

Claimant was not subject to a lost time charge where the review examiner concluded that the claimant was not in partial or total unemployment.

**Board of Review
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Issue ID: 0021 1892 61

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. I. Cofer, a review examiner of the Department of Unemployment Assistance (DUA), to apply a lost time charge to the claimant's benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, with an effective date of February 26, 2017, which was denied in a determination issued on March 22, 2017. The determination indicated that the claimant was on an indefinite leave of absence granted by his employer, and that, since work was available to him, it was determined that he is not in unemployment and is subject to disqualification. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, in a decision rendered on April 25, 2017, the review examiner modified the agency's initial determination, and applied a lost time charge to the claimant's benefits, despite the fact that the claimant was not in either total or partial unemployment. We accepted the claimant's application for review.

The issue before the Board is whether the review examiner's conclusion that the claimant was subject to a lost time charge, under G.L. c. 151A, § 1(r)(1), and 430 CMR 4.04(6), is supported by substantial and credible evidence and is free from error of law. In this case, the review examiner concluded that the claimant was not in total or partial unemployment for the period at issue, February 26, 2017, to March 18, 2017, but he then determined that the claimant was entitled to partial benefits, and was subject to a lost time charge.

Findings of Fact

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

1. The effective date of the claim is 2/26/17. The claimant did not have a claim in 2016.
2. The claimant's weekly benefit amount is \$645.00.

3. The employer is a livery service. The claimant worked as a livery driver for the employer from 1/01/13 until 3/20/17.
4. The claimant worked twenty hours per week for the employer. The employer paid him \$9.50 per hour.
5. The claimant had full-time employment with another employer (Employer X). He worked for Employer X for several years. His employment with Employer X ended on 2/23/17.
6. The claimant asked the employer for permission to take a leave of absence. The claimant wanted to take a leave of absence because his full-time employment ended and he wanted time off to relax. The employer allowed the claimant to take the requested leave. The leave started on 2/19/17. The claimant remained on the leave until 3/20/17.
7. The claimant did not perform any work for the employer after 2/19/17.
8. In February and March 2017, the claimant had a foot injury. This injury did not render him unable to work for the employer. He could have continued to work twenty hours per week for the employer in the period 2/19/17 to 3/18/17 if he wanted to.
9. The employer discharged the claimant on 3/20/17.

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 findings of fact and deems them to be supported by substantial and credible evidence. However, we believe that the findings support the conclusion that the claimant was not in either total or partial unemployment and was not eligible to receive benefits. We reject the review examiner's determination that the claimant is subject to a lost time charge which we conclude to be an error of law, as outlined below.

The review examiner analyzed the claimant's eligibility for benefits under G.L. c. 151A, §§ 29(a), 29(b), and 1(r)(1), for the period, February 26, 2017, to March 18, 2017. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

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 . . .

Following the review examiner’s analysis, he concluded that the claimant was not in total or partial unemployment. That conclusion is supported by substantial and credible evidence in the record. The claimant was not in total unemployment because he had work available to him in that period, but had declined it. The claimant was not in partial unemployment because he did not perform any work for the employer after February 19, 2017.

Based on the review examiner’s own analysis, the claimant was not entitled to receive benefits. But, after reaching a conclusion, under G.L. c. 151A, §§ 29(a), 29(b), and 1(r)(1), that the claimant was in neither partial nor total unemployment during the period at issue, the review examiner then determined that the claimant was entitled to receive partial benefits for the relevant time period, and the review examiner imposed a lost time charge on “claimant’s benefits.” We conclude that it was a legal error to impose a lost time charge, where the claimant was not in total or partial unemployment, and was not eligible to receive benefits.

We, therefore, conclude as a matter of law that the claimant is not entitled to receive partial benefits under 29(b) and 1(r) of the law, and is not subject to a lost time charge for the period, February 26, 2017 to March 18, 2017.

The review examiner's decision is reversed. The claimant is not entitled to receive benefits until he meets the requirements of the Law.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 18, 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.

SPE/rh