

The employer did not present substantial evidence to show that it offered full-time hours to the claimant during the two weeks that he claimed partial unemployment benefits. Pay stubs merely showing the hours worked did not corroborate bookkeeper's hearsay testimony that the claimant voluntarily took days off. Claimant is not disqualified under G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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**Issue ID: 0025 7151 06
0025 7151 19**

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals two decisions by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits during separate weeks. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse both decisions.

The claimant separated from his position with the employer in December 2017. He filed a claim for unemployment benefits with the DUA, which denied benefits during the weeks ending March 3, 2018, and March 17, 2018, in separate determinations issued on June 1, 2018.¹ The claimant appealed the determinations to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determinations and denied benefits for these two weeks in separate decisions rendered on August 17, 2018. We accepted the claimant's applications for review.

Benefits were denied after the review examiner determined that the claimant did not work all available hours, and, thus, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decisions, which concluded that the claimant did not work all hours that were available to him during the weeks ending March 3 and 17, 2018, are supported by substantial evidence and are free from error of law.

Findings of Fact

¹ Issue ID # 0025 7151 06 pertains to the week ending March 3, 2018. Issue ID # 0025 7151 19 pertains to the week ending March 17, 2018.

The review examiner's findings of fact and credibility assessments are identical for both Issue ID # 0025 7151 06 and 0025 7151 19. They are set forth below in their entirety:

1. On December 17, 2017, the claimant filed a claim for unemployment benefits effective December 17, 2017. The claimant worked for one employer, which was the instant employer during the base period of the claim. The Department of Unemployment Assistance (the DUA) determined the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$574.00 with an earnings exclusion of \$191.33.
2. In February 2018, the employer recalled the claimant to work.
3. The claimant is employed full time for the employer.
4. The claimant's pay rate is \$23.00 per hour.
5. The claimant is still employed by the employer.
6. During the week ending February 24, 2018, the claimant worked 40 hours regular time plus 1.25 over time hours. The claimant earned \$ 963.13 in gross income from the employer.
7. During the week ending March 3, 2018, the claimant earned \$517.50 in gross income from the employer.
8. During the week ending March 3, 2018, the claimant did not work his full time schedule for unknown reasons.
9. During the week ending March 3, 2018, the employer had full time work available for the claimant.
10. During the week ending March 17, 2018, the claimant earned \$391.00 in gross income from the employer.
11. During the week ending March 17, 2018, the employer had full time work available for the claimant.
12. During the week ending March 17, 2018, the claimant did not work his full time schedule for unknown reasons.
13. During the week ending March 24, 2018, the claimant earned \$529.00 in gross income from the employer.
14. During the week ending March 24, 2018, the employer did not have full time work available for the claimant due to the inclement weather.

15. For the week ending March 30, 2018, the employer paid a one-time bonus to the claimant in the amount of \$360.00 before taxes.

[Credibility Assessment:]

The employer offered credible testimony that from February 2018, the claimant was recalled to full time work. The employer's Bookkeeper further offered testimony corroborated by documentation indicating that the claimant worked full time during the week ending February 24, 2018. Also, during the week ending March 17, 2018 and March 24, 2018, although the employer had full time work available, the claimant did not work full time. In addition, during the week ending March 24, 2018, the employer did not have full time work available for the claimant due to the inclement weather.

The claimant denied that the employer had full time work available. The claimant contends that the employer did cancelled [sic] work because of the weather. The claimant also denies taking days off from work and contends that the employer did not pay him wages in February 2018.

Given the totality of the evidence presented, it is concluded that the employer's corroborated testimony is more credible. It is further concluded that although the employer had full time work available, the claimant was not available to work full time.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Findings of Fact ## 9 and 11, which provide that the employer had full time work available for the claimant during the two weeks at issue, because they are not supported by substantial evidence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits during the weeks ending March 3 and March 17, 2018.

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.

In this case, the review examiner found that the claimant is regularly employed full-time for the employer. Finding of Fact # 3. His weekly benefit amount was \$574.00. Finding of Fact # 1. During the week ending March 3, 2018, he earned only \$517.50, and during the week ending March 17, 2018, he earned only \$391.00. Findings of Fact ## 7 and 10. Thus, in both weeks, he worked less than full-time and earned remuneration less than his weekly benefit amount.

However, in order to be eligible for partial unemployment benefits, the statute also requires that the claimant be unable to obtain more work. The issue in this case is whether he did not work full-time during those weeks because the employer had no more work available to give him, or because the claimant chose not to work.

During the hearing, the employer’s bookkeeper testified that full-time work was available to the claimant during both weeks ending March 3 and March 17, 2018, but that the claimant took some days off. The claimant disputed this. Ultimately, the review examiner found the employer’s testimony to be more credible and, thus, found that, during those weeks, full-time work was available. *See* Findings of Fact ## 9 and 11. Such assessments are within the scope of the fact finder’s role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). “The test is whether the finding is supported by “substantial evidence.” *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted.) “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we cannot accept these findings.

The employer’s witness at the hearing, the bookkeeper, had no personal knowledge about the amount of work offered to the claimant during the weeks ending March 3 and 17, 2018. Her testimony that the claimant had more work available but took days off is hearsay. Hearsay evidence is admissible in informal administrative proceedings, and it can constitute substantial evidence on its own if it contains “indicia of reliability.” *Covell v. Department of Social Services*, 439 Mass. 766, 786 (2003), *quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether it was corroborated by other evidence in the record. *Covell*, 439 Mass. at 785–786. Here, the review examiner determined that the bookkeeper’s testimony was more reliable because it was corroborated by documentation indicating that the claimant worked full-time. However, the only documentation that the employer presented as evidence was a paystub for each week. These paystubs show the hours worked; they do not

show whether the employer offered more hours.² Thus, the employer's documents do not corroborate the bookkeeper's hearsay testimony that the claimant voluntarily took days off.

Because there is nothing else in the record that a reasonable mind would accept as adequate to support a conclusion that the claimant chose not to work more hours during those two weeks, the review examiner's credibility assessment and Findings of Fact ## 9 and 11 are not supported by substantial evidence. Without these findings, there is no basis to conclude that the claimant turned down suitable work and he is entitled to partial benefits.

We conclude as a matter of law that the review examiner's decisions to disqualify the claimant from receiving partial unemployment benefits under G.L. c. 151A, §§ 29 and 1(r), are not supported by substantial evidence and, therefore, they are incorrect as a matter of law.

The review examiner's decisions are reversed. The claimant is entitled to receive partial unemployment benefits for the weeks ending March 3, 2018, and March 17, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – December 21, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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

² See Exhibit 2, the paystub for the week ending March 3, 2018, under Issue ID # 0025 7151 06, and Exhibit 1c, the paystub for the week ending March 17, 2018, under Issue ID # 0025 7151 19. These paystubs, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. 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).

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.

AB/rh