

Where new evidence was presented regarding the claimant's earnings, the DUA must properly enter those earnings into the UI Online computer system and recalculate the claimant's entitlement to benefits. He was eligible for benefits in any week in which he was in total unemployment or in which he was in partial unemployment, as long as he was otherwise eligible under Chapter 151A.

Board of Review
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Issue ID: 0031 1975 46

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 the claimant overpaid benefits in various weeks beginning July 2, 2017, through September 9, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective December 26, 2016. On June 26, 2019, the DUA sent the claimant a Notice of Disqualification, informing him that he was eligible for benefits only in weeks in which he did not work full time and in which he earned less than his benefit rate. The notice informed him that he had been overpaid benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner, in a decision rendered on January 4, 2020, affirmed in part and reversed in part the agency's initial determination.

The review examiner determined that the claimant was in unemployment for the weeks addressed by the DUA's initial determination and, thus, was eligible for benefits under G.L. c. 151A, §§ 29 and 1. However, the claimant was still subject to an overpayment. 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 matter to the review examiner to clarify the claimant's earnings for the weeks at issue in 2017. Both parties attended the remand hearing. 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 conclusion 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 are set forth below in their entirety:

1. The claimant's preferred language is Haitian Creole.
2. In 2008, the claimant began working, as a part time school bus driver, for a bus transportation business. Since starting this job, he has worked for this employer Monday through Friday during the regular school year and in July for the summer school.
3. In 2013, the claimant started working a subsidiary bus driving job for the present employer, also a bus transportation business, on weekends, school holidays, and evenings.
4. The present employer provides service 24 hours a day, 7 days a week. Shifts may start in one week and end in another. There is always work available. Unless they arrange for another employee to cover their shift or request leave time, they will be scheduled for [sic] number of hours in the shift they received through bidding. The minimum number of hours for a part time employee is 15 and the maximum number is 30. Employees may pick up additional hours above their bid for shift.
5. The claimant's shifts have been for 15 hours a week. He sometimes he [sic] picks up extra hours.
6. During 2016, the present employer paid the claimant \$16.39 an hour.
7. The employer issues its pay checks on Thursdays, for the one week pay period ending the prior Friday. On rare occasions a paycheck may contain money due from a prior week for which an employee was underpaid in error. This extra money is not listed separately from what was earned during the week in the payroll records.
8. The employer is only able to provide payroll information by Saturday [to] Friday pay week, not by Sunday to Saturday.
9. The claimant's 2016-01 claim was effective December 25, 2016. His benefit rate for this claim was \$742.00, and his earnings disregard was \$247.33.
10. For the pay period ending Friday, June 23, 2017, the claimant worked 40 regular hours. He was paid \$655.62 for these hours, in a paycheck issued on June 29, 2017.
11. For the pay period ending Friday, June 30, 2017, the claimant worked 24.25 regular hours. He was paid \$397.47 for these hours, in a paycheck issued on July 6, 2017.
12. For the pay period ending Friday, July 7, 2017, the claimant worked 40 regular hours and 19.74 overtime hours. He was paid \$655.61 in regular pay and

- \$485.31 in overtime, along with \$122.93 “other pay” for a total of \$1,263.85, in a paycheck issued on July 13, 2017.
13. For the pay period ending Friday, July 14, 2017, the claimant worked 20 regular hours. He was paid \$460.25 in regular pay for these hours, in a paycheck issued on July 20, 2017.
 14. For the pay period ending Friday, July 21, 2017, the claimant worked 38.16 regular hours. He was paid \$625.48 for these hours, in a paycheck issued on July 27, 2017.
 15. For the pay period ending Friday, July 28, 2017, the claimant worked 36.16 regular hours. He was paid \$592.69 for these hours, in a paycheck issued on August 3, 2017.
 16. For the pay period ending Friday, August 4, 2017, the claimant worked 22 regular hours. He was paid \$360.59 for these hours, in a paycheck issued on August 10, 2017.
 17. For the pay periods ending Friday, August 11, 2017 and April 18, 2017, the claimant did not work any hours for the present employer and received no pay from the employer for these weeks.
 18. For the pay period ending Friday, August 25, 2017 the claimant did not work any hours for the present employer. He received \$349.43 in “other pay” for this week, in a paycheck issued on August 31, 2017.
 19. For the pay period ending Friday, September 1, 2017, the claimant worked regular 17.5 hours. He was paid \$286.83 for these hours, in a paycheck issued on September 7, 2017.
 20. For the pay period ending Friday, September 8, 2017, the claimant worked 3.58 regular hours. He was paid \$58.00 in regular pay for these hours, in a paycheck issued on September 14, 2017.
 21. For the pay period ending Friday, September 15, 2017, the claimant worked 27.58 regular hours. He was paid \$450.74 for these hours, in a paycheck issued on September 21, 2017.
 22. For the pay period ending Friday, September 22, 2017, the claimant worked 27.74 regular hours. He was paid \$454.68 for these hours, in a paycheck issued on September 28, 2017.
 23. On June 26, 2019, DUA issued Notice of Disqualification 0031 1975 46-01, stating that the claimant is eligible, under section 29(a), 29(b) and 1(r) of the law to receive partial benefits in any week in which his employment is less than

full time and his gross earnings are less than his allowable amount of \$742 + \$247.33. This determination covers the period of 7/2/2017 to 9/9/2017.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Findings of Fact ##10 and 20 contain incorrect gross earnings figures for the claimant. Exhibit # 5, p. 4 shows that the claimant was paid \$657.59 in gross earnings on June 29, 2017 and \$58.68 in gross earnings on September 14, 2017. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner and the DUA that the claimant incorrectly reported his earnings to the DUA during the benefit year of the claim effective December 26, 2016. However, based on the information provided during the remand hearing, the amount of any overpayment must be recalculated.

The DUA 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. . . .

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

In practical terms, this case turns on the verification of the claimant's earnings in his benefit year. The Board remanded this matter, in part, because it was unclear what information the agency had used to arrive at its determination that the claimant had been overpaid. Moreover, the claimant offered some testimony at the first hearing that called into question the accuracy of the DUA's figures.

The review examiner's consolidated findings of fact now clarify how the claimant was paid and when he was paid. Each paycheck the claimant received represented work done in the prior week, and the employer's pay period runs from Saturday through the following Friday. Consolidated

Findings of Fact ## 7 and 8. The employer's pay period does not coincide exactly with the DUA's benefit period, which is a calendar week, running from Sunday through Saturday. However, the claimant did not offer any evidence to clarify when exactly he worked or what the discrepancy might be if his earnings were calculated using the Sunday through Saturday period. Thus, we have accepted the figures provided by the employer as the best and most accurate evidence of what the claimant earned in the weeks at issue. *See* Exhibit # 5, p. 4.

The gross 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 week, he will be eligible for his full benefit rate, as 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 \$742.00 per week, with an earnings disregard of \$247.33, the claimant can earn up to \$989.33 each week and still receive some benefits. Consolidated Finding of Fact # 9. In any week in which he earned over that total amount, he will not be eligible for benefits.

We think it unnecessary here to undertake a detailed discussion for each week, including what the claimant 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 at this point to simply state what earnings should be attributed to the weeks addressed in the DUA's initial determination. 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 December 26, 2016 are:¹

For the week ending July 8, 2017: \$1,263.85.
For the week ending July 15, 2017: \$460.25.
For the week ending July 22, 2017: \$625.48.
For the week ending July 29, 2017: \$592.69.
For the week ending August 5, 2017: \$360.59.
For the week ending August 12, 2017: \$0.00.
For the week ending August 19, 2017: \$0.00.
For the week ending August 26, 2017: \$349.43.
For the week ending September 2, 2017: \$286.83.
For the week ending September 9, 2017: \$58.68.

We, therefore, conclude as a matter of law that the review examiner's decision is affirmed in part and reversed in part. The claimant was in total unemployment in any week in which he did not work at all and was otherwise eligible for benefits. The claimant was in partial unemployment in any week in which he was otherwise eligible for benefits and he earned less than his benefit rate,

¹ As indicated above, the employer's pay periods do not match the DUA's benefit weeks. However, without more accurate information, we must attribute the figures contained in the record as applying to the DUA's benefit weeks. Thus, for example, the employer's pay period ended July 7, 2017. We attribute the earnings for that period to the week ending July 8, 2017.

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.



Paul T.

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Fitzgerald, Esq.

DATE OF DECISION - June 22, 2020

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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

² See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (coronavirus) Pandemic, dated 5-26-20.