

A claimant with a prior history of correctly reporting his part-time earnings to the DUA while he certified for benefits is at fault for failing to correctly report his earnings on his most recent claim. The review examiner rejected his contention that he was confused or that his education level was such that he misunderstood how to report his earnings, given his history of correctly reporting his earnings in several prior unemployment claims.

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Issue ID: 0029 9851 33

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 assess interest and penalties on overpaid unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective October 1, 2017. After claiming benefits for several months, the DUA noted that, because the claimant had not accurately reported what he was earning during weeks in which he was certifying for benefits, he had been overpaid unemployment benefits. On March 14, 2019, the DUA sent the claimant a Notice of Fault and Fraud Finding, in which the agency imposed a one-time penalty assessment of 15% of the overpayment amount, a separate 12% interest penalty on any remaining balance of overpaid benefits, and a compensable week disqualification.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's determination in a decision rendered on April 19, 2019.

The assessment of interest and penalties was based upon the review examiner's conclusion that the claimant's overpayment was "the result of the claimant's intentional failure to give information to DUA he knew was important in determining his benefits," and, thus, he was subject to the penalties pursuant to G.L. c. 151A, §§ 69(a) and (e). 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 further evidence, mainly regarding how the claimant reported weekly earnings to the DUA while he was certifying for benefits on prior claims. The claimant attended the remand hearing, and, thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

¹ The compensable week disqualification is issued pursuant to G.L. c. 151A, § 25(j).

The issue before the Board is whether the review examiner's decision, which concluded that the overpayment attributed to the claimant was the result of his intentional failure to give information to the DUA which he knew would be important when determining his benefits, is supported by substantial and credible evidence and free from error of law in light of the consolidated findings of fact after remand.

Findings of Fact

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

1. On 10/10/17, the claimant filed a claim for unemployment benefits with an effective date of 10/01/17.
2. The Department of Unemployment Assistance (DUA) determined the claimant's benefit rate to be \$539 with an earnings disregard of \$179.67.
3. Prior to 2017, the claimant had unemployment claims in 1997, 2010, 2012, 2013, 2014, 2015, and 2016.
4. When certifying his claims each week on his prior claims, the claimant reported his partial earnings each week by calculating his hours worked for the weeks in question.
5. For the weeks 10/01/17 through 04/21/18, the claimant worked part time and earned wages each week.
6. For the weeks 10/01/17 through 04/21/18, the claimant certified his claim for unemployment benefits and answered "YES" to the question: "Did you work during the reporting period listed above? This includes full-time, part-time, temporary, self or military employment."
7. For each of the weeks in question, the claimant provided the hours he worked each week when asked.
8. For each of the weeks in question, the claimant provided his hourly wage and not his total wages earned for the week when asked for his weekly wages.
9. For the weeks 10/01/17 – 03/10/18, the claimant answered that his total wages for each week were \$20.
10. For the weeks 03/11/18 – 03/31/18, the claimant answered that his total wages for each week were \$21.
11. For the weeks 04/01/18 – 04/21/18, the claimant answered that his total wages for each week were \$22.

12. For each of the weeks in question, the claimant underreported his wages to the DUA.
13. The DUA issued the claimant his full benefit amount for each of the weeks in question due to the misinformation the claimant provided to the DUA.
14. Subsequently, the DUA discovered through the employer that the claimant had received additional wages from working for the time period in question and was therefore overpaid.
15. On 03/14/19, the DUA sent the claimant a Notice of Fault and Fraud Finding.

[Credibility Assessment:]

The claimant and his attorney attended the remand hearing. The claimant does not dispute that he misreported his partial earnings to the DUA throughout his most recent unemployment claim but argues that it was not intentional. When questioned as to how he reported his partial earnings on his multiple prior claims, the claimant testified that he did not remember. When presented with Remand Exhibit 7 showing various weekly certifications from prior unemployment claims and his correctly reported partial earnings, the claimant acknowledged that, for his prior claims, he entered his wages earned and not his hourly wage. The claimant failed to provide a sufficient explanation as to why his reporting method changed on his most recent unemployment claim and his attorney's argument that the claimant's education level and hectic lifestyle ("married with three kids") was not persuasive nor did it provide a mitigating circumstance. Based on the claimant's prior experience reporting his partial earnings on his multiple unemployment claims, it is concluded that the claimant knew how to accurately report his earnings to the DUA and his testimony that his misreporting of his earnings on his most recent claim was unintentional is not credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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, we agree with the DUA's determination and the decision reached by the review examiner.

The review examiner issued her decision pursuant to the following provisions under G.L. c. 151A, § 69:

- (a) The department may recover . . . any amounts paid to an individual through error, . . . If any individual fails to pay when due any amount paid to said

individual because of such individual's *failure knowingly to furnish accurate information concerning any material fact*, including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amounts shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.

...

(e) At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the individual's *misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material*, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment

(Emphasis added.)

The DUA regulations at 430 CMR 4.23, define the phrase “failure knowingly to furnish accurate information” in G.L. c. 151A, § 69(a), to mean that the overpayment resulted from information which the individual knew, or should have known, to be incorrect, or a failure to furnish information which he knew, or should have known, to be material. Thus, in considering whether the claimant’s overpayment warrants an interest charge under G.L. c. 151A, § 69(a), or a 15% assessment penalty under § 69(e), the standard is essentially the same. We must decide whether the claimant knew or reasonably should have known that he was furnishing incorrect or incomplete information to the DUA.²

There was no dispute that the claimant submitted incorrect information when he certified for benefits during the period of time in question. Rather than provide his weekly earnings on his certification forms, the claimant provided his hourly rate of pay. *See Consolidated Findings of Fact ## 8–11.* The question before us is whether, in each week, at the time he submitted the incorrect information, he knew or reasonably should have known that it was incorrect. We conclude that he reasonably should have known that it was incorrect, essentially for the reasons stated by the review examiner in her decision. She concluded the following:

The claimant’s testimony did not establish a reasonable circumstance that caused him to misreport his earnings to the DUA for the weeks in question. The claimant testified that he misunderstood the question regarding his wages earned each week to mean his hourly wage each week. Given the claimant’s multiple prior unemployment claims and familiarity with the unemployment system, the claimant’s testimony is not found credible.

² During the remand hearing, the claimant’s attorney argued, in effect, that, in order to find “fault” or “fraud,” the agency would have to look into the claimant’s mind. He suggested that the DUA had to show “actual fraud.” Based on the argument, the attorney’s definition of “fault” or “fraud” appears to have encompassed some kind of an intentional act, which the claimant undertook to improperly obtain unemployment benefits. For purposes of deciding this case, however, we address only the standard of “knew or reasonably should have known” that is set forth in the statute and regulation.

We remanded this matter to flesh out the record regarding the prior claims noted in this conclusion. Claim certifications covering various weeks of several prior claims for the claimant were entered into the record during the remand hearing. *See* Remand Exhibit # 7. This claim history showed that, when he certified his claims in the past, “the claimant reported his partial earnings each week,” not his hourly rate of pay. Consolidated Finding of Fact # 4. The record shows that the claimant had no confusion in prior years as to how to report his weekly earnings. The prior claim certifications also support a conclusion that the claimant’s understanding of the reporting requirements was not affected by his education level or hectic lifestyle, as argued in this case. Thus, the review examiner was reasonable in rejecting the claimant’s reasons for not accurately reporting his earnings to the DUA.

We note that a person’s knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). Here, in light of all the evidence before her, including the claimant’s history of properly reporting his earnings to the DUA, the review examiner was reasonable in finding that the claimant should have known how to correctly report his earnings on the 2017 claim. Moreover, he reasonably should have known that what he was reporting to the DUA (his hourly rate of work) was incorrect, incomplete, and a false response to the prompt which allowed him to enter his “part-time earnings” or “wages” for the weeks in question.

We, therefore, conclude as a matter of law that the claimant knowingly failed to furnish accurate information to the DUA within the meaning of G.L. c. 151A, § 69(a), and that the overpayment was due to submissions and omissions which the claimant knew, or reasonably should have known, were misrepresentations of material fact within the meaning of G.L. c. 151A, § 69(e).

The review examiner’s decision is affirmed. The claimant shall be subject to interest and penalties as stated in the March 14, 2019 determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 25, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Charlene A. Stawicki, 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

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