

**Where the claimant presented new evidence regarding his earnings, the DUA must properly enter those earnings into the UI Online computer system and recalculate the claimant's entitlement to benefits. He is eligible for benefits in any week in which he was in total unemployment or in which he was in partial unemployment, so long as he is otherwise eligible under Chapter 151A.**

**Board of Review  
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**Issue ID: 0021 7769 42**

## **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), which found the claimant overpaid benefits due to the misreporting of his earnings from January 15, 2017, through July 15, 2017. Ultimately, he was found to be overpaid pursuant to the provisions of G.L. c. 151A, §§ 29 and 1.

The claimant had filed a claim for unemployment benefits in early 2017, and the claim was determined to be effective January 15, 2017. Thereafter, the claimant certified for benefits while also reporting some partial earnings during the benefit year of the claim. On August 3, 2017, the DUA issued a Notice of Disqualification, which stated that the claimant had incorrectly reported his earnings to the DUA during the benefit year of his claim, and which notified him that he had been overpaid. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on December 23, 2017. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On May 31, 2018, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's earnings during the benefit year of the claim effective January 15, 2017. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant incorrectly reported his earnings to the DUA, thus causing him to be overpaid unemployment benefits, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the documentary evidence submitted at the remand hearing, the review examiner's consolidated findings of fact, and the District Court's Order, we affirm in part and reverse in part the review examiner's decision.

### Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant started working for the employer, a construction company, in April 2011 initially as a fulltime laborer. The employer has periods of time when there is no work available for the claimant due to lack of work and periods of time the claimant's hours are reduced due to lack of work.
2. The claimant is always able and available to work fulltime with the employer.
3. On January 22, 2017, the claimant filed an initial claim for Unemployment Insurance Benefits (hereinafter benefits). The claim is effective the week beginning January 15, 2017 and expires on January 13, 2018 (Exhibit 4).
4. The employer's pay week begins on Wednesday and ends on Tuesday.
5. The Department of Unemployment Assistance's (hereinafter the Department) week begins on a Sunday and ends on a Saturday.
6. The claimant misreported his earnings to the Department for the weeks he was working for the employer and requesting benefits on his claim effective January 15, 2017 for the time period running from the week ending January 21, 2017 through the week ending April 1, 2017.
7. The Department received a Payroll Inquiry Report from the employer listing the claimant's gross earnings for the period of time running from January 15, 2017 through April 1, 2017. This Payroll Inquiry Report lists weekly wage information based upon the employer's pay period.
8. The Department updated the claimant's gross wages in the Department's database to reflect the claimant's gross wages as listed in the Payroll Inquiry Report provided by the employer.
9. On August 3, 2017, the Department issued a Notice of Disqualification, Issue Identification Number 0021 7769 42, under Sections 29(a) (b) & 1(r) of the Law covering the period of time running from January 15, 2017 through April 1, 2017 (Exhibits 11). On the Notice of Disqualification, the Department listed the following information: "You failed to accurately report your gross [earnings] for the week in which you worked. You are entitled to partial benefits for any week in which you are employed less than a full-time schedule of hours and earn less than your allowable amount (Exhibit 11)." As

a result of the Notice of Disqualification, the claimant was overpaid \$2,737 in previously received benefits for the weeks ending February 11, 2017 through April 1, 2017 (Exhibit 11). The claimant appealed this Notice of Disqualification.

10. The Notice of Disqualification was affirmed at the Hearings Level.
11. The claimant appealed the Notice of Disqualification to the Board of Review and the District Court.
12. The issue was remanded for additional evidence.
13. The claimant subsequently obtained an Employee Hours with Wages report from the employer listing the claimant's daily gross wages for the period of time running from January 15, 2017 through April 1, 2017 (Remand Exhibit 10).
14. The following is a list of the claimant's daily gross wages, weekly gross wages, daily hourly rate for the weeks the claimant requested on his benefits claim running from January 15, 2017 through January 13, 2018 up until the week ending April 1, 2017:

<b>Week 1</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	01/15/17	01/16/17	01/17/17	01/18/17	01/19/17	01/20/17	01/21/17
<u>Hourly Rate</u>				\$37.35	\$37.35	\$37.35	
<u>Hours Worked</u>	0	0	0	8	8	8	0
<u>Gross Daily Wage</u>				\$298.80	\$298.80	\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$896.40						
<b><u>Weekly Hours Worked</u></b>	24						

<b>Week 2- Declined UI</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	01/22/17	01/23/17	01/24/17	01/25/17	01/26/17	01/27/17	01/28/17
<u>Hourly Rate</u>		\$37.35	\$37.35	\$37.35	\$37.35	\$37.35	
<u>Hours Worked</u>	0	8	8	8	8	8	0
<u>Gross Daily Wage</u>		\$298.80	\$298.80	\$298.80	\$298.80	\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$1,494.00						
<b><u>Weekly Hours Worked</u></b>	40						

<b>Week 3</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	02/05/17	02/06/17	02/07/17	02/08/17	02/09/17	02/10/17	02/11/17
<u>Hourly Rate</u>						\$37.35	
<u>Hours Worked</u>	0	0	0	0	0	8	0
<u>Gross Daily Wage</u>						\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$298.80						
<b><u>Weekly Hours Worked</u></b>	8						

<b>Week 4</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	02/12/17	02/13/17	02/14/17	02/15/17	02/16/17	02/17/17	02/18/17
<u>Hourly Rate</u>			\$37.35	\$37.35	\$37.35	\$37.35	
<u>Hours Worked</u>	0	0	8	8	8	8	0
<u>Gross Daily Wage</u>			\$298.80	\$298.80	\$298.80	\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$1,195.20						
<b><u>Weekly Hours Worked</u></b>	32						

<b>Week 5</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	02/19/17	02/20/17	02/21/17	02/22/17	02/23/17	02/24/17	02/25/17
<u>Hourly Rate</u>			\$37.35	\$37.35	\$36.35	\$36.35	
<u>Hours Worked</u>	0	0	8	8	8	5	0
<u>Gross Daily Wage</u>			\$298.80	\$298.80	\$290.80	\$181.75	
<b><u>Gross Weekly Wage</u></b>	\$1,070.15				Sick Day	Sick Day	
<b><u>Weekly Hours Worked</u></b>	16						
<u>Sick Hours</u>	13						

<b>Week 6</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	02/26/17	02/27/17	02/28/17	03/01/17	03/02/17	03/03/17	03/04/17
<u>Hourly Rate</u>				\$37.35		\$37.35	
<u>Hours Worked</u>	0	0	0	8	0	8	0
<u>Gross Daily Wage</u>				\$298.80		\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$597.60						
<b><u>Weekly Hours Worked</u></b>	16						

<b>Week 7</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	03/05/17	03/06/17	03/07/17	03/08/17	03/09/17	03/10/17	03/11/17
<u>Hourly Rate</u>				\$37.35	\$37.35		
<u>Hours Worked</u>	0	0	0	8	8	0	0
<u>Gross Daily Wage</u>				\$298.80	\$298.80		
<b><u>Gross Weekly Wage</u></b>	\$597.60						
<b><u>Weekly Hours Worked</u></b>	16						

<b>Week 8</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	03/12/17	03/13/17	03/14/17	03/15/17	03/16/17	03/17/17	03/18/17
<u>Hourly Rate</u>				\$37.35	\$37.35	\$37.35	
<u>Hours Worked</u>	0	0	0	8	8	8	0
<u>Gross Daily Wage</u>				\$298.80	\$298.80	\$298.80	
<b><u>Gross Weekly Wage</u></b>	\$896.40						
<b><u>Weekly Hours Worked</u></b>	24						

<b>Week 9</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	03/19/17	03/20/17	03/21/17	03/22/17	03/23/17	03/24/17	03/25/17
<u>Hourly Rate</u>		\$37.35			\$37.35	\$37.35	\$56.03
<u>Hours Worked</u>	0	8	0	0	8	8	8
<u>Gross Daily Wage</u>		\$298.80			\$298.80	\$298.80	\$448.24
<b><u>Gross Weekly Wage</u></b>	\$1,344.64						
<b><u>Weekly Hours Worked</u></b>	32						

<b>Week 10</b>	<u>Sunday</u>	<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>
<u>Date</u>	03/26/17	03/27/17	03/28/17	03/29/17	03/30/17	03/31/17	04/01/17
<u>Hourly Rate</u>		\$37.35	\$37.35	\$37.35	\$37.35	\$37.35	
<u>Hours Worked</u>	0	8	8	8	8	4	0
<u>Gross Daily Wage</u>		\$298.80	\$298.80	\$298.80	\$298.80	\$149.40	
<u>Gross Weekly Wage</u>	\$1,344.60						
<u>Weekly Hours Worked</u>	36						

15. In May 2017, the Department mailed the claimant questionnaires inquiring about his employment with the employer. In May 2017, the Department first notified the claimant that he may have underreported his wages from the employer.
16. The claimant's schedule and pay rate fluctuated from week to week during this time period. The rate of pay fluctuated depending on the time of day the claimant worked, the day of the week the claimant worked, and if the claimant was working as a foreman or non-foreman.
17. The claimant would learn his pay rate for this period of time when the claimant looked at his paystubs from the employer.
18. The claimant could not have reported the exact wages from the employer during the weeks he requested benefits based upon the information the employer provided the claimant when he was paid.
19. The claimant's educational level is high school.
20. The claimant had zero record keeping habits during the weeks he requested benefits.

21. The claimant knew the Department's work week was different than employer's work week. The claimant knew the Department's work week ran from Sunday to Saturday.
22. The claimant was estimating his wages he reported to the Department for the weeks he requested benefits. The claimant spoke with his co-workers about reporting earnings to the Department. The claimant's co-workers informed the claimant to estimate the wages he reported to the Department.
23. The claimant did not intend to misreport his earnings to the Department.

### 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. As discussed more fully below, we agree with the review examiner and the DUA that the claimant incorrectly reported his earnings to the DUA during the benefit year of the claim effective January 15, 2017; however, based on the new earnings information provided during the remand hearing, the amount of any overpayment must be recalculated.

The DUA initially issued the Notice of Disqualification in this matter, pursuant to G.L. c. 151A, §§ 29 and 1. G.L. c. 151A, § 29, authorizes benefits to be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) "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 . . . .
- (2) "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.

Whether the claimant was in total or partial unemployment during his benefit year necessarily depends on whether he worked and what he earned in each week he worked.

This case, in practical terms, is essentially one which turns on the verification of the claimant's earnings in his benefit year. The employer had submitted information regarding this to the agency, and the agency based its initial determination on the employer's wage information. During the initial hearing, the claimant offered no new information regarding his earnings.

Although he noted that the pay periods used by the employer, which run from Wednesdays to Tuesdays, did not match the DUA's reporting week, which runs from Sunday to Saturday, he offered no specific information about the hours and pay rate. Consequently, the review examiner relied on the information submitted to the agency to render her decision.

The claimant has now submitted new, more accurate information regarding the days he worked, the number of hours he worked, and his pay rate for each day. The total amount of earnings for each week must now be applied to the relevant weeks of the claimant's unemployment claim. Generally, we note that if the claimant did not work at all in a given week, he will be eligible for his full benefit rate, so long as he is otherwise eligible for benefits under Chapter 151A. *See* G.L. c. 151A, § 1(r)(2). If the claimant did work, he will be eligible for benefits pursuant to the terms of G.L. c. 151A, § 1(r)(1). Because the benefit rate on the claim is \$515.00 per week, with an earnings disregard of \$171.67, the claimant can earn up to \$686.67 each week and still receive some benefits.<sup>1</sup> In any week in which he earned over that total amount, he will not be eligible for benefits, even if he worked less than full-time hours, because he will have earned over his benefit rate.

We think it unnecessary here to undertake a detailed discussion for each week, including what the claimant actually earned, what he reported, what the DUA initially paid him, and what he now may be overpaid. Indeed, the consolidated findings of fact do not contain all of that information. It is sufficient for us at this point to simply state what earnings should be attributed to the weeks the claimant certified for benefits on this claim. Upon implementation of this decision in the DUA's computer system, an updated overpayment figure will be generated.

In summary, the following provides the claimant's earnings for the weeks at issue for the claim effective January 15, 2017:

For the week ending January 21, 2017: \$896.40.  
For the week ending January 28, 2017: \$1,494.00.  
For the week ending February 11, 2017: \$298.80.  
For the week ending February 18, 2017: \$1,195.20.  
For the week ending February 25, 2017: \$1,070.15.  
For the week ending March 4, 2017: \$597.60.  
For the week ending March 11, 2017: \$597.60.  
For the week ending March 18, 2017: \$896.40.  
For the week ending March 25, 2017: \$1,344.64.  
For the week ending April 1, 2017: \$1,344.60.

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<sup>1</sup>The claimant's benefit rate, 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).

We, therefore, conclude as a matter of law that the review examiner's decision is affirmed in part and reversed in part. The claimant shall be in total unemployment in any week in which he did not work at all and is otherwise eligible for benefits. The claimant shall be in partial unemployment in any week in which he is otherwise eligible for benefits and he earned less than his benefit rate, after taking into account the earnings disregard provided for in G.L. c. 151A, § 29(b). The amount of any overpayment shall be updated to reflect the correct earnings noted in this decision.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 24, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](http://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