

Where a claimant accepted all hours available to him, he will be in partial unemployment so long as his earnings for the weeks at issue are not in excess of his benefit rate.

**Board of Review
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Issue ID: 0022 4427 39

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 deny unemployment benefits for the two-week period beginning June 25, 2017 and ending July 8, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant stopped working for the employer and continued to certify for benefits on a claim effective May 7, 2017. On September 27, 2017, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not in partial unemployment, and, thus, was not eligible for unemployment benefits.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 10, 2018.

Benefits were denied after the review examiner determined that the claimant had work available to him but was unable to work due to a lack of transportation and, thus, was not in unemployment as defined by G.L. c. 151A, §§ 29 and 1, for the two weeks at issue. 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. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Following our review of the review examiner's consolidated findings of fact, we remanded the case again to the review examiner, this time to make subsidiary findings of fact from the record. The review examiner then returned the case to the Board with a new set of 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 decision, which concluded that the claimant was not in unemployment for the two-week period from June 25, 2017, through July 8, 2017, is supported by substantial and credible evidence and is free from error of law, where the claimant worked all hours that were available for him during the two-week period.

¹ The determination did not state when the disqualification was effective. See Exhibit # 3.

Findings of Fact

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

1. The claimant worked for the employer, a temporary agency, on an assignment as a full-time welder from 6/26/2017 until 7/12/2017 when he last performed work.
2. The claimant was hired to work 40 hours a week for the assignment.
3. During his first week of on [sic] the assignment, he was scheduled to be trained Monday through Friday, however he only worked Tuesday 6/27/2017 through Friday 6/30/2017 since the trainer had been unavailable on Monday 6/26/2017.
4. The week of 7/2/2017 through 7/8/2017, the employer was closed 7/3/2017 and 7/4/2017 due to the holiday. The employer reopened on 7/5/2018 and he worked through Friday 7/7/2018 as scheduled.
5. There was no work available for the claimant during the days which he did not work during the week of 7/2/2017 through 7/8/2017.
6. The following week, on 7/11/2017, the claimant's vehicle broke down on his way to work and was a total loss.
7. The claimant could not afford the repairs for the vehicle and did not report to work for his shifts for the remainder of the week.
8. The claimant was seeking other transportation to the assignment, however he could not find transportation for the 100 mile commute to Rhode Island where the assignment was located.
9. After being unable to get to work, the claimant contacted the employer asking for additional work near [City A], however the employer only had assignments in Rhode Island.
10. The claimant no longer has the text messages communicating with the employer in July 2017 because he lost his other cell phone service.
11. The claimant was still able to work after he lost his transportation to Rhode Island.
12. The claimant was still available for work and was looking for work in the [City B], [City C] or [City A] area where he could get there by train or taxi.

13. Effective the week beginning 7/10/2017, the claimant has been seeking employment with other employers as a welder using the internet.

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 conclude that the claimant was in unemployment for the two-week period June 25, 2017 through July 8, 2017.

In his decision, the review examiner concluded that the claimant was not in unemployment for the two-week period at issue. In both of the weeks, the claimant performed some wage-earning services for the employer. *See Consolidated Findings of Fact ## 3–5.* Consequently, the issue before us is whether the claimant was in partial unemployment for those weeks.

G.L. c. 151A, § 29(b) authorizes benefits be paid to those in “partial unemployment.” This term is defined in 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

Here, the review examiner's supported consolidated findings of fact show that the claimant worked all hours available to him during the two weeks at issue. During the first week, he worked four days. He did not work on Monday June 26, 2017, because a trainer was not available that day to train him. During the second week, the claimant did not work on July 3 and 4, 2017, because the employer was closed for the holiday. However, he did work three days that week, from July 5 through 7, 2017. Although the claimant experienced some transportation issues after the week ending July 8, 2017, those issues did not affect him during the two-week period before us. Nothing suggests that he was not able or available to work on the days that he did not work from June 25 through July 8, 2017. Indeed, Consolidated Finding of Fact # 5 suggests that the only reason the claimant did not work would have been because work was not available.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits from June 25, 2017, through July 8, 2017, is not supported by substantial and credible evidence or free from error of law, because the consolidated findings of fact indicate that the claimant worked all hours available to him for those two weeks and the only reason why he did not work on three days was because the employer had no work available for him.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning June 25, 2017, through July 8, 2017, so long as his earnings during each week are not in excess of his benefit rate, after taking into account the earnings disregard provided for under G.L. c. 151A, § 29(b),² and if he is not subject to disqualification under any other provision of Chapter 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 3018



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

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

² The review examiner's consolidated findings of fact did not make note of the claimant's benefit rate or gross earnings for the weeks at issue.