

False information submitted to the DUA about hours worked and wages paid during three weeks of partial unemployment were found to be attributable to the claimant's unfamiliarity with the claims process, misinformation provided by a Career Center representative, and not knowing how many work hours she would be paid for until after she certified. Held the claimant did not knowingly submit false information and she is not subject to interest charges or penalties on the overpaid benefits under G.L. c. 151A, § 69(a) or (e).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0020 2720 17

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to assess interest and penalties on overpaid unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from employment and filed a claim for unemployment benefits with the DUA, effective July 3, 2016, which was approved. Subsequently, the DUA issued a Notice of Disqualification concluding that the claimant was overpaid benefits in the total amount of \$1,512.00 for the three weeks ending August 20, 2016, August 27, 2016, and September 3, 2016 (Issue ID # 0019 6438 64). The present case arises from a separate DUA determination, a Notice of Fault and Fraud Finding, issued on November 30, 2016, in which the agency imposed a one-time penalty assessment of 15% of the overpayment amount, a separate 12% interest penalty on any remaining balance of overpaid benefits, and a compensable week disqualification. The claimant appealed this November 30, 2016, determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's determination and upheld the assessment of interest and penalties in a decision rendered on February 9, 2017. We accepted the claimant's application for review.

The assessment of interest and penalties was based upon the review examiner's conclusion that the claimant's overpayment was due to "fraud," and, thus, she was subject to such penalties pursuant to G.L. c. 151A, §§ 69(a) and (e). 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 obtain further evidence pertaining to the claimant's understanding of the claims process at the time she reported incorrect information. The claimant attended the remand hearing, and, 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 original decision, which concluded that the claimant reasonably should have known that the wage information reported for the weeks ending August 20–September 3, 2016, was inaccurate because she is an attorney, is supported by substantial and credible evidence and is free from error of law in light of the consolidated findings after remand.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits effective for July 31, 2016.
2. Prior to filing for unemployment benefits, the claimant most recently worked as a lawyer.
3. This was the claimant's first claim for unemployment benefits.
4. On or about August 14, 2016, the claimant became re-employed as a temporary contract employee editing online content. The claimant earned \$40.00 per hour and was not guaranteed a certain amount of hours.
5. During the week ending August 20, 2016, the claimant participated in training.
6. The employer did not notify the claimant whether she would be paid for the training she completed during the week ending August 20, 2016.
7. On August 21, 2016, the claimant submitted her request for unemployment benefits for the week ending August 20, 2016. She reported that she did not work during the reporting period listed and did not report her earnings to the DUA because she was not aware she was completing work and earning money.
8. On or about August 22, 2016, the claimant's supervisor told her to submit her time sheet for the work she completed during the week ending August 20, 2016.
9. The claimant was unaware how to calculate the hours she worked during the week ending August 20, 2016, and indicated on the time sheet she submitted to her supervisor she worked 10.50 hours.
10. The claimant was not aware if the employer accepted the hours she reported until she received her paycheck.

11. For the week ending August 20, 2016, the claimant worked 10.50 hours for the employer and her gross earnings were \$420.00. The claimant's net earnings were \$352.00.
12. The claimant did not receive her paycheck for the week ending August 20, 2016 until the week ending September 3, 2016.
13. The claimant contacted the DUA's teleclaims line two to three times on unknown dates to ask how to report her earnings when requesting weekly benefits. The claimant was unable to speak with a representative each time she called because of high call volume.
14. On an unknown date during the week ending August 28, 2016, the claimant went to the [Town A] Career Center to speak with a Career Center representative about how to report her earnings when requesting weekly unemployment benefits. During her conversation with a representative, the claimant asked the representative when to report her earnings, if she should do it the week she worked or the week she was paid. A [Town A] Career Center employee told the claimant to report her net earnings when she was paid.
15. For the week ending August 27, 2016, the claimant reported to her supervisor that she worked 25 hours. The claimant reported she worked 25 hours because she was unsure at the time how to calculate her work hours for her supervisor.
16. During the week ending August 27, 2016, the claimant worked 37 hours for the employer and her gross earnings were \$1,480.00.
17. For the week ending August 27, 2016, the claimant reported on her certification that she worked 10 hours during the reporting period listed and reported she earned \$1.00 in self-employment.
18. For the week ending August 27, 2016, the claimant reported working 10 hours because she misunderstood how to report her hours and reported the hours she worked during the week ending August 20, 2016.
19. For the week ending August 27, 2016, the claimant reported earning \$1.00 because she had not received her paycheck for the week ending August 20, 2016 and the DUA's reporting system would not allow her to continue requesting benefits without an amount input in the earnings.
20. For the week ending September 3, 2016, the claimant worked 33 hours for the employer and her gross earnings were \$1,340.00.
21. For the week ending September 3, 2016, the claimant reported on her certification that she worked 25 hours during the reporting period listed and reported she earned \$352.00.

22. For the week ending September 3, 2016, the claimant reported that she worked 25 hours because she believed she was reporting her hours for the week ending August 27, 2016 and she was unsure how many hours the employer accepted in her time sheet for the week ending August 27, 2016.
23. For the week ending September 3, 2016, the claimant reported earning \$352.00 because she received her paycheck for the week ending August 20, 2016 during that week and reported her net earnings when she received her paycheck, as she was told by the [Town A] Career Center representative.
24. For each week, the claimant reported on her certification that the information provided is true and correct.
25. The claimant believed she made a mistake and reported her earnings and hours a week behind for each week ending August 20, 2016, August 27, 2016 and September 3, 2016.
26. For the weeks ending August 20, 2016 and August 27, 2016, the claimant was paid unemployment benefits in the gross amount of \$722.00 and for the week ending September 3, 2016, she was paid unemployment benefits in the gross amount of \$610.00.
27. On December 1, 2016, the DUA issued the claimant a Notice of Disqualification denying her benefits under Sections 29(a)&(b)&1(r) of the Law. The claimant was found to be overpaid benefits for the three weeks beginning August 14, 2016 through the week ending September 3, 2016 in the total amount of \$1,512.00.
28. On November 30, 2016, the DUA issued the claimant a Notice of Fault and Fraud Finding.

Credibility Assessment:

The claimant testified and the DUA record indicates this was her first unemployment claim and as such, it was her first time collecting benefits while working. The claimant offered consistent testimony at both the original hearing and the remand hearing that although she was unsure of the date, she spoke with a [Town A] Career Center employee in person about how to submit her benefits requests while working and was told to report her earnings when she received them, not when earned.

Further, the claimant's provision of the time sheet she submitted to the employer for the week ending August 27, 2016 is consistent with her testimony that she reported the hours she worked a week behind, when she submitted her time sheet. The claimant's testimony and the documents in record also reflect she reported her earnings when she received them, as she was told to do by the [Town A]

Career Center employee. Also, as a new employee, the claimant was unclear how to report the hours she worked to her employer, which they corrected prior to paying her, preventing her from knowing how many hours she was going to be paid for until she received her paychecks.

Based on the claimant's consistent testimony at both hearings, the DUA record and the corroborating documentation, the claimant's testimony that she reported her hours and earnings to the best of her ability is reasonable.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to any penalties under G.L. c. 151A, § 69.

The review examiner issued her decision pursuant to the following provisions under G.L. c. 151A, § 69:

(a) The department may recover . . . any amounts paid to an individual through error, . . . If any individual fails to pay when due any amount paid to said individual because of such individual's *failure knowingly to furnish accurate information concerning any material fact*, including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amounts shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.

...

(e) At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the individual's *misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material*, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment

(Emphasis added.)

The DUA regulations at 430 CMR 4.23, define the phrase "failure knowingly to furnish accurate information" in G.L. c. 151A, § 69(a), to mean that the overpayment resulted from information which the individual knew, or should have known, to be incorrect, or a failure to furnish information which she knew, or should have known, to be material.

Thus, in considering whether the \$1,512.00 overpayment for the weeks ending August 20–September 3, 2016, warrants an interest charge under G.L. c. 151A, § 69(a), or a 15% assessment penalty under § 69(e), the standard is essentially the same. We must decide whether the claimant knew, or reasonably should have known, that she was furnishing false information.¹

There is no dispute that the claimant submitted incorrect information when she certified for benefits during the three weeks at issue. The question before us is whether, in each week, at the time she submitted the incorrect information, she knew or reasonably should have known that it was false. A person’s knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

With respect to the week ending August 20, 2016 (week # 1), the findings show that the claimant reported to DUA that she did not work, yet her employer reported gross earnings of \$420.00 for 10.5 hours of work. *See Consolidated Findings of Fact ## 7 and 11.* After remand, the review examiner accepted the claimant’s explanation as to why she reported incorrect information. At the time she certified for week # 1, the claimant did not understand that the training she had performed for the employer during that first week was compensable. *See Consolidated Finding # 7.* She did not realize that it was compensable work until the day after she had certified, when her supervisor instructed her to put in a timesheet for those hours. *See Consolidated Finding # 8.* Apparently, after learning that the 10 hours were compensable, she then reported them to DUA the following week, the week ending August 27, 2016 (week # 2). *See Consolidated Finding # 17.*

During week # 2, the claimant believed that she worked 25 hours. *See Remand Exhibit # 6.*² The employer actually paid her for 37 hours that week. *See Consolidated Finding # 16.* After remand, the review examiner has found that the claimant made a mistake with the actual hours worked because she did not know how to calculate her hours at the time.³ She reported the 25 hours to DUA, but not until the week ending September 3, 2016 (week # 3). *See Consolidated Finding # 21.*

Compounding the errors with reporting the correct number of hours worked, the claimant reported her earnings in the week paid rather than for the week earned. Again, the review examiner has now found that this was based upon a misunderstanding. Consolidated Findings

¹ During the hearing, the claimant argued that “fraud” is legally distinguishable from “knew or should have known,” as the former requires a finding of an intentional act. For purposes of the deciding whether the penalties imposed under G.L. c. 151A, § 69, are warranted in the present case, we address only the standard of “knew or reasonably should have known” that is set forth in the statute and regulation.

² Remand Exhibit # 6 is a weekly contractor log showing 25 hours of work, which the claimant completed for her employer for the week ending August 27, 2016. While not explicitly incorporated into the review examiner’s findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

³ In her testimony, the claimant explained that her time was often adjusted by her supervisor later. For example, the claimant would not bill for time she spent learning to use the technology or for security training, but her supervisor subsequently added that time to her timecard. This portion of the claimant’s testimony is also part of the unchallenged evidence at the hearing.

13 and 14 show that the claimant tried to contact the DUA by phone to find out how to report her earnings, and, when unsuccessful, she sought answers at the Career Center. There, an agency representative misinformed her to report them when paid. Moreover, in response to her inquiry about whether to report net or gross earnings, the Career Center representative also misadvised her to report net earnings. Consolidated Finding # 14. Consequently, the claimant waited to report her earnings until after receiving her first paycheck, and then reported net, rather than gross earnings. See Consolidated Findings ## 11, 12, 21, and 23.

The consolidated findings and credibility assessment now reflect that these errors were mistakes as a result of not knowing the actual hours worked until after certifying for benefits, being new to the unemployment process, and the claimant's confusion and reliance upon misinformation about when and how to report earnings from a Career Center representative. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). For the reasons set forth in the review examiner's credibility assessment, we believe the findings are reasonable in relation to the evidence presented and we see no reason to disturb them.

We, therefore, conclude as a matter of law that the claimant did not knowingly fail to furnish accurate information to the DUA within the meaning of G.L. c. 151A, § 69(a). We further conclude as a matter of law that the erroneous payments from the Unemployment Compensation Fund were not due to submissions or omissions, which the claimant knew or should have known were misrepresentations of material fact within the meaning of G.L. c. 151A, § 69(e).

The review examiner's decision is reversed. The claimant remains obligated to return the overpaid benefits in the amount of \$1,512.00. However, the claimant is not required to pay interest on any overdue amount, is not subject to a 15% penalty, and is not subject to a compensable week disqualification.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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.

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