

During the weeks when the claimant was not accepting all available work from her employer, she was not in unemployment and is not eligible for benefits under G.L. c. 151A, §§ 29 and 1(r). However, when the employer's business shut down due to the COVID-19 emergency, no hours of work were available to the claimant, she was in unemployment, and was eligible to receive benefits.

**Board of Review
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Issue ID: 0031 3343 44

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits, beginning May 26, 2019, and indefinitely thereafter. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which is effective May 26, 2019. On January 6, 2020, the DUA issued its Notice of Approval to the employer, allowing the claimant to receive benefits. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on February 14, 2020.

Benefits were denied after the review examiner determined that the claimant was not in unemployment beginning May 26, 2019, and, thus, was not eligible to receive benefits under 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 take additional evidence regarding the weeks the claimant certified for benefits and whether the claimant was out of work in March of 2020 due to the COVID-19 emergency. Both parties attended the remand hearing.¹ 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 to indefinitely deny benefits pursuant to G.L. c. 151A, §§ 29 and 1, beginning May 26, 2019, is supported by substantial and credible evidence and free from error of law, where the claimant did not work all of the hours available to her in the spring of 2019, but then was out of work and had no hours available from the employer in March of 2020.

¹ This matter was remanded twice. During the first remand hearing, the review examiner did not ask the questions contained within the Board of Review's remand order. The case was remanded again with specific instructions to hold the remand hearing, question the parties according to the remand order, and make consolidated findings of fact.

Findings of Fact

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

1. The claimant began work as a stylist with the employer's hair salon business on or about 9/1/2005. During the period of December 2017 and April 2019, the claimant left her fulltime work with the employer after accepting work with new employers. After subsequently separating from the new employers, the claimant returned to work with the instant employer.
2. The claimant reduced her schedule from full-time to part-time after accepting a full-time position with a new employer in April 2019. The claimant was separated from the new full-time employer on May 28, 2019. The claimant informed the instant employer that she lost her full-time job; the claimant was very upset over this loss. The instant employer told the claimant that she could return to a full-time schedule. The employer asked the claimant to consider working on Sundays because the employer typically has a large number of walk-in clients on Sundays and needs stylists to provide services. The claimant declined, telling the employer that working on Sundays interferes with her family life.
3. The employer's business is open 7 days per week. The employer's business has expanded 50% during the last two years. The employer has found that it has a significant volume of walk-in customers each day. If the claimant did not have scheduled appointments but reported to the workplace, she would be assigned walk-in customers. The employer would allow the claimant to work 7 days per week if the claimant wanted to. The claimant is paid 100% commissions. The employer pays assistants at a rate of \$15 per hour. The employer typically starts new employees in the assistant position before moving them up to commissioned stylist. The claimant moved from assistant to commissioned stylist several years ago.
4. The employer found that after separating from her full-time job, the claimant did not work all of the hours available to her. The claimant informed the employer that she is involved in real estate sales. The employer found that on one Saturday, the claimant called out after scheduling a full day of client appointments.
5. During the period of August to December 2019, the claimant worked 379 hours and was paid an average hourly wage of \$60. During the period of 1/1/20 through 2/11/20, the claimant worked 153.5 hours and was paid wages of approximately \$7700. This calculates to an average hourly wage of \$50.
6. On the claim, effective May 26, 2019, the claimant has certified for benefits for the weeks ending 6/1/19; 6/8/19; 4/4/20; 4/11/20; 4/18/20; 4/25/20; 5/2/20; 5/9/20; 5/16/20; and 5/23/20.

7. The claimant stopped certifying for benefits in June of 2019 because she needed only two weeks to rebuild her clientele. During the weeks ending 6/1/19 and 6/8/19, full-time work was available for the claimant. The claimant worked approximately 30-40 hours during each of these two weeks. The claimant considered herself to have worked a fulltime schedule during each of the weeks ending 6/1/19 and 6/8/19, building up her hair salon clientele. The claimant built up her clientele by calling and communicating on social media with clients to inform them of her new schedule.
8. During the week of May 26, 2019, the claimant was employed with the full-time employer until her employment was terminated on May 28, 2019.
9. The claimant began certifying for benefits again in April of 2020 because the employer's business was closed due to the COVID-19 emergency. The employer did not have work for the claimant after the business closed on 3/20/20. The employer paid employees through 3/28/20. The claimant reopened her claim with an effective date of 3/29/20. The business reopened on 5/25/20.

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, agree that the claimant is not eligible to receive benefits for the first two weeks she certified for benefits. However, we also conclude that the claimant is eligible to receive benefits when she re-opened her claim in March of 2020.

To be eligible for benefits, the claimant must be in unemployment. 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.

Read together, the statutory provisions cited above under G.L. c. 151A, §§ 1(r) and 29, reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time work.

As indicated in the review examiner's consolidated findings of fact, the claimant certified for benefits during two specific periods of time: the two weeks at the start of her claim and the weeks in 2020 when she re-opened her claim due to the COVID-19 emergency.

As to the two weeks ending June 1, 2019, and June 8, 2019, we agree with the review examiner's original conclusion that the claimant is not eligible for benefits. First, the claimant could have made herself available for walk-in customers during the two weeks in question. *See* Consolidated Finding of Fact # 3. However, rather than be in the salon, she focused on her family and on contacting prospective customers. Consolidated Findings of Fact ## 2 and 7. As a result, the employer noted that the claimant was not making herself available for all the income-earning work she could have done. Consolidated Finding of Fact # 4. Because she was not making herself available for the suitable work the employer had for her, she was not in unemployment. Second, the review examiner specifically found that the claimant worked thirty to forty hours in those weeks and considered herself fully employed. Consolidated Finding of Fact # 7. A claimant who is fully employed is not considered to be in unemployment. Thus, we conclude, as the review examiner did, that the claimant was not in unemployment for the weeks ending June 1, 2019, and June 8, 2019. She is not eligible to receive benefits for those two weeks.

However, when the claimant re-opened her claim, effective March 29, 2020, the employer had no work available for her, because the salon closed due to the COVID-19 emergency. Consolidated Finding of Fact # 9. At that time, the claimant was able and available to work full-time, as she had been since June 9, 2019, but no work, whether full-time or part-time, was available for her. Therefore, she was in unemployment at that point and was eligible for benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to indefinitely disqualify the claimant from receiving benefits pursuant to G.L. c. 151A, §§ 29 and 1, is not supported by substantial and credible evidence or free from error of law. Although the claimant was not in unemployment for the first two weeks of her unemployment claim, she was in unemployment and eligible for benefits beginning March 29, 2020.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits from May 26, 2019, through June 8, 2019 only. The claimant is eligible to receive benefits, beginning June 9, 2019, if otherwise eligible.²



Paul T.

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DATE OF DECISION - May 29, 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, 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

² For practical purposes, because the claimant did not certify for benefits again until the week beginning March 29, 2020, she will receive no benefits until that week.

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.