

- CORRECTED DECISION -

Claimant:
KIRK L JENNINGS JR

Decision No.: 807-BR-11

Date: February 16, 2011

Appeal No.: 1036294

S.S. No.:

Employer:
MELWOOD HORTICULTURAL

L.O. No.: 64

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 18, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact. The Board enters into evidence as Claimant's Exhibit B1, the letter dated October 26, 2010, from Doctor Dida Ganjoo, M.D. The Board makes the following additional findings of fact and reverses the decision of the hearing examiner as to the merits of this case:

The claimant was released by his physician, Dr. Dida Ganjoo, as of October 26, 2010, to return to work without restrictions.

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. *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.

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 has met 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.as of the week beginning October 24, 2010. The decision on the merits of this case shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant did file a timely appeal within the meaning and intent of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 806(e).

It is held that the claimant is not 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 disqualified from receiving benefits from the week beginning May 2, 2010 until the week ending October 23, 2010.

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 October 24, 2010.

The Hearing Examiner's decision is affirmed in part and reversed in part.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

KIRK L. JENNINGS JR

MELWOOD HORTICULTURAL

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KIRK L JENNINGS JR

SSN #

Claimant

vs.

MELWOOD HORTICULTURAL

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: 1036294

Appellant: Claimant

Local Office : 64 / BALTOMETRO
CALL CENTER

November 22, 2010

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. Whether this appeal was filed timely within the meaning of Section 806 of the Labor and Employment Article.

FINDINGS OF FACT

A Notice of Benefit Determination was mailed to the parties in this case. The determination had an appeal deadline of June 2, 2010. In this case, the appeal was filed by facsimile and faxed September 23, 2010. The appellant offers as a reason for the late appeal that he was part of an inpatient program for persons with bi-polar disorder and was unable to communicate with people outside of the program.

The Claimant filed for unemployment insurance benefits establishing a benefit year effective May 2, 2010 with a weekly benefit amount of \$247.00.

Since opening his claim for benefits, the claimant has been seeking work as in maintenance for which the customary hours of employment vary. Claimant has is not in school or training program than would interfere with an offer of full time employment on any shift and no child/elder-care responsibilities. Claimant does have a medical restriction related to inpatient treatment of his bi-polar disorder which renders him unable and unavailable to perform full time work in his occupational field.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-806(e) provides, in essence, that either a claimant or employer has 15 days after the date of the mailing of the benefit determination to file a timely appeal. COMAR 09.32.06.01(B) provides that an appeal is considered filed on the earlier of the following: (a) the date that is delivered in person to any office of the Department of Labor, Licensing and Regulation ("DLLR") that accepts appeals, or (b) the date on which it is postmarked by the U. S. Postal Service. Appeals filed after that date shall be deemed late and the determination shall be final, unless the appealing party meets the burden of demonstrating good cause for late filing. COMAR 09.32.06.01B(3) provides that "the period for filing an appeal from the Claims Specialist's determination may be extended by the Hearing Examiner for good cause shown." Good cause means due diligence in filing the appeal. Francois v. Alberti Van & Storage Co., 285 Md. 663 (1979) and Matthew Bender & Co. v. Comptroller of the Treasury, 67 Md. App. 693, 509 A.2d 702 (1986).

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.

In the instant case, the appellant filed a late appeal within the meaning of Section 8-806 because that appeal was tendered after the deadline date.

Once an appeal has been filed late, the burden is on the appealing party to show by credible evidence that good cause exists. Cooper v. Holy Cross Hospital, 328-BR-86. In this case, the appellant has met this burden because during his treatment appellant was unable to communicate with people outside of the program.

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 because his medical condition is a material restriction on claimant's ability to work full time.

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 appellant filed a late appeal with good cause within the meaning and intent of Md. Code Ann., Labor & Emp. Article, Section 8-806(e).

The determination of the Claims Specialist is reversed.

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 May 2, 2010 and until the claimant is fully able, available and actively seeking work without material restriction.

The determination of the Claims Specialist is affirmed.



B H Woodland-Hargrove, 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

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 December 7, 2010. 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 20, 2010

BLP/Specialist ID: UTW7D

Seq No: 002

Copies mailed on November 22, 2010 to:

KIRK L. JENNINGS JR
MELWOOD HORTICULTURAL
LOCAL OFFICE #64