Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-216

SEPTEMBER TERM, 2004

Gregory Carlson v. Department of Employment and Training	}	APPEALED FROM: Employment Security Board DOCKET NO. 12-03-094-05 Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

Claimant appeals the Employment Security Board's order upholding the decisions of the appeals referee and claims adjudicator denying him unemployment benefits for the weeks ending November 8 through December 6, 2003 and requiring him to repay the Department of Employment and Training $1077 in benefits provided to him during that period. We affirm.

Claimant had been employed at Mount Snow, Ltd. as a front desk clerk and occasional spa attendant since May 2001. On October 15, 2003, the employer told claimant that his services as a front-desk clerk would not be needed until December 6, at the start of the ski season. Claimant continued to work for the employer two days a week as an attendant at employer' s health spa until November 1. Claimant received $1077 in employment benefits for the three weeks ending November 8, 15, and 22. He sought additional benefits for the next two weeks before he was to report back to work as a front desk clerk. The claims adjudicator, however, denied his request and ordered claimant to repay the $1077 he had received for the first three weeks in November. She based this decision on her finding that claimant had failed to reveal that he was not available for work between November 1 and December 6, 2003. Following a hearing, the appeals referee upheld the claims adjudicator' s decision. Following another hearing before the Board, in which claimant did not participate, the Board upheld the appeals referee' s decision. On appeal to this Court, claimant contends that he was available for work during the period in question.

Among the statutory criteria that an employee must satisfy to be eligible for unemployment benefits is that the employee must be " available for work." 21 V.S.A. § 1343(a)(3); Stoodley v. Dep' t of Employment Sec., 141 Vt. 457, 459 (1982). Claimants bear the burden of establishing that they were available for work during the periods in which they are seeking unemployment benefits. Stoodley, 141 Vt. at 459. Generally, claimants may make a prima facie showing of availability simply by demonstrating that they registered at an employment office and provided the Department with evidence of their efforts to find suitable work. Id. " In the last analysis, [however,] availability for work as prescribed by 21 V.S.A. § 1343(a)(3) is a factual question and must be decided on a case by case basis." Id. " [U]nreasonable restrictions placed on availability will render a claimant unavailable for work." Donahue v. Dep' t of Employment Sec., 142 Vt. 351, 356 (1982).

Here, the appeals referee, whose findings and conclusions were adopted by the Board, based his conclusion that claimant was not available for work during the period in question on the testimony of a Mount Snow personnel employee and of claimant himself that he told the manager of the health spa that he was going out of town and would not be available for work between November 1 and December 6, 2003. In a memorandum sent to the appeals referee by

his attorney, claimant stated that (1) he had advised the employer' s department head that he was planning to be out of town from November 1 until sometime before December 6, 2003; (2) he left for Europe on November 7 and returned sometime before December 6; and (3) that he had been available and looking for work during the entire period. The appeals referee concluded, however, that claimant' s statement regarding his trip to Europe was further evidence that he had not been available for work during the period in question.

On appeal, claimant states that (1) the employer assured him that his benefits would be taken care of; (2) the health spa did not need him during November and could only offer him part-time work at a reduced wage; (3) he went to Europe on a " scouting mission" to see about the availability of work there; and (4) he was available by e-mail and had a special airline ticket permitting him to come home early for $200 in the event work was available in Vermont. For the most part, claimant did not raise these arguments before the appeals referee, who, as the trier of fact, was entitled to assess the credibility of the witnesses and the persuasiveness of the evidence. Kasnowski v. Dep' t of Employment Sec., 137 Vt. 380, 381 (1979). We conclude that there is ample evidence in the record to support the appeals referee' s finding that claimant was not available for work between November 1 and December 6, 2003. See Pfenning v. Dep' t of Employment & Training, 151 Vt. 50, 52 (1989) (when issue depends on facts and circumstances of case, " we must uphold the Board' s factual conclusion unless we conclude that its findings of fact are clearly erroneous"); Whitcomb v. Dep' t of Employment & Training, 147 Vt. 525, 528 (1986) (Board' s findings will be affirmed if supported by any credible evidence); Trombley v. Dep' t of Employment & Training, 146 Vt. 332, 334 (1985) (Board' s findings will be upheld if supported by credible evidence, even if there is substantial evidence to contrary). Therefore, claimant is not entitled to benefits for that entire period and is required to repay the Department for the $1077 in benefits he received during that period.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned