

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0032 4338 26

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 deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On November 2, 2019, the agency initially determined that the claimant was not entitled to unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1). The claimant appealed, and both parties attended the hearing. In a decision rendered on December 28, 2019, the review examiner modified the agency determination, concluding that the claimant was not entitled to receive benefits, because he was not in unemployment, as defined by G.L. c. 151A, § 1(r).¹ The Board accepts the claimant's application for review.

Findings of Fact

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

1. The claimant works as a Painter for the employer, a Painting and Landscaping Company.
2. The claimant began working for the employer in August 2018.
3. The claimant reported to work on June 24, 2019.
4. When the claimant reported to work on June 24, 2019, he had a very stiff back and was in pain.
5. During his shift on June 24, 2019, the claimant informed the employer that he was in too much pain and that he needed to go home and see a doctor.
6. On June 24, 2019, the claimant went to urgent care. The doctor thought his issue might possibly be related to sciatica issues. The doctor told the claimant to rest for several days.

¹ During the hearing, the parties agreed to allow the review examiner to decide the case under this section of law.

7. Within a few days, the claimant called the employer and informed the employer that he went to urgent care, but that he is still in a lot of pain and he would be out of work until it got better.
8. The employer asked the claimant to keep him posted on what was happening, but unofficially approved the claimant to be on a leave for his medical issues.
9. The claimant went to urgent care again on July 1, 2019. The claimant continued to be in pain.
10. The claimant again went to urgent care on July 10, 2019. They spoke about the claimant getting a primary care doctor.
11. The claimant told the employer he was still in pain and could not return to work.
12. The claimant got a primary care doctor in August 2019. The doctor prescribed physical therapy for the claimant.
13. The claimant informed the employer he was going to begin physical therapy.
14. The claimant's doctor recommended around round [sic] of physical therapy.
15. The claimant had a MRI the last week of October 2019.
16. As of the date of the hearing (December 17, 2019), the claimant has not been medically cleared to return to work.
17. The claimant has an upcoming appointment with his doctor on December 22, 2019.
18. The employer did not require the claimant to take the time off from work.
19. Had the employer [sic] not needed to go on an unofficial leave, the employer had continuing work available for the claimant.
20. The claimant filed for unemployment benefits and received an effective date of October 13, 2019.
21. As of the date of the hearing (December 17, 2019), the claimant has not quit his job.
22. As of the date of the hearing (December 17, 2019), the employer has not fired the claimant.

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 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 with regard to two typographical errors. Finding of Fact # 14 should read that the "claimant's doctor recommended another round of physical therapy." In addition, Finding of Fact # 19 should begin, "Had the claimant not needed to go on an unofficial leave" Neither of these minor errors affects the outcome of the decision.

Following our review of the entire record, and noting these issues with the review examiner's findings of fact, we conclude that the review examiner's decision is based on substantial evidence and is free from any error of law affecting substantive rights. The review examiner concluded that the claimant was not eligible for benefits, because he had not shown that he was in unemployment. Here, the claimant was not working at all, so the question before the review examiner was whether he was in total unemployment. A claimant is 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." G.L. c. 151A, § 1(r)(2). The review examiner made supported findings of fact that the claimant was not capable of working. Therefore, he was not in total unemployment.²

² The DUA initially viewed this matter as being controlled by G.L. c. 151A, § 25(e)(1). However, even if the claimant's separation was of a non-disqualifying nature, in order to receive unemployment benefits, the claimant would still need to be in unemployment, as defined by G.L. c. 151A, § 1(r). See Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980).

The review examiner's decision is affirmed. The claimant is denied benefits, beginning June 23, 2019, and for subsequent weeks. If the claimant obtains medical documentation to show that he is (or was) able to work, he should contact a DUA customer service representative and send such information to the DUA. The DUA can then make a determination as to whether the current indefinite disqualification should be ended.³

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 29, 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

³ The claimant testified during the hearing that he was verbally told by a doctor in October of 2019 that he could return to work. The review examiner clearly did not find this credible. After reviewing the record, we think the decision not to credit the claimant's testimony on this point was reasonable. In order to show that he is (or was) capable of working in some capacity, the claimant must submit medical documentation.