

The claimant presented evidence regarding his daily earnings for the employer during his benefit year. He is eligible for benefits in any week in which, in light of these earnings, he was in total unemployment or in partial unemployment, so long as he is otherwise eligible under Chapter 151A.

**Board of Review
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Issue ID: 0027 3826 76

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) relating to the claimant's eligibility for benefits for various weeks from June 19, 2016 through May 13, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse in part and affirm in part.

The claimant had filed a claim for unemployment benefits on July 2, 2016, and the claim was determined to be effective June 19, 2016. Thereafter, the claimant certified for benefits while also reporting some partial earnings during the benefit year of the claim. On December 25, 2018, the DUA issued a Notice of Disqualification, which stated that the claimant had inaccurately reported his earnings to the DUA. The disqualification notified him that he had been overpaid. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner modified the agency's initial determination in a decision rendered on March 12, 2019.

In her decision, the review examiner allegedly corrected the claimant's weekly earnings and found the claimant in unemployment for some of the weeks at issue, pursuant to G.L. c. 151A, §§ 29 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to make subsidiary findings of fact from the record. Specifically, we noted that the calculations of the claimant's earnings were incorrect, and we instructed the review examiner to review the documentary evidence and revise her findings. Thereafter, the review examiner issued her 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 concluded that the claimant incorrectly reported his earnings to the DUA, thus causing him to be overpaid unemployment benefits, 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 worked as a part-time Security Guard for the employer from November 2013 until the current time.
2. The claimant would receive his schedule from the employer by way of text message or email. The claimant would accept or decline the work offered, then would receive a schedule of hours 3 to 4 days before the start of the scheduled shifts.
3. The claimant filed a claim for unemployment benefits on July 2, 2016. The effective date of the claim is June 19, 2016. The Department of Unemployment Assistance determined his benefit rate to be \$593, with an earnings exclusion of \$197.67.
4. The employer's pay period was Friday through Thursday. The claimant was paid by the employer on a weekly basis.
5. The claimant attempted to report his hours to DUA on the basis of DUA's Sunday through Saturday week.
6. The chart below shows the days and hours the claimant worked for the employer; and the earnings per DUA's weeks:

2016

<p align="center">DATES AND HOURS WORKED FROM EXHIBIT 19 All hours are at \$16.50 per hour. OT rate is assumed to be an additional \$8.25 per hour.</p>								
Date worked	# of hours	Total Straight time earnings	OT	OT Earnings attributed to this date	Total Straight plus OT Earnings	DUA Week Ending	# Hours Worked During DUA Week	Total Earnings for DUA Week
6/19/16	8 + 1	148.50			148.50			
6/20	8	132.00			132.00			
						WE 6/25	17	280.50
6/26	4 + 6.5	173.30			173.30			
						WE 7/2	10.5	173.30
7/3	8.5	140.30			140.30			
7/4/16	8	132.00			132.00			
7/7	8	132.00			132.00			
7/8	8	132.00	y-.5	1.00	133.00			
7/9	8	132.00	y-.5	1.00	133.00			
						WE 7/9	40.5	670.30

7/10	8.5	140.30			140.30			
7/11	8	132.00	y-.5	1.00	133.00			
7/13	8	132.00	y-.5	1.00	133.00			
7/15	8	132.00			132.00			
7/16						WE 7/16	32.5	538.30
7/17	8.5	140.30			140.30			
7/18	6.5	107.30			107.30			
7/19	8 + 1	148.50			148.50			
7/21	8	132.00			132.00			
7/23	6	99.00			99.00			
						WE 7/23	38	627.10
7/24	8.5	140.30			140.30			
7/25	8	132.00			132.00			
7/26	8	132.00			132.00			
7/27	8	132.00			132.00			
7/29	8	132.00	y-2.5	6.90	138.90			
7/30	8 + 1.5	156.80			156.80			
						WE 7/30	50	832.00

Date worked	# of hours	Total Straight time earnings	OT	OT Earnings attributed to this date	Total Straight plus OT Earnings	DUA Week Ending	# Hours Worked During DUA Week	Total Earnings for DUA Week
7/31	8.5	140.30			140.30			
8/2	8	132.00	y-2.5	6.90	138.90			
8/3	8.5	140.30	y-2.5	6.90	147.20			
8/5	8	132.00			132.00			
						WE 8/6	33	558.40
8/7	8.5	140.30			140.30			
8/9	8	132.00			132.00			
8/10	8	132.00			132.00			
8/12	5	82.50			82.50			
						WE 8/13	29.5	486.80
8/14	8.5	140.30			140.30			
8/18	8	132.00			132.00			
8/19	12 + 1.5	222.80			222.80			
8/20						WE 8/20	30	495.10
8/21	3.5 + 8	189.80			189.80			
8/22	9.25	152.60	y-17	46.80	199.40			
8/23	13.5	222.80	y-17	46.80	269.60			
8/24	9.25	152.60	y-17	46.80	199.40			
						WE 8/27	43.5	858.20

8/28	8.5	140.30			140.30			
						WE 9/3	8.5	140.30
9/8	8	132.00			132.00			
9/9	12.5	206.30			206.30			
9/10	8.25	136.10	y-30	49.50	185.60			
						WE 9/10	28.75	523.90
9/11	12.5	206.30			206.30			
9/12	9.08	148.50	y-30	49.50	198.00			
9/13	14.5	239.30	y-30	49.50	288.80			
9/14	7.5	123.80	y-30	49.50	173.30			
9/15	5.75	94.90	y-30	49.50	144.40			
						WE 9/17	49.33	1,010.80

<p align="center">DATES AND HOURS WORKED FROM EXHIBIT 19</p> <p align="center">All hours are at \$16.50 per hour. OT rate is assumed to be an additional \$8.25 per hour.</p>								
Date worked	# of hours	Total Straight time earnings	OT	OT Earnings attributed to this date	Total Straight plus OT Earnings	DUA Week Ending	# Hours Worked During DUA Week	Total Earnings for DUA Week
9/19	7.83	129.20			129.20			
9/20	12	198.00			198.00			
9/21	8.17	134.80			134.80			
9/22	8	132.00			132.00			
9/23	8.5	140.30	y-20.25	28.70	169.00			
9/24	8	132.00	y-20.25	28.70	160.70			
						WE 9/24	52.5	923.70
9/25	12.5	206.30			206.30			
9/26	8.25	136.10	y-20.25	28.70	164.80			
9/27	8.5	140.30	y-20.25	28.70	169.00			
9/28	8	132.00	y-20.25	28.70	160.70			
9/29	6.5	107.30	y-20.25	28.70	136.00			
						WE 10/1	43.75	836.80
						WE 10/8	0	
10/15	4	66.00			66.00			

						WE 10/15	4	66.00
10/21	6	99.00			99.00			
10/22	4	66.00			66.00			
						WE 10/22	10	165.00
						WE 10/29	0	
11/3	8.5	140.30			140.30			
11/4	8.5	140.30	y-31.5	37.10	177.40			
11/5	7.5	123.80	y-31.5	37.10	160.90			
						WE 11/5	24.5	478.60
11/6	9.5	156.80	y-31.5	37.10	193.90			
11/7	9.5	156.80	y-31.5	37.10	193.90			
11/8	13.5	222.80	y-31.5	37.10	259.90			
11/9	13.5	222.80	y-31.5	37.10	259.90			
11/10	9.5	156.80	y-31.5	37.10	193.90			
						WE 11/12	55.5	1,101.50
<p align="center">DATES AND HOURS WORKED FROM EXHIBIT 19 All hours are at \$16.50 per hour. OT rate is assumed to be an additional \$8.25 per hour.</p>								
Date worked	# of hours	Total Straight time earnings	OT	OT Earnings attributed to this date	Total Straight plus OT Earnings	DUA Week Ending	# Hours Worked During DUA Week	Total Earnings for DUA Week
11/13	12	198.00			198.00			
11/14	12	198.00			198.00			
11/18	14	231.10			231.10			
						WE 11/19	38	627.10
						WE 11/26	0	
12/3	4	66.00			66.00			
						WE 12/3	4	66.00
12/4	8	132.00			132.00			
						WE 12/10/16	8	132.00
2017								
2/3/17	6	99.00			99.00			
						WE 2/4/17	6	99.00
3/6	6	99.00			99.00			
3/10	13	214.50			214.50			
3/11	9	148.50			148.50			

						WE 3/11	28	462.00
3/12	8	132.00			132.00			
3/16	2	33.00			33.00			
						WE 3/18	10	165.00
3/20	8	132.00			132.00			
3/21	8.75	144.40			144.40			
3/22	5.25 + 1.5	111.40			111.40			
3/23	6.5	107.30			107.30			
3/24	6.75	111.40			111.40			
						WE 3/25	36.75	606.50

DATES AND HOURS WORKED FROM EXHIBIT 19 All hours are at \$16.50 per hour. OT rate is assumed to be an additional \$8.25 per hour.								
Date worked	# of hours	Total Straight time earnings	OT	OT Earnings attributed to this date	Total Straight plus OT Earnings	DUA Week Ending	# Hours Worked During DUA Week	Total Earnings for DUA Week
3/26	6.5	107.30			107.30			
3/28	6.25	103.10			103.10			
						WE 4/1	12.75	210.40
4/3	9	148.50			148.50			
4/5	7.5	123.80			123.80			
						WE 4/8	16.5	272.30
4/9	8.5	140.30			140.30			
4/10	8	132.00			132.00			
4/11	9.0	148.50			148.50			
4/12	.25	4.10			4.10			
						WE 4/15	25.75	424.90
4/16	7	115.50			115.50			
4/17	8	132.00			132.00			
4/18	7.5	123.80			123.80			
4/19	7.75	127.90			127.90			
						WE 4/22	30.25	499.10
4/23	6.5	107.30			107.30			
						WE 4/29	6.5	107.30
5/1	6.5	107.30			107.30			
5/5	7.5	123.80			123.80			
						WE 5/6	14	231.10

5/8	13	214.50			214.50			
5/12	8	132.00			132.00			
5/13	8.25	136.10			136.10			
						WE 5/13	29.25	482.60

7. On December 25, 2018, a Notice of Disqualification was issued under Section 29(a) & (b) of the Law indicating, in part, that “you failed to accurately report your gross earnings for the week in which you worked. You are entitled to partial benefits for any week in which you are employed less than a full-time schedule of hours and earning less than your allowable amount. You are entitled to partial benefits for the following weeks: 6/19/2016 – 8/13/2016, 8/21/2016 – 9/3/2016, 10/9/2016 – 10/29/2016, 1/29/2017 – 2/4/2017, 2/26/2017 – 3/18/2017, 4/9/2017 – 5/13/2017. You are not entitled to benefits for the following weeks: 8/14/2016 – 8/20/2016, and 9/4/2016 – 9/10/2016.” It further indicated “you are eligible to receive partial benefits for any week in which your employment is less than a full-time schedule of hours and your gross earnings are less than your allowable amount which is \$593.00 +\$197.67.” The determination indicated the weeks of overpayment from 7/2/2016 through 8/6/2016, 8/20/2016, 10/29/2016, and 3/11/2017 through 3/18/2017, 4/15/2017, and 4/29/2017 through 5/13/2017.”

Credibility Assessment:

Because the employer reported earnings based on a Friday through Thursday week rather than a Sunday through Saturday week as *required* by DUA, the difficulty in this case was determining the claimant’s earnings per DUA’s week. There was a significant difference between the earnings reported by the claimant and those reported by the employer. The claimant argued the difference was solely due to the difference in the week being reported. The best evidence on this question is the Confirmed Time by Employee Detail report (in the record as Exhibit 19) as this is an employer-generated report which shows the days, rather than the weeks, the claimant worked. The information in that report has been used to create the table included in the Findings of Fact, above. The figures shown as “# of hours” are based on the portions of the Confirmed time by Employee Detail report that list the individual sites worked rather than the “daily hours recap” or “billing hours recap.” Unfortunately, the Confirmed Time by Employee Detail report provides raw data of dates and hours worked. The table in the Findings of Fact consolidates that data to show earnings and hours worked per DUA week. It is noted the Confirmed Time report lists the number of hours per the employer’s week that were paid as overtime hours. Since the report did not break down the overtime hours by day, the amount of overtime for the week was spread evenly over each day worked during that week

In creating the chart shown in Finding of Fact No. 6 in the decision issued on March 12, 2019, an error was made in determining the Week Ending Date. That has now been corrected.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, the review examiner's updated findings of fact alter whether the claimant was in unemployment for at least some of the weeks addressed by the DUA.

The DUA initially issued the Notice of Disqualification in this matter, pursuant to G.L. c. 151A, §§ 29 and 1. 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.

Whether the claimant was in total or partial unemployment during his benefit year necessarily depends on whether he worked and what he earned in each week he worked.

This case, in practical terms, is essentially one which turns on the verification of the claimant's earnings in his benefit year. During the hearing, the review examiner clarified the claimant's daily earnings, because the employer's pay period, which runs from Friday through Thursday, is not the same as the DUA's week (Sunday through Saturday) for determining eligibility for unemployment benefits. The review examiner reasonably relied on payroll records submitted by the employer (the Confirmed Time by Employee Detail report).

Because the review examiner's initial decision contained calculations which did not appear to be supported by the payroll records, we remanded the matter for her to reconsider the evidence. The consolidated findings of fact are now more accurate. The total amount of earnings for each week must now be applied to the relevant weeks of the claimant's unemployment claim. Generally, we note that, if the claimant did not work at all in a given week, he will be eligible for his full benefit rate, so long as he is otherwise eligible for benefits under Chapter 151A. *See* G.L. c. 151A, § 1(r)(2). If the claimant did work, he will be eligible for benefits pursuant to the terms of G.L. c. 151A, § 1(r)(1). Because the benefit rate on the claim is \$593.00 per week, with an earnings disregard of \$197.67, the claimant can earn up to \$790.67 each week and still receive some benefits. In any week in which he earned over that total amount, he will not be eligible for

benefits, even if he worked less than full-time hours, because he will have earned over his benefit rate.

We think it unnecessary here to undertake a detailed discussion for each week, including what the claimant actually earned, what he reported, what the DUA initially paid him, and what he now may be overpaid. Indeed, the consolidated findings of fact do not contain all of that information. It is sufficient for us at this point to simply state what earnings should be attributed to the weeks the claimant certified for benefits on this claim. Upon implementation of this decision in the DUA's computer system, an updated overpayment figure will be generated.

In summary, the claimant's earnings for the weeks *at issue* for the claim effective June 19, 2016 are the following:

For the week ending June 25, 2016: \$280.50.
For the week ending July 2, 2016: \$173.30.
For the week ending July 9, 2016: \$670.30.
For the week ending July 16, 2016: \$538.30.
For the week ending July 23, 2016: \$627.10.
For the week ending July 30, 2016: \$832.00.
For the week ending August 6, 2016: \$558.40
For the week ending August 13, 2016: \$486.80.
For the week ending August 20, 2016: \$495.10.
For the week ending August 27, 2016: \$858.20.
For the week ending September 3, 2016: \$140.30.
For the week ending September 10, 2016: \$523.90
For the week ending September 17, 2016: \$1,010.80.
For the week ending September 24, 2016: \$923.70.
For the week ending October 1, 2016: \$836.80.
For the week ending October 8, 2016: \$0.00.
For the week ending October 15, 2016: \$66.00.
For the week ending October 22, 2016: \$165.00.
For the week ending October 29, 2016: \$0.00.
For the week ending November 5, 2016: \$478.60.
For the week ending November 12, 2016: \$1,101.50.
For the week ending November 19, 2016: \$627.10.
For the week ending November 26, 2016: \$0.00.
For the week ending December 3, 2016: \$66.00.
For the week ending December 10, 2016: \$132.00.
For the week ending February 4, 2017: \$99.00.
For the week ending March 11, 2017: \$462.00.
For the week ending March 18, 2017: \$165.00.
For the week ending March 25, 2017: \$606.50.
For the week ending April 1, 2017: \$210.40.
For the week ending April 8, 2017: \$272.30.
For the week ending April 15, 2017: \$424.90.
For the week ending April 22, 2017: \$499.10.
For the week ending April 29, 2017: \$107.30.

For the week ending May 6, 2017: \$231.10.
For the week ending May 13, 2017: \$482.60.

We, therefore, conclude as a matter of law that the review examiner's decision is affirmed in part and reversed in part. The claimant shall be in total unemployment in any week in which he did not work at all and is otherwise eligible for benefits. The claimant shall be in partial unemployment in any week in which he is otherwise eligible for benefits, and in which he earned less than his benefit rate, after taking into account the earnings disregard provided for in G.L. c. 151A, § 29(b). The amount of any overpayment shall be updated to reflect the correct earnings noted in this decision.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 20, 2019



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