STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of

[redacted]

Claimant,

[redacted]

Employer.

Appeal Docket No.: [redacted]21-000360

UIA Case No.: [redacted]

DECISION OF THE UNEMPLOYMENT INSURANCE APPEALS COMMISSION

This case is before the Unemployment Insurance Appeals Commission (Commission) pursuant to the claimant's timely appeal from a November 17, 2021 decision by an Administrative Law Judge (ALJ). The ALJ's decision modified an August 24, 2021 Unemployment Insurance Agency (Agency) redetermination and found the claimant ineligible for benefits under the availability provision of the Michigan Employment Security Act (Act), Section 28(1)(c), beginning February 7, 2021 and continuing "until [the claimant] is available for full-time work at all hours, days, and shifts of her customary work."

After reviewing the entire record in this matter, we find the ALJ's decision must be reversed. Our reasons are as follows.

The question before this Commission is whether the claimant is ineligible under Section 28(1)(c) because she is unavailable to work the night shift due to childcare obligations. The claimant testified that she worked for the employer beginning on June 5, 2018. She first began working full-time on a daytime shift as a general worker and then transitioned to working on the night shift in 2019 in a supervisory position. The claimant typically worked from 11:00 p.m. until 7:00 a.m. each day from Sunday through Friday, and was temporarily laid off on March 20, 2020 due to the COVID-19 pandemic.

The claimant indicated that she has two children, ages 12 and 10. She stated that her children attend school during daytime hours and childcare was not required during that time. Claimant testified that she was called back to work on June 1, 2020, but at that time she was unavailable to return to the night shift because she no longer had childcare in place for that shift and needed to be home with her children. She stated that prior to the pandemic, she relied on a friend to assist with childcare overnight so that she could work on the night shift, but as a result of her friend's medical issues and the COVID-19 pandemic, her friend was unable to continue assisting her.

The claimant stated that she was willing to work the first or second daytime shifts, but the employer did not have any positions available for those shifts when she was called back to work in June of 2020. The claimant stated that she has been attempting to find full-time work by submitting applications with other employers for supervisory positions for first and second shifts.

The ALJ ruled that the claimant was not eligible for benefits because she was not available to work the night shift. He found that she must be available for the night shift because her profession is not limited to weekday shifts. In so ruling, he relied on the 1947 case of *Ford Motor Co v Appeal Bd of Mich Unemployment Compensation Comm*, 316 Mich 468; 25 NW2d 586 (1947). In that case, the Court held that the claimant, a line worker who limited her availability to the afternoon shifts so she could get her children out of bed and off to school, was ineligible for benefits under Section 28(1)(c).

The ALJ erred by deciding the case based on the 1947 decision in *Ford* because in 1974, Section 28(1)(c) was amended to require consideration of the suitability of the offered work. Suitability was not a consideration in the pre-amended version. Then the test was whether the claimant "is able and available to **perform full-time work** of a character which he is qualified to perform by past experience or training, and of a character generally similar to work for which he has previously received wages…" Section 28(1)(c)(emphasis added).

In Public Act 104 of 1974, the Michigan Legislature inserted the word "suitable" to modify "full-time work." Section 28(1)(c) now states:

> (1) An unemployed individual is eligible to receive benefits with respect to any week only if the unemployment agency finds all of the following:
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> (c) The individual is able and available to appear at a location of the unemployment agency's choosing for evaluation of eligibility for benefits, if required, and **to perform suitable full-time work** of a character which the individual is qualified to perform by past experience or training, which is of a character generally similar to work for which the individual has previously received wages, and for which the individual is available, full time, either at a locality at which the individual earned wages for insured work during his or her base period or at a locality where it is found by the unemployment agency that such work is available. [Emphasis added.]

Accordingly, the suitability of the night shift work at issue in this case must be analyzed to determine if claimant is available within the meaning of Section 28(1)(c). The ALJ erred by not taking that factor into consideration.

Suitability is a multi-factor test as set forth in Section 29(6) of the Act. It states:

> In determining whether **work is suitable for an individual**, the unemployment agency shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness and prior training, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, and the distance of the available work from the individual's residence. [Section 29(6).] [Emphasis added.]

As is evident from the text of Section 29(6), the suitability determination must be based on the claimant's individual circumstances. As expressed by the Court in *Lyscas v Chrysler Corp,* 76 Mich App 55, 58, n 3; 255 NW2d 767 (1977), the work must be "suitable for an individual." Many different factors may be considered in the suitability determination, including transportation, health, and childcare considerations.[1]

We also look to the analysis of the California Supreme Court in *Sanchez v Unemployment Insurance Appeals Board,* 20 Cal 3rd 55; 569 P2d 740 (1977), with respect to the suitability factor. There, a waitress who refused weekend work due to childcare concerns was denied benefits by the lower court even though she was available for daytime and evening shifts.

In reversing the lower court's ruling, the California Supreme Court found that childcare concerns must be considered in determining whether a job is suitable:

> The rule of availability accepted by the board and the court below, if approved and generalized, might exclude from the coverage of the unemployment compensation insurance system thousands of parents who actively seek work but who must nevertheless reserve some time to fulfill essential parental obligations. Here the board claims authority to declare that a mother, who seeks employment in restaurants and factories, day or night, Monday through Friday, is not sufficiently attached to the labor market if she is unable also to accept weekend work which conflicts with her responsibilities to her child. Such insensitivity to the need of claimants to balance availability for work with parental duty is impossible to reconcile with the underlying social purposes of the unemployment insurance law.
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> [Id. at 71—72.][Emphasis added.]

We are in agreement with the California Supreme Court. Indeed, we further find that factoring in childcare concerns is consistent with the remedial purpose of the Act, which is to "lighten the burden of involuntary unemployment on the unemployed worker and his family." Section 8. Absent such a consideration, shift workers, workers in the medical field, and many others in the workforce, would need to be available for work at every hour of every day in order to be eligible for unemployment insurance. Childcare obligations make that an impossibility for many workers and it is incompatible with Sections 8 and 28(1)(c) of the Act to demand around the clock availability of workers who have childcare obligations. Accordingly, we must consider childcare obligations when determining the suitability of work under Section 28(1)(c).

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[1] In *Nelson v Beverly Manor,* unpublished opinion of the Genesee County Circuit Court, issued January 10, 1979 (Docket No 78-296), the court ruled that claimant's lack of transportation to the job site made the position unsuitable. In *Youmans v Chelsea Community Hospital,* unpublished per curiam opinion of the Michigan Court of Appeals, issued November 17, 1987 (Docket No. 97579), the Court held the offered work was unsuitable because of wage rate and travel cost differences. Further, even if the offered work were suitable, the claimant would have good cause to refuse because of the increase in transportation and childcare costs. In *Wilks v Ice Cream Parlor,* unpublished opinion of the St. Clair Count Circuit Court, issued April 19, 1978 (Docket No. 8250), the court ruled that a transfer from first to second shift made the job unsuitable because the second shift duties were harmful to the claimant's health.

As we start our analysis of the facts of this case, we note that the claimant bears the burden of proof to establish that he or she meets the conditions of eligibility. *Dwyer v Unemployment Compensation Comm,* 321 Mich 178 at 187; 32 NW2d 434 (1948).

We also consider the definition of "availability" as set forth in *Dwyer*:

> The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market. To be available for work within the meaning of the act, the claimant must be genuinely attached to the labor market, i.e., he must be desirous to obtain employment, and must be willing and ready to work. [*Id.* at 188-189.]

We find that in this case, the claimant has demonstrated that she is a genuinely attached to the labor market within the meaning of the test in *Dwyer.* She provided uncontroverted testimony that she has remained completely available to work full-time during the first and second shifts. There is no indication on the record that the claimant had any other limitations on her availability. Further, the claimant testified that she had been actively seeking work and submitting applications with other employers for comparable first and second shift work.

Next, we find that under these circumstances, work on the night shift is not suitable for the claimant due to her childcare responsibilities. Claimant needed to be home during the nighttime hours to care for her children. Claimant's refusal to accept the third shift work at issue in order to fulfill her parental obligations does not make her unavailable for work.

Accordingly, we find the claimant has met the burden of proof necessary to show that she is genuinely attached to the labor market and is available for suitable full-time work.

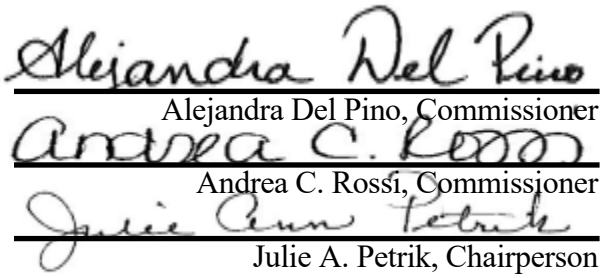
Therefore,

IT IS ORDERED that the ALI's decision is REVERSED.

The claimant is eligible to receive unemployment benefits under the availability provision of the Act, Section 28(1)(c).

The claimant may receive benefits if otherwise eligible and qualified.

This matter is referred to the Agency for action consistent with this decision.



Alejandra Del Pino, Commissioner

Andrea C. Rossi, Commissioner

Julie A. Petrik, Chairperson

MAILED AT LANSING, MICHIGAN April 5, 2022

This decision shall be final unless EITHER (1) the Unemployment Insurance Appeals Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

**TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME. May 5, 2022**