

Where the claimant received a lump sum payment upon his separation from employment, and he did not have to sign a release of claims to receive this payment, the money constitutes remuneration pursuant to G.L. c. 151A, § 1(r)(3).

**Board of Review
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Issue ID: 0022 6580 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Matthew Shortelle, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits from August 13, 2017, through October 14, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant separated from his position with the employer on August 7, 2017. He filed a claim for unemployment benefits with the DUA, and the DUA determined that the claim is effective August 13, 2017. On September 14, 2017, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not eligible to receive benefits from August 13, 2017 through September 2, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner, in a decision rendered on December 30, 2017, modified the agency's initial determination and denied benefits for the period from August 13, 2017, through October 14, 2017.

Benefits were denied after the review examiner determined that the claimant had received remuneration from the employer following his separation, and, thus, he was disqualified from receiving benefits under G.L. c. 151A, §§ 29(a) and 1(r)(3). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accept the claimant's application for review. 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 not eligible to receive unemployment benefits from August 13, 2017, through October 14, 2017, is supported by substantial and credible evidence and is free from error of law, where the claimant received \$10,480.66 at his separation and the substantial and credible evidence in the record is that the claimant had an average weekly wage of \$2,530.65.

Findings of Fact

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

1. The claimant worked as an engineer for the employer, an oil and gas builder, from August 1, 2008 until August 7, 2017.
2. The claimant earned approximately \$131,593.00 per year.
3. The employer paid the claimant approximately \$2,530.65 bi-weekly.
4. On August 7, 2017, the claimant became separated from her [sic] employment.
5. Around August 7, 2017, the employer paid the claimant a lump sum totaling \$10,480.66. The claimant did not have to sign any release of claims or any other document to receive the initial \$10,480.66 payment.
6. On August 13, 2017, the claimant filed a claim for unemployment benefits with an effective date of August 13, 2017.
7. On August 14, 2017, the claimant signed the Agreement and General Release ("the Agreement") entitling him to a second lump sum payment of \$10,480.66.
8. Around September 4, 2017, the employer paid the claimant a second lump sum of \$10,480.66.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. First, it was clear from the hearing that the claimant is male. Nevertheless, the review examiner found in Finding of Fact # 4 that the claimant separated from "her" employment on August 7, 2017. More importantly, the review examiner found in Finding of Fact # 3 that the claimant was paid "\$2,530.65 bi-weekly." This is not supported by the claimant's testimony or the documentary evidence in the record. The claimant testified that this amount was his weekly pay. Additionally Exhibit # 2, p. 2 shows that the claimant supplied his weekly gross pay to the DUA, and he indicated that it was \$2,530.65. Moreover, if \$2,530.65 was the claimant bi-weekly rate of pay, it would not make sense for him to have a yearly salary of over \$131,000.00. *See* Finding of Fact # 2. Based on the full record, we conclude that the "bi-weekly" portion of Finding of Fact # 3 is unsupported, and that the \$2,530.65 was the claimant's gross weekly rate of pay. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, because the review examiner misstated the claimant's weekly rate of pay, we reject the review examiner's legal conclusion that the claimant is subject to disqualification from August 13, 2017, through October 14, 2017.

The question before the review examiner in this case was whether the claimant was in unemployment following his separation from work on August 7, 2017. His claim for benefits is effective August 13, 2017. As of that time, he was performing no work. Therefore, the issue to be decided is whether the claimant was in total unemployment.

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.

As noted in the review examiner’s findings, the claimant received a lump sum payment of \$10,480.66 upon his separation from work. If this money constituted remuneration, then he would not be in total unemployment, according to the definition quoted above.

Under G.L. c. 151A, § 1(r)(3), remuneration is defined, in relevant part, as the following:

. . . any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses . . . received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice . . .

The review examiner concluded that the \$10,480.66 was remuneration. We agree. This payment exhibits classic attributes of severance pay, including that the total amount paid was directly related to years of service,¹ the payments were not subject to limitation if the claimant obtained employment with employers other than the employer, and the claimant was permanently severed from employment. See Bolta Prods. Div. v. Dir. of Division of Employment Security, 356 Mass. 684, 689–690 (1970).² Moreover, the claimant did not sign the Agreement and General Release to receive this initial \$10,480.66 payment. The release of claims was signed to receive a second payment of the same amount. Thus, the initial payment constituted remuneration. Cf. White v. Comm’r of Department of Employment and Training, 40 Mass. App. Ct. 249, 252–253, *further app. rev. den’d.* (1996). Accordingly, the review examiner was correct to conclude that the receipt of the first \$10,480.66 served to disqualify the claimant from receiving unemployment benefits for a specific period of time.

¹ Although not noted in the findings of fact, the claimant testified that the amount of the payments was based on his years of service. This testimony is supported by the claimant’s initial response to the agency that the payment was calculated “[b]ased on number years of service, 1 week per 1 year of service.” See Exhibit # 3, p. 2. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

² 430 CMR 4.38 defines “Severance Pay” as “a payment to an employee at the time of separation in recognition and consideration of the past services the employee has performed for the employer. The amount of the payment is usually based on years of service.”

However, because the review examiner incorrectly noted the claimant's weekly wage in his decision, the length of the disqualification, from August 13 through October 14, 2017, is incorrect. The review examiner concluded that the \$10,480.66 equated to 8.28 weeks of regular payments. In fact, the correct number is half of that. The full \$10,480.66 divided by \$2,530.65 gives four full weeks, plus several hundred dollars left over for another week.

Indeed, the DUA's initial determination in this case, which disqualified the claimant from August 13, 2017, through September 2, 2017, was entirely correct. The first week of the severance payment is attributable to a week prior to the start of the claimant's unemployment claim, namely the week beginning August 6, 2017. Beginning August 13, 2017, the effective date of the claimant's unemployment claim, there are three more full weeks of disqualification. As to the extra amount, while it is attributable to the week beginning September 3, 2017, it does not fully disqualify the claimant from receiving unemployment benefits.³

We, therefore, conclude as a matter of law that the review examiner's decision to disqualify the claimant due to the receipt of remuneration is supported by substantial and credible evidence; however, the length of the disqualification was erroneous due to a miscalculation of the claimant's average weekly wage while working for the employer.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from August 13, 2017, through September 2, 2017. Pursuant to G.L. c. 151A, § 1(a), the claimant's benefit year shall be extended by three weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 14, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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:

³ In Part IV of his decision, the review examiner states that the claimant "is subject to a lost time charge for the week ending October 14, 2017." Nothing in Part III of the decision explains this reference to lost time. We note that the concept of lost time is totally inapplicable in this case because the claimant had no work offered to him after August 7, 2017. We reject that part of the decision, because it is legally erroneous, unsupported, and unexplained.

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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