

Where the claimant previously worked 11 hours/week for the instant employer while working 80 hours/week for two other employers, and where after filing his unemployment claim he continued to work 11 hours/week for the instant employer until his hours were reduced to 5.5 hours/week, the claimant is in partial unemployment under 151A, §§ 29(b) and 1(r).

**Board of Review
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Issue ID: 0023 8981 04

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. 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, which was determined to be effective November 12, 2017. He then certified for benefits on that claim. On December 22, 2017, the DUA issued a determination in relation to his ongoing employment with the instant employer, finding the claimant eligible for partial benefits pursuant to G.L. c. 151A, §§ 29(b) and 1(r). The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 23, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to allow the claimant an opportunity to present testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 conclusion, which is that the claimant is not in either total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits on 11/22/17. The effective date of the claim is 11/12/17.
2. The claimant's weekly benefit amount is \$616.00. The claimant's earnings disregard is \$205.33
3. The claimant began his employment for the employer on 5/11/2000. The employer hired the claimant to work as a part-time support staffer. The employer hired the claimant to work eleven hours per week.
4. The employer hired the claimant to provide services for two individuals ([A] and [B]). The employer hired the claimant to perform five and a half hours of services per week for [A] and five and a half hours of services per week for [B].
5. In the period 10/01/16 to 11/01/17, the claimant performed services for [A]. In this period, [A] was the claimant's employer for forty hours of services per week. The employer was the claimant's employer for an additional five and a half hours of services per week.
6. On 11/01/17, the claimant's employment as [A]'s employee ended. This employment ended because [A] wanted other people to provide services for the forty hours per week. The claimant continued to perform five and half hours per week of services for [A] as the employer's employee. The claimant still has this employment.
7. In the period 10/01/16 to 2/05/18, the claimant performed services for [B]. In this period, [B] was the claimant's employer for forty hours of services per week. The employer was the claimant's employer for an additional five and a half hours of services per week. [B] passed away on 2/05/18.
8. After [B] passed away, the claimant continued to work five and a half hours per week for [A] via the employer.
9. From 5/11/2000 until 2/05/18, the employer never reduced the claimant's hours.
10. Since 11/12/17, the claimant has remained available for suitable full-time work.
11. Since 11/12/17, the claimant has remained able to perform suitable full-time work.

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. After 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

believe that the consolidated findings support the conclusion that, for the period beginning November 12, 2017, the claimant has been in partial unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r).

G.L. c. 151A, § 29, authorizes benefits 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.

It is undisputed that, in every week since the claimant filed his unemployment claim effective November 12, 2017, the claimant worked some hours for the instant employer. Therefore, the claimant has not been in ‘total unemployment’ for any week in question.

We then turn to the question of whether the claimant meets the definition of “partial unemployment.” For at least 13 months prior to filing his unemployment claim in November 2017, the claimant worked 80 hours per week for two other employers ([B] and [A]) while working 11 hours per week for the instant employer. In these circumstances, it appears that the instant employment is subsidiary to [B] and [A], the claimant’s primary employment. *See* DUA Service Representative Handbook §§ 1404(C) and 1404(D). After becoming separated from [A] on November 1, 2017, the claimant worked 40 hours per week for [B] and 11 hours per week for the instant employer, significantly less than the claimant’s normal “full-time weekly schedule of work” established in the previous period. The claimant’s hours were further reduced beginning the week of February 4, 2018, when he separated from [B] and the instant employer reduced his schedule to 5.5 hours per week. The findings also state that the claimant was able and available for suitable full-time work since filing for unemployment effective November 12, 2017. Therefore, the claimant has been in “partial unemployment” for each week of his unemployment claim.

According to the formula set forth in G.L. c. 151A, § 29(b), for individuals in partial unemployment, the claimant’s weekly benefits shall be reduced by his weekly remuneration in excess of his earnings disregard of \$205.33. During the weeks of November 12, 2017, through February 3, 2018, the claimant earned \$242 per week for the instant employer.¹ Therefore, for this

¹ 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).

period, his weekly benefits shall be reduced by \$36.67, plus any earnings from his contemporaneous employment with [B].

During week beginning February 4, 2018, and thereafter, the claimant earned \$121 per week for the instant employer. As his total weekly remuneration for this period is lower than his earning disregard of \$205.33, he therefore would not be subject to any reduction in benefits for this period.

The review examiner's decision is reversed. Pursuant to G.L. c. 151A, §§ 29(b) and 1(r), the claimant is entitled to receive partial benefits beginning November 12, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 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.

JRK/rh