

False information submitted to the DUA about hours worked and wages paid during the benefit year of claim were found to be attributable to the claimant's estimation of his earnings due to the different pay cycles used by the DUA and his employer, and not to an intentional effort to mislead the DUA into paying more benefits that the claimant was entitled to. Because the claimant did not knowingly submit false information, he is not subject to interest charges or penalties on the overpaid benefits under G.L. c. 151A, § 69(a) or (e).

**Board of Review
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Issue ID: 0022 5535 02

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 at fault for failing to properly report his earnings to the DUA on a claim effective January 15, 2017.

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 Fault and Fraud Finding, which provided that an overpayment on the claim was due to the claimant's fault and fraudulent intent. The notice informed him that the overpayment would be subject to an interest penalty and that he would have to serve a four-week compensable week penalty. 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 January 19, 2018. 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 why the claimant misreported his earnings to the DUA for 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 was at fault for the overpayment on the claim, is supported by substantial and credible

evidence and free from error of law, where the review examiner has found that the claimant did not intend to misreport his earnings.

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 reverse 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).

10. On August 3, 2017, the Department issued a Notice of Fault and Fraud Finding, Issue Identification Number 0022 5535 02, under Sections 69(a) & 25(j) of the Law assigning an interest penalty for the now overpaid benefits and assigning a 4 week compensatory week penalty (Exhibit 11A). The parent issue of this Notice of Fault and Fraud Finding is the Notice of Disqualification that was issued on August 3, 2017 under Issue Identification Number 0021 7769 42 (Exhibit 1).
11. The Notice of Fault and Fraud Finding was affirmed at the Hearings Level.
12. The claimant appealed the Notice of Fault and Fraud Finding to the Board of Review and the District Court.
13. The issue was remanded for additional evidence.
14. 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).
15. 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 [sic] claim running from January 15, 2017 through January 13, 2018 up until the week ending April 1, 2017:

Week 1	<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	
<u>Gross Weekly Wage</u>	\$896.40						

<u>Weekly Hours Worked</u>	24						
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Week 2- Declined UI	<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	
<u>Gross Weekly Wage</u>	\$1,494.00						
<u>Weekly Hours Worked</u>	40						

Week 3	<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	
<u>Gross Weekly Wage</u>	\$298.80						

<u>Weekly Hours Worked</u>	8						
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Week 4	<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	
<u>Gross Weekly Wage</u>	\$1,195.20						
<u>Weekly Hours Worked</u>	32						

Week 5	<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	
<u>Gross Weekly Wage</u>	\$1,070.15				Sick Day	Sick Day	

<u>Weekly Hours Worked</u>	16						
<u>Sick Hours</u>	13						

<u>Week 6</u>	<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	
<u>Gross Weekly Wage</u>	\$597.60						
<u>Weekly Hours Worked</u>	16						

<u>Week 7</u>	<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		
<u>Gross Weekly Wage</u>	\$597.60						

<u>Weekly Hours Worked</u>	16						
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<u>Week 8</u>	<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	
<u>Gross Weekly Wage</u>	\$896.40						
<u>Weekly Hours Worked</u>	24						

<u>Week 9</u>	<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
<u>Gross Weekly Wage</u>	\$1,344.64						

<u>Weekly Hours Worked</u>	32						
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<u>Week 10</u>	<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						

16. 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.
17. 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.
18. The claimant would learn his pay rate for this period of time when the claimant looked at his paystubs from the employer.

19. 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.
20. The claimant's educational level is high school.
21. The claimant had zero record keeping habits during the weeks he requested benefits.
22. 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.
23. 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.
24. 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 disagree with the review examiner's conclusion that the overpayment was due to the claimant's fault.

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 overpayment on the claim effective January 15, 2017, warrants an interest charge under G.L. c. 151A, § 69(a), or a 15% assessment penalty under G.L. c. 151A, § 69(e), the standard is essentially the same. We must decide whether the claimant knew, or reasonably should have known, that he was furnishing false information.

During the remand hearing, the claimant did not dispute that, in many weeks, he provided incorrect information to the agency when he certified for benefits. However, we conclude that the claimant did the best he could to give information, which he thought was as accurate as possible. The employer's pay week begins on Wednesday and ends on Tuesday. However, for purposes of paying benefits, the DUA's week runs from Sunday through Saturday. Thus, from the outset, we note that when the claimant certified for benefits on a Sunday or Monday, it would have been very difficult for the claimant to calculate what he had earned in the preceding week, given that the DUA's week and the employer's “week” do not overlap. Further complicating matters is that the claimant's pay rate fluctuated often. The review examiner's findings regarding his weekly earnings clearly shows that. The claimant would often learn his pay rate after he received his pay stub, which, for certain days, would have been after he needed to certify for benefits. *See Consolidated Findings of Fact ## 17–18.* Thus, he could not have known exactly what he earned in a DUA week when he certified. Consolidated Finding of Fact # 19.

The review examiner found credible the claimant's assertions that he estimated his earnings for each DUA week. Consolidated Finding of Fact # 23. It was not unreasonable for the review examiner to do so, given the confusing nature of the employer's pay periods and payment process. Ultimately, she concluded that the claimant did not intend to misreport his earnings. Consolidated Finding of Fact # 24. We think that this, too, is reasonable and supported by the record.

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 any overpaid benefits on the claim effective January 15, 2017. 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 - 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

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