:

ERIC C. RUSSELL

**EVALUATION OF THE EVIDENCE**

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

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 hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d); COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02*.

The Board is persuaded that the reason for the dismissal in the case at bar was due to an unforeseen and unavoidable emergency. The claimant was unexpectedly required to continue working at his new temporary job past his usual end of shift at 8:00 a.m. The claimant was unable to call the designated hearing number until after 9:30 a.m. The Board finds that the claimant should be afforded an opportunity to be heard on the merits of the underlying issues.

The Board notes that the Agency, duly notified of the date, time and place of the hearing, failed to appear.

The Board is persuaded that although the claimant was medically unable to continue his job as a forklift driver in a warehouse that exceeded 100 degrees, the claimant is able and available for other work. In fact, the claimant has actively sought and found work with a temporary agency.

#### **FINDINGS OF FACT**

On March 5, 2011, the claimant was working at his new job with a temporary employment agency's client. The claimant was scheduled for a telephone hearing before a hearing examiner at 9:30 a.m. on the issue of whether the claimant was able, available and actively seeking work. The claimant's shift usually ended at 8:00. The claimant was instructed that he could not stop work for the day at 8:00 a.m. and had to continue working. The claimant was not able to telephone into the hearing until after 9:30 at which time, the claimant was unable to connect with the hearing because it was dismissed. The claimant's predicament at his new job assignment was unforeseen and unavoidable.

The claimant previously worked as a forklift operator at a warehouse where the temperature exceeded 100 degrees. The claimant has high blood pressure and takes medication to keep it under control. The claimant was ordered by his physician to cease working in these conditions because of medical problems related to his blood pressure and complications with his medicine. The claimant, however, was not restricted from working other jobs in less harsh conditions. The claimant has actively sought and obtained suitable employment through temporary employment agencies since opening his claim.

### CONCLUSIONS OF LAW

The evaluation of the evidence and findings of fact are incorporated herein by reference.

For good cause shown, the claimant met his burden that he has the right to reopening of the dismissed case due to an unforeseeable and unavoidable exigent circumstance within the meaning of *COMAR 09.32.06.02N*. The Chief Hearing Examiner's decision on this issue is reversed.

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.

In the instant case, the claimant's medical restriction was limited to the unique conditions of his prior employer – working on a forklift in a warehouse where the temperature exceeded 100 degrees. Although the claimant was ordered by his physician to quit that particular job, the claimant has applied for and accepted suitable work since the beginning of his benefit year and is otherwise able and available for work.

The Board finds based upon a preponderance of the credible evidence that the claimant did not meet his burden of demonstrating that he was able, available, and actively seeking work within the meaning of *Robinson v. Md. Empl. Sec. Bd., 202 Md. 515 (1953)* and §8-903 from the week beginning June 27, 2010. The claims specialists initial determination is reversed. No disqualification shall be imposed provided the claimant meets the other requirements of the law.

**DECISION**

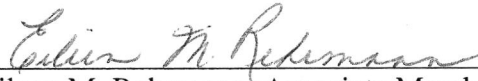
The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning June 27, 2010.

The Hearing Examiner's decision is reversed.



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Clayton A. Mitchell, Sr., Associate Member



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Eileen M. Rehrmann, Associate Member

RD

Date of hearing: August 02, 2011

Copies mailed to:

ERIC C. RUSSELL

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS SECOND DISMISSAL**

ERIC C RUSSELL

SSN :  
**Claimant**

vs.

**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: 1106449  
Appellant: Claimant

April 28, 2011

**For the Claimant:**

**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. Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

**FINDING OF FACT**

The appellant's hearing was originally scheduled for March 07, 2011 and the appellant, having due notice of this hearing mailed to the last address on record, failed to appear. The appeal was dismissed for non-appearance and the appellant subsequently petitioned for re-opening of the appeal. A new hearing was set for April 28, 2011 and the appellant was again duly notified of the hearing date at the last address on record but again failed to pursue the appeal.

**DECISION**

It is held that for failure to appear at two consecutive appeal hearings, without good cause shown, the appellant's appeal is dismissed without right of re-opening.

*Judy G. Smylie*

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Judy G. Smylie  
Director/Chief 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 410-949-0022 or 1-800-827-4839. 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.**

**Notice of Right of Further Appeal**

Any party may request a further appeal either in person or by mail which may be filed in any local office of the Department of Labor, Licensing and Regulation, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by May 13, 2011.

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

FILE

