

The claimant is entitled to her full weekly benefit amount during the two weeks at issue because there was less than a full-time schedule of work available to her, and her earnings were less than her earnings disregard.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 3933 27

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 concluded that the claimant was entitled to partial benefits, but affirmed an overpayment for the weeks ending November 25, 2017, and December 2, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits effective December 11, 2016. She reopened her claim effective August 27, 2017. On March 20, 2018, the agency issued a Notice of Disqualification pursuant to G.L. c. 151A, §§ 29(b) and 1(r), stating that the claimant failed to accurately report her gross earnings. This disqualification resulted in an overpayment for the two weeks ending November 25, 2017, and December 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 affirmed the agency's initial determination in a decision rendered on September 8, 2018. We accepted the claimant's application for review.

The claimant's overpayment was affirmed after the review examiner concluded that the claimant was entitled to partial benefits, but the review examiner failed to make a decision on the issue of whether or not the claimant misreported her earnings during the weeks ending November 25, 2017, and December 2, 2017. 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 obtain additional testimony and other evidence pertaining to the claimant's earnings. 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 decision, which merely concluded that the claimant was entitled to partial benefits without determining whether her reported earnings were accurate during the two weeks at issue, 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 and credibility assessment are set forth below in their entirety:

1. The claimant currently works two part-time union jobs. The claimant works with the instant employer and also as needed and less frequently with the [Employer A].
2. The claimant began working a variable schedule of part-time hours for this instant employer's college food service company on 11/30/10, and she continues presently to work for this employer, accepting all available hours of work.
3. The claimant works for the instant employer as a Banquette Server, Cashier, Bartender, and Bar Busing Worker.
4. For the instant employer, the claimant works a range of zero to 35 hours per week.
5. The claimant always reports her gross wages to DUA for the period she worked.
6. The claimant also works part-time, zero to 20 hours per week, for a hotel employer as a Server from 09/09/82 to the present. During the period from 10/20/17 through 12/30/17, the claimant worked zero hours for the [Employer A] employer.
7. The claimant retired from her town fire department Administrative Assistant job in October of 2016.
8. The claimant filed a claim for unemployment benefits effective 12/11/16, reopening on 08/27/17. The claimant's benefit rate was \$742.00 with an earnings disregard of \$247.33.
9. On 03/20/18, the claimant was sent a Notice of Disqualification noting the claimant had allegedly not accurately reported her gross earnings for the period from 11/19/17 through 12/02/17.
10. During the week ending 11/25/17, the claimant worked 4.83 hours and was paid \$103.48.
11. During the week ending 12/02/17, the claimant worked 2.85 hours and was paid \$71.71.
12. In the paycheck for the week ending 12/02/17, the claimant was also paid \$68.46 in back pay following a union grievance settlement regarding work several weeks earlier. The claimant had already reported the \$68.46 in wages during the week in which it was earned.

Credibility Assessment:

The claimant's testimony and evidence regarding her wages for the weeks at issue is [sic] supported by a letter from the employer agreeing with the information provided by the claimant at the remand hearing.

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.

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

We do not disagree with the review examiner's decision that the claimant is entitled to partial unemployment benefits during any week in which there is less than a full-time schedule of work available to her. We would add that, in order to receive benefits, the claimant would also have to earn less than her weekly benefit amount plus earnings disregard. However, in his decision, the review examiner failed to consider whether there should be an overpayment for the two weeks ending November 25, 2017, and December 2, 2017, which resulted from the agency's original determination that the claimant misreported (*i.e.*, underreported) her earnings. We, therefore, remanded the case to the review examiner to obtain additional evidence and findings pertaining to the claimant's earnings during these two weeks.

After remand, the review examiner found that the claimant worked 4.83 hours and earned \$103.48 during the week ending November 25, 2017, and she worked 2.85 hours and earned \$71.71 during the week ending December 2, 2017. The review examiner based his findings on documentary evidence submitted by the claimant and a letter by the employer confirming the wages testified to by the claimant. On the findings and record before us, we cannot conclude that the claimant misreported her earnings to the DUA. Rather, it appears that the employer erroneously reported to the agency that the claimant had higher earnings during this period. Since the claimant is entitled to earn up to \$247.33 before the agency begins to deduct her earnings from her weekly benefit amount of \$742.00, and, during the two weeks at issue, she earned significantly less, she is entitled to her full benefit amount during this period.

We, therefore, conclude as a matter of law that based on the claimant's earnings with the instant employer, she is not subject to an overpayment of benefits during the two weeks ending

November 25, 2017 and December 2, 2017. We note that the claimant's entitlement to her weekly benefit amount may be affected by any remuneration she received from sources other than the instant employer.

We affirm the part of the decision that found the claimant was entitled to partial unemployment benefits. However, we reverse the part of the decision that affirmed the claimant's overpayment during the two weeks ending November 25, 2017, and December 2, 2017. The claimant is entitled to her full weekly benefit amount during these two weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 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.

SVL/rh