

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: 0025 0780 80

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 the claimant benefits, beginning March 25, 2018. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

On April 10, 2018, the agency initially determined that the claimant was not entitled to unemployment benefits pursuant to G.L. c. 151A, §§ 29(b) and 1(r), in any week in which he worked any hours for the employer. The claimant appealed, and only the claimant attended the hearing. In a decision rendered on August 30, 2018, the review examiner affirmed, in large part, the agency determination. However, the review examiner also concluded that the claimant was not entitled to benefits in any week of his benefit year, as he was working each week. The review examiner concluded that the claimant was not in unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(b) and 1(r). The Board accepts the claimant's application for review.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's findings of fact, with one observation regarding Finding of Fact # 7, are supported by substantial and credible evidence in the record. In Finding of Fact # 7, the review examiner found that the "Captain pays the claimant via check every week." This finding was based on the claimant's testimony, which, in part, was that he is paid every week. We think that the testimony is reasonably construed as meaning that the claimant is paid in every week in which he works. Contrary to the review examiner's conclusion, this does not necessarily mean that he works every week. To conclude that he works every week would, in some respects, be inconsistent with the finding that the breaks between fishing trips could last "hours, days, and weeks." Finding of Fact # 5. There is nothing in the record to suggest that the claimant would be paid for weeks in which no work was performed. Thus, we accept the findings with the understanding that the evidence reasonably supports Finding of Fact # 5 insofar as it means that the claimant is paid for weeks in which he works.

The review examiner's other findings of fact allow for the conclusion that Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984) is applicable here. In Mattapoisett, the claimant was hired to be a part-time police officer. He worked on call,

whenever he was needed, under the terms of his employment contract. Some weeks he worked, and other weeks he did not work at all. The Court found that the claimant was not in partial unemployment in the benefit year, because “[t]o characterize [the claimant] who agreed to be part-time and on call as ‘partially employed’ when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term.” *Id.* at 549. Here, there is no question that the claimant’s main work in his base period (the year prior to the filing of his claim) was as a fisherman and deck hand. Trips on the boat could be of varied lengths, no work was guaranteed in any week, and there were potentially irregular breaks between the trips. The claimant also offered unrefuted testimony that he accepted all work offered to him by the employer.¹ On this record, we do not see a legal error in concluding, as the DUA and the review examiner did, that Mattapoissett should apply.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is eligible to receive benefits in any week of his benefit year in which he did not work at all or was not offered any work. The claimant is not eligible to receive benefits in any week in which he performed services or in which, although work was available, he refused work.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 26, 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

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).