

Because the claimant did not perform sufficient wage earning services and was not paid three times the benefit rate of his previous claim, he is not eligible to receive benefits on his subsequent claim, under G.L. c. 151A, § 31.

**Board of Review
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Issue ID: 0019 7342 10

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the claimant was not eligible to receive benefits on an unemployment claim, effective September 18, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his employer on September 22, 2015, and filed a claim for unemployment benefits, effective September 20, 2015. He exhausted his benefit entitlement on the 2015 claim, and the claim expired. He then filed a new claim, effective September 18, 2016. On September 20, 2016, the DUA sent the claimant a Monetary Determination, which informed him that he could not collect benefits on the new unemployment claim, because he did not meet the requirements of G.L. c. 151A, § 31. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's Monetary Determination. We accepted the claimant's application for review.

The review examiner affirmed the determination after she determined that the claimant had not earned sufficient wages since the establishment of the 2015 claim to meet the statutory requirements set out under G.L. c. 151A, § 31. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence regarding the claimant's earnings from his prior employer, as well as what services he performed after the effective date of the 2015 claim. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not eligible to receive benefits on his 2016 unemployment claim, is supported by substantial and credible evidence and free from error of law, where, after establishing his 2015 unemployment claim, the claimant performed services and received \$872.07 for those services.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. After separating from work on September 22, 2015, the claimant opened an unemployment claim having an effective date of September 20, 2015. The base period of the claim was the third quarter of 2014 through the second quarter of 2015. The Department of Unemployment Assistance (DUA) determined his benefit rate to be \$698 per week.
2. The claimant exhausted his benefits under the 2015 claim, meaning that he received all the benefits to which he was entitled.
3. The claimant worked for the instant employer for approximately eight hours on September 21, 2015.
4. The claimant worked for the instant employer for approximately four hours on September 22, 2015.
5. The claimant was paid a salary of approximately \$150,000 per year from the instant employer.
6. On September 22, 2015, the employer paid the claimant a gross amount of \$10,384.63. Out of this amount, \$1,730.77 represented unused vacation pay and out of the \$8,653.86, \$5,769.24 represented two weeks of severance pay. The remaining \$2,884.62 represented the claimant's pay for work performed beginning Tuesday September 15, 2015 through Tuesday September 22, 2015.
7. In order to figure out the amount the claimant made for the work he performed on September 21, 2015 and September 22, 2015, the following calculations were performed:
 - a. \$150,000 divided by 12 (months in a year) = \$12,500
 - b. \$12,500 divided by 4.3 (weeks in a month) = \$2,906.97
 - c. \$2,906.97 divided by 5 (days in a week) = \$581.39
 - d. \$581.39 divided by 8 (hours in a work day) = \$72.67 paid to the claimant per hour
 - e. The claimant worked 8 hours of Monday September 21, 2015 and therefore earned approximately \$581.39 for that day.
 - f. The claimant worked 4 hours on Tuesday September 22, 2015 and therefore earned approximately \$290.68(72.67×4) for that day.
 - g. The claimant earned a total of \$872.07 ($581.39 + 290.68$) for the two days the claimant worked for the employer after September 20, 2015.
8. The claimant performed no wage-earning services after September 22, 2015.

9. On September 23, 2016, the claimant opened another claim for benefits and received an effective date of September 20, 2016. The base period of the claim was the third quarter of 2015 through the second quarter of 2016. The Department of Unemployment Assistance (DUA) determined his benefit rate to be \$722 per week.
10. On September 20, 2016, DUA issued a Monetary Determination on the claimant's application for unemployment benefits. The determination stated that the claimant is not able to establish a new benefit claim because he had not earned wages on new employment greater than or equal to three times his 2015 claim weekly benefit amount.
11. The claimant appealed the Monetary Determination.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except for the date noted in Consolidated Finding of Fact # 9 for the effective date of the 2016 claim. According to Exhibit # 4, the effective date of the 2016 claim is September 18, 2016. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the agency's conclusion that the claimant is not eligible to receive benefits on the 2016 unemployment claim.

According to the review examiner's findings, the claimant last worked for his employer on September 22, 2015. When the 2015 claim expired, he filed a new claim, effective September 18, 2016. In order to be monetarily eligible for the 2016 unemployment claim, the claimant must meet certain statutory requirements. For a claim effective in September, 2016, a claimant must have been paid \$3,900.00 in the base period and have been paid at least thirty times the benefit rate. *See* G.L. c. 151A, § 24(a).¹ According to Exhibit # 4, the claimant did meet this initial threshold.

In addition, if a claimant is filing a new unemployment claim immediately after the expiration of a prior claim, then G.L. c. 151A, § 31 applies. That section of law provides the following:

No individual may receive benefits in a subsequent benefit year unless, since the beginning of the previous benefit year during which he received benefits, he performed service for an employer subject to this chapter and has been paid wages for such service of not less than three times his weekly benefit rate for said previous benefit year.

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount has been changed, as required under the statute, based on changes to the minimum wage. For a claim effective after January 3, 2016, the minimum amount of wages needed for a valid unemployment claim is \$3,900.00.

In this case, the “subsequent benefit year” is the benefit year beginning on September 18, 2016. The “previous benefit year” is the benefit year beginning September 20, 2015. Therefore, in order to be eligible for benefits on the 2016 claim, the claimant needed to have “performed service for an employer” and needed to have “been paid wages for such service of not less than three times” his weekly benefit amount on the 2015 claim at some point subsequent to September 20, 2015. Since the benefit rate on the 2015 claim was \$698.00 per week, the claimant needed to have been paid \$2,094.00 for service provided after September 20, 2015.

As the review examiner’s consolidated findings indicate, the claimant has not met the requirements of G.L. c. 151A, § 31. She found that the claimant performed no wage-earning services after September 22, 2015. Therefore, the claimant needed to have satisfied the G.L. c. 151A, § 31, requirement in the period of time from September 20 through 22, 2015. The calculation given by the review examiner in Consolidated Finding of Fact # 7 is reasonable and supported by the documentation provided by the claimant. Because the claimant was not paid at least \$2,094.00 for services performed on or after September 20, 2015, he is not eligible for benefits on the 2016 claim.

During the hearing, the claimant expressed disbelief and frustration with the results reached by the DUA and the review examiner. After all, his final paycheck, paid on September 22, 2016, was for over \$10,000.00. In addition, his 2016 base period contained wages in excess of \$40,000.00, and he was found to have met the requirements of G.L. c. 151A, § 24(a). However, as we have noted above, in this case, the claimant needed to satisfy both the provisions of G.L. c. 151A, § 24(a), and the provisions of G.L. c. 151A, § 31. The other monies paid to the claimant on September 22, 2016, including vacation pay and alleged “severance” pay, do not qualify as “payment for service” earnings, as contemplated by G.L. c. 151A, § 31. The statute contemplates pay for actual active work following the establishment of the previous benefit year, not payments for unused vacation or non-disqualifying remuneration. *See* DUA Service Representative Handbook, § 2037.²

We, therefore, conclude as a matter of law that the review examiner’s conclusion that the claimant is not eligible for benefits on his claim, effective September 18, 2016, is supported by substantial and credible evidence and free from error of law.

² Had the agency counted the claimant’s vacation pay or severance pay as remuneration and disqualified him from receiving benefits for a corresponding period of time on the 2015 claim, our reasoning on this issue might have been different. *See Ruzicka v. Comm’r of Department of Employment and Training*, 36 Mass. App. Ct. 215 (1994). The question presented in *Ruzicka* was “whether lump sum payments deemed remuneration by [the agency] should count as ‘wages earned’ for subsequent unemployment benefits claims.” *Id.* at 217. The Board has reviewed the claimant’s 2015 claim, and we note that the claimant was never found to have received remuneration from the employer in his benefit year, nor were his benefit payments delayed for any period of time that might have corresponded with any such remuneration. Indeed, on his initial application for the 2015 claim, the claimant reported that he did not receive severance pay. Therefore, the question presented in *Ruzicka* or the holding of that case is not applicable here.

The review examiner's decision is affirmed. The claimant is not eligible for benefits on the 2016 claim.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 22, 2017



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh