

Since the claimant's weekly earnings were less than her benefit rate, after taking into account the earnings disregard, she was in partial unemployment, pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), for the six weeks at issue.

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

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0020 3451 08

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that, although the claimant was in partial unemployment from October 16, 2016 through November 26, 2016, she had been overpaid \$604.00 in unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm the conclusion that the claimant was in partial unemployment for the period at issue.

The claimant filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective October 9, 2016. On February 17, 2017, the DUA sent the claimant a Notice of Disqualification, informing her that she was in partial unemployment for the period from October 16, 2016, through November 26, 2016. The claimant was further notified that she had been overpaid \$604.00 for that period of time. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner summarily affirmed the agency's initial determination. His decision, rendered on May 9, 2017, concluded that the claimant was in partial unemployment, but overpaid \$604.00.

The review examiner concluded that the claimant was in partial unemployment, pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), based on his findings that the claimant was accepting all work offered to her after the effective date of her claim and that her weekly earnings were less than her unemployment benefit rate. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's exact weekly earnings, so that the precise amount of an overpayment, if one existed, could be determined. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 in partial unemployment from October 16, 2016, through November 26, 2016, is supported by substantial and credible evidence and is free from error of law, where after remand, the record

shows that during the period at issue the claimant's earnings never exceeded her weekly benefit rate.

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 new claim for unemployment benefits effective on 10/09/16.
2. The claimant at all times worked all available hours.
3. The claimant continued to apply for partial benefits while working part-time hours for her part-time employer.
4. The claimant was paid at a rate of \$9.25 per hour while working for the instant employer during the weeks beginning 10/16/16 through 11/26/16.
5. In error, the claimant reported to DUA her hours worked but not her actual gross wages. In error, the claimant reported being in self-employment when she never was self-employed. The claimant was in good faith confused by the new wage reporting system.
6. The claimant was paid biweekly. Initially, the claimant did not have a password to go into her employer's computer system to learn her actual wages as they did fluctuate from week to week. Later, when reporting wages to DUA, if the claimant worked 13.02 hours (for example), she would report working 13 hours because she believed that was what was expected.
7. The claimant did not understand that reporting hours without reporting wages would result in an overpayment.
8. On 02/17/17, the claimant was sent a Notice of Disqualification. This Notice informed the claimant she was eligible for partial benefits for the weeks ending 10/22/16 through 11/26/16, as long as all the eligibility requirements were met. The determination found the claimant had been overpaid a total of \$604.00 for these six weeks.
9. The claimant's weekly benefit rate was determined to be \$470.00.
10. The claimant's weekly earnings disregard amount is \$156.67.
11. For the week ending 10/22/16, the claimant's gross wages were \$122.10.

12. For the week ending 10/29/16, the claimant's gross wages were \$218.30. For the period of 10/16/16 through 10/29/16, the claimant grossed \$340.40.
13. For the week ending 11/05/16, the claimant's gross wages were \$199.61.
14. For the week ending 11/12/16, the claimant's gross wages were \$212.56. For the period of 10/30/16 through 11/12/16, the claimant grossed \$412.17.
15. For the week ending 11/19/16, the claimant's gross wages were \$205.63.
16. For the week ending 11/26/16, the claimant's gross wages were \$205.91. For the period 11/13/16 through 11/26/16, the claimant grossed \$411.52.
17. For the week ending 10/22/16, DUA issued benefits of \$470.00 to the claimant.
18. For the week ending 10/29/16, DUA issued benefits of \$456.00 to the claimant.
19. For the week ending 11/05/16, DUA issued benefits of \$470.00 to the claimant.
20. For the week ending 11/12/16, DUA issued benefits of \$420.00 to the claimant.
21. For the week ending 11/19/16, DUA issued benefits of \$470.00 to the claimant.
22. For the week ending 11/26/16, DUA issued benefits of \$420.00 to the claimant.

Credibility Assessment

To corroborate her weekly earnings, the claimant provided copies of her bi-weekly pay stubs as well as testifying to the amount received each week. Since the claimant's report of her weekly earnings correlate with her bi-weekly pay stubs, her testimony regarding her weekly earnings is considered accurate.

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. 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. As discussed more fully

below, we conclude, as the review examiner did, that the claimant is in partial unemployment for the weeks at issue.

In this case, there is no dispute that the claimant performed services in each of the weeks addressed in the initial February 17, 2017, determination. The question, then, is whether the claimant was in partial unemployment in those weeks. G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week....

In his decision, the review examiner concluded that the claimant was in partial unemployment for the period at issue. However, he made no findings about the claimant’s weekly earnings. Without such findings, the Board was not able to assess whether the review examiner’s conclusion was supported, as it was not clear whether the claimant “earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week. . . .” Therefore, we remanded the case to obtain specific, weekly totals of the claimant’s earnings.

Following the remand hearing, the review examiner made findings about the claimant’s earnings. We have adopted those findings. Based on the new findings, it would appear that the overpayment amount of \$604.00 is incorrect. For example, the agency initially determined that the claimant was overpaid \$206.00 for the week ending November 12, 2016, and the review examiner affirmed that overpayment amount. *See* Exhibit # 17 and Remand Exhibit # 3. The review examiner has now found that the claimant was paid \$420.00 in unemployment benefits for that week and had earned \$212.56 from the employer for that week. Taking into account the earnings exclusion of \$156.67, the claimant is subject to a reduction of \$56.00 from her total weekly benefit rate of \$470.00. Therefore, she was entitled to \$414.00 for the week ending November 12, 2016. Since she was paid \$420.00 (prior to tax deductions), she was overpaid \$6.00, not \$206.00.

Several of the other weeks at issue have a similar problem. Nevertheless, given the earnings noted in the decision, the claimant never had earnings high enough to exceed her weekly benefit rate. Thus, she was in partial unemployment each week.

The agency shall update its records to reflect the claimant’s weekly earnings for the period at issue, as follows.

For the week October 16 through October 22, 2016, the claimant earned \$122.10.

For the week October 23 through October 29, 2016, the claimant earned \$218.30.

For the week October 30 through November 5, 2016, the claimant earned \$199.61.

For the week November 6 through November 12, 2016, the claimant earned \$212.56.

For the week November 13 through November 19, 2016, the claimant earned \$205.63.

For the week November 20 through November 26, 2016, the claimant earned \$205.91.

After doing so, the amount of the overpayment, if any, will be re-calculated.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant was in partial unemployment for the period from October 16 through November 26, 2016, is supported by substantial and credible evidence and free from error of law; however, the claimant's weekly earnings and the amount of any overpayment must be updated to reflect the review examiner's consolidated findings of fact.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the period from October 16, 2016, through November 26, 2016, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 22, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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