

Pursuant to Chapter 151A and the holding of Naples, and absent some evidence of malfeasance by an employer, the agency is not at liberty to attribute the payment of wages to a quarter in which they were not paid, but allegedly should have been paid.

**Board of Review
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Issue ID: 0030 0348 50

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 found her eligible for an unemployment claim with a benefit rate of \$347.00 per week. 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, and the claim was determined to be effective on January 6, 2019. On March 12, 2019, the DUA sent the claimant a Monetary Redetermination, which informed her that she was monetarily eligible for an unemployment claim with a benefit rate of \$347.00 per week. 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 redetermination in a decision rendered on July 4, 2019.

The review examiner affirmed the agency's Monetary Redetermination, after she concluded that the claimant's base period wages had been properly reported and considered when the DUA established the claim for benefits pursuant to the provisions of G.L. c. 151A, §§ 24 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accept the claimant's application for review. 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 is eligible for a claim, effective January 6, 2019, with a benefit rate of \$347.00 per week, is supported by substantial and credible evidence and is free from error of law, where there was no dispute that the claimant's base period wages were reported correctly by her employer.

Findings of Fact

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

1. The claimant filed a claim for benefits with an effective date of 01/06/19.

2. On 03/12/19, the DUA issued the claimant a Monetary Redetermination informing her that she was monetarily eligible for unemployment benefits.
3. The 03/12/19 Monetary Redetermination established the claimant's weekly benefit rate at \$347 with an earnings disregard of \$115.67.
4. The claimant appealed the Monetary Redetermination because she believed her weekly benefit amount would be higher if the DUA posted some of her wages in the base period(s) she earned them [sic] not when the employer paid her.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact, except for the portion of Finding of Fact # 4 that follows the phrase "Monetary Redetermination." Our reasons for rejecting that portion of the finding are clarified below. As we will discuss, even if the review examiner had properly considered the claimant's reasons for appealing the Monetary Redetermination, she is still not entitled to the relief she seeks.

To be eligible for unemployment benefits, individuals must be paid wages in their base period of at least thirty times their weekly benefit rate. G.L. c. 151A, § 24(a). The base period, as defined by G.L. c. 151A, § 1(a), is "the period of fifty-two consecutive calendar weeks ending with the day immediately preceding the first day of a claimant's benefit year." The benefit rate amounts to fifty per cent of a claimant's average weekly wage. G.L. c. 151A, § 29(a). For an individual with more than two quarters of wages, such as the claimant, the average weekly wage is an amount equal to "one twenty-sixth of the total wages reported for an individual in the two highest quarters of his base period." G.L. c. 151A, § 1(w).

In this case, the claimant did not dispute the manner in which the employer reported her wages for purposes of establishing her claim. The claimant testified that the wages, as given in Exhibit # 3, p. 2, were "technically" correct. Contrary to the review examiner's Finding of Fact # 4, the claimant was not arguing during the hearing that the DUA should count some of her wages in a quarter when she earned them, rather than when she was paid them. She was arguing the opposite. The claimant wants the DUA to count some of the wages reported for the second quarter of 2018 (when she earned them and was paid them) in the third quarter of 2018 (when she did not earn them and was not paid them). The claimant argues that the wages she earned for work in June of 2018 were paid to her in June of 2018, rather than in July of 2018.¹ If the wages are counted as paid in the third quarter of 2018 (July of 2018), the claimant asserts that her benefit rate will be higher. *See* Exhibit # 6. She is, in essence, arguing that the wages should be attributable to the quarter in which she *should have been paid* them, rather than the quarter in which she was *actually* paid them.

¹ According to her testimony and the information submitted by her employer, the employer would regularly pay the claimant her wages in the following month. For example, if the claimant earned her wages in June of 2018, the employer should have paid her in July of 2018.

Although we fully understand the argument posited by the claimant, and her reasons for wanting the situation to be considered again, we conclude that nothing in the law allows the DUA to transfer wages from one quarter to another under the circumstances presented here. In Naples v. Comm’r of Department of Employment and Training, the Supreme Judicial Court (SJC) noted that the language of G.L. c. 151A and its associated regulations was clear as to how employers should report wages. 412 Mass. 631, 634 (1992). The SJC held that “the Legislature intended that employers must report wages in the quarter in which they are ‘paid,’ . . . and that ‘average weekly wage’ includes those wages ‘paid’ to an employee in an appropriate quarter.” Id. Here, as noted above, the employer properly reported the claimant’s wages in the quarter when they were paid, as required by law and as intended by the Legislature. There is no legal mechanism in place for altering the quarterly breakdown of the claimant’s wages.

In Naples, the SJC specifically declined to address the argument “that counting wages when paid . . . allows employers to manipulate the unemployment compensation eligibility of their employees.” 412 Mass. at 633 n.2. We think it possible that, if an employer was deliberately delaying the payment of wages, or deliberately altering when an employee was paid, for the apparent purpose of skirting the unemployment law (or any other law for that matter), we could take some action to correct a resulting injustice. Here, no deliberate manipulation has been shown. The claimant submitted a letter from her employer stating that the employer paid the claimant on June 29, 2018, rather than in early July of 2018, because the employer was “heading out of town and had decided to pull payroll early.” Exhibit # 7, p. 3. We decline to hold that such a circumstance necessitates an alteration to the claimant’s properly reported base period wages, especially where the claimant has been determined to be eligible for an unemployment claim.

We, therefore, conclude as a matter of law that the review examiner’s decision, which found the claimant eligible for an unemployment claim with a benefit rate of \$347.00 per week, is supported by substantial evidence and is free from error of law.

The review examiner's decision is affirmed. The claimant is eligible for an unemployment claim, effective January 6, 2019, with a benefit rate of \$347.00 per week.

BOSTON, MASSACHUSETTS
DATE OF DECISION – August 8, 2019



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

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