

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 is eligible for benefits in any week in which he was in total unemployment or in which he was in partial unemployment, if he was otherwise eligible under Chapter 151A.

**Board of Review
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Issue ID: 0031 1975 53

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 8, 2018, through September 8, 2018. 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 31, 2017. 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 also 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 2018. 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 conclusions 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 as 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, employees will be scheduled for 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. Employee may pick up additional hours above their bid for shift.
5. The claimant shifts have been for 15 hours a week. He sometimes he [sic] picks up extra hours.
6. During 2018, the present employer paid the claimant \$18.15.
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 2018-01 claim was effective December 31, 2017. His benefit rate for this claim was \$715 and his earnings disregard was \$238.33.
10. For the pay period ending Friday February 23, 2018, the claimant did not work any hours and did not receive any from the employer.
11. For the pay period ending Friday March 2, 2018, the claimant worked 18.25 regular hours. He was paid \$317.37 for these hours, in a paycheck issued on March 8, 2018.
12. For the pay period ending April 20, 2018, the claimant worked 6.75 regular hours. He was paid \$117.38 for these hours, as well as \$69.56 for 4 hours of holiday pay, for a total of \$186.94, in a paycheck issued on April 26, 2018.

13. For the pay period ending June 29, 2018, the claimant worked 13.75 regular hours. He was paid \$239.12 for these hours, as well as \$165.21 for 9.5 hours of holiday time, for a total of \$404.33, in a paycheck issued on July 5, 2018.
14. For the pay period ending July 6, 2018, the claimant worked 19.75 regular hours. He was paid \$343.46 for these hours, in a paycheck issued on July 12, 2018.
15. For the pay period ending July 13, 2018, the claimant worked 35 regular hours. He was paid \$608.67 for these hours, in a paycheck issued on July 19, 2018.
16. For the pay period ending July 20, 2018, the claimant worked 40 regular hours and 2.25 overtime hours. He was paid \$695.62 for the regular hours and \$58.69 for the overtime hours, for a total of \$754.31, in a paycheck issued on July 26, 2018.
17. For the pay period ending July 27, 2018, the claimant worked 40 regular hours and 4.33 overtime hours. He was paid \$695.61 for the regular hours and \$112.95 for the overtime hours, for a total of \$808.56, in a paycheck issued on August 2, 2018.
18. For the pay period ending August 3, 2018, the claimant worked 29.75 regular hours. He was paid \$517.36 for them, as well as \$377.14 for 21.70 hours of vacation time, for a total of \$894.72 in a paycheck issued on August 9, 2018.
19. For the pay periods ending Friday, August 10, 2018, through August 24, 2018, the claimant did not work any hours for the present employer. He received no pay from the employer for these weeks.
20. For the pay period ending August 31, 2018, the claimant worked 5.5 regular hours. He was paid \$95.65 for these hours, in a paycheck issued on September 6, 2018.
21. For the pay period ending September 7, 2018, the claimant worked 24 hours. He was paid \$417.39, as well as \$69.56 for 4.00 hours of holiday time, for a total of \$486.95 in a paycheck issued September 13, 2018.
22. For the pay period ending September 14, 2018, the claimant worked 27.50 hours. He was paid \$478.23 for these hours, in a paycheck issued September 20, 2018.
23. On June 26, 2019, DUA issued Notice of Disqualification 0031 1975 53-01, 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 \$715 + \$238.33. This determination covers the period of 3/3/2018 to 9/8/2018.

24. On June 26, 2019, DUA issued Notice of Fault Finding 0031 4007 98-01, stating that the claimant was overpaid benefits due to providing information to DUA that he either knew or should reasonably have known to be incorrect or had withheld information which he knew or should have known would be considered to be material in deciding if he was eligible to receive unemployment benefits.

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. 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. 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 31, 2017. However, based on the new earnings 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. In addition, documentation in the record as to what the claimant earned in 2018 was illegible.

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 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* Remand Exhibits # 8A and 8B.¹

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 \$715.00 per week, with an earnings disregard of \$238.33, the claimant can earn up to \$953.33 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 31, 2017 are:²

For the week ending July 14, 2018: \$608.67.
For the week ending July 21, 2018: \$754.31.
For the week ending July 28, 2018: \$808.56.
For the week ending August 4, 2018: \$894.72.
For the week ending August 11, 2018: \$0.00.
For the week ending August 18, 2018: \$0.00.
For the week ending August 25, 2018: \$0.00.
For the week ending September 1, 2018: \$95.65.
For the week ending September 8, 2018: \$486.95.

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

¹ The claimant's earnings for the weeks at issue were discussed during the remand hearing. The claimant did not dispute or object to the figures testified to by the employer's general manager. The employer submitted legible copies of the Employee Compensation Report after the remand hearing conducted on May 4, 2020. The claimant, who was represented during the remand hearing, also did not object to the documents being entered into the record.

² As stated 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 13, 2018. However, we must attribute the earnings for that period to the week ending July 14, 2018.

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, 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

Fitzgerald, Esq.

DATE OF DECISION - June 22, 2020

Paul T.

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, 2020³. 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

³ 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.