

A claimant who was not available to work on various days over the course of a six-week period of time is subject to lost time charges.

**Board of Review
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Issue ID: 0032 8254 85

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 from November 24, 2019, through January 4, 2020. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse in part and affirm in part.

The claimant filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective November 10, 2019. On January 10, 2020, the DUA issued a Notice of Disqualification to the claimant, informing her that she could receive benefits, but would be subject to a lost time charge of \$60.80 for the week beginning November 24, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination and denied benefits in a decision rendered on February 20, 2020.

Benefits were denied after the review examiner determined that the claimant "was not accepting all available hours of work," and, thus, was not in unemployment, as defined by 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. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision to deny benefits from November 24, 2019, through January 4, 2020, is supported by substantial and credible evidence and is free from error of law, where the claimant worked for the employer during the period from November 24, 2019, through January 4, 2020, but was not available for work on various days during that time.

Findings of Fact

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

1. The effective date of [the] claim is November 10, 2019.
2. The claimant has an established monetary determination with a weekly benefit amount of \$190.00 and an earnings disregard of \$63.33.

3. The [claimant] filed a claim for benefits due the park closing temporarily from November 1, 2019, to November 22, 2019.
4. For the employer's holiday in the park schedule, the claimant (and other employees) were given an availability calendar to complete prior to the park reopening. The claimant made her hours of availability and unavailability known between November 23, 2019, and January 1, 2020.
5. For the week ending November 23, 2019, the employer had hours available on November 23, 2019. The claimant was available for work on November 23, 2019. The claimant worked for seven and one-half hours on November 23, 2019.
6. For the week ending November 30, 2019, the employer had hours available on November 24, 29 and 30, 2019. The claimant was available for hours of work on November 24, 2019, but the park was closed on November 24, 2019, due to rain. The claimant was not available to work on November 29 and 30, 2019. The claimant worked no hours.
7. For the week ending December 7, 2019, the employer only had hours available on December 1 and 7, 2019. The claimant was unavailable for December 7, 2019. The claimant worked seven hours on December 1, 2019.
8. For the week ending December 14, 2019, the employer had hours available on December 8 and 14, 2019. The claimant was unavailable for December 14, 2019. The claimant worked seven hours on December 14, 2019.
9. For the week ending December 21, 2019, the employer had hours available on December 15 and 21, 2019. The claimant was unavailable for December 15, 2019. The claimant was not given any hours to work on December 21, 2019.
10. For the week ending December 28, 2019, the employer had hours available December 22, 23, 26, 27 and 28, 2019. The claimant was unavailable for December 22, 23, 26 and 27, 2019. The claimant was not given hours to work on December 28, 2019.
11. For the week ending January 4, 2019, the employer had hours available on December 29, 30 and 31, 2019, and January 1, 2020. The claimant was unavailable for December 29, 2019, and January 1, 2020. The claimant worked six hours during the week on an unknown date.

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 as follows. In Finding of Fact # 7, the review examiner found that the claimant worked on December 1 and was unavailable on December 7. Per the testimony of the parties, these dates should be reversed. The claimant worked on December 7, but she was not available on December 1. In addition, in Finding of Fact # 8, the review examiner found that the claimant was unavailable for work on December 14, but also that she worked on December 14. Per the testimony of the parties, the claimant worked on December 14. Finally, in Finding of Fact # 11, the review examiner found that the employer had some hours available on December 29, 30, and 31, 2019, and January 1, 2020. However, both parties agreed during the hearing that the claimant worked on January 2, 2020. So, some hours must have been available that day as well, which the claimant was offered and worked. The review examiner then found that the claimant was unavailable for work on December 29, 2019, and January 1, 2020. Based on these dates, it appears that the claimant worked one day during the week, was unavailable for two days during the week, and was not offered hours on the other days. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.¹ As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is totally disqualified from receiving benefits from November 24, 2019, through January 4, 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.

Generally, a person must be able and available for full-time work in order to receive unemployment benefits. However, the law allows for certain situations in which a person may still receive benefits, even if she is unavailable for work on a day or two in a given week.² G.L. c. 151A, § 1(r)(2), the provision allowing benefits to claimant's in partial unemployment, further provides:

For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages

¹ We also note that, in her appeal to the Board, the claimant does not specifically dispute the review examiner's findings of fact, including those that provide the dates she worked and the dates she was not available to work.

² Cases in which an individual indefinitely reduces her availability for work or cannot work full-time at all constitute a different category of cases. Here, we are dealing with a claimant who is unavailable for random days in the period at issue. We do not see this as a permanent reduction in availability.

and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

This statutory provision is further explained by 430 CMR 4.04(6), which provides:

The cash value of time lost for reasons other than failure to furnish full-time work shall be determined by multiplying the average hourly earnings for the week by the number of hours lost. If it is not possible to ascertain the average hourly earnings for the week of such "lost time", such lost earnings shall be computed at four percent of the benefit rate for each hour lost.

The DUA has also expanded the idea of lost time beyond the confines of a claimant in partial unemployment. In the DUA Adjudication Handbook, Chapter 4, Section 3(4), the DUA's policy is as follows:

A claimant who is not able or available to work for **fewer than three days** during a week may be subject to a lost-time charge based on the amount of time the claimant was not available for and able to work. . . .

A claimant who refuses an offer of short-term employment because of unavailability or an inability to work may be subject to a lost-time charge based on the earnings the claimant could have received from that job. . . .

Lost-time charges are calculated by multiplying the average hourly earnings for the week by the number of hours lost. In general, eight hours of lost-time should be charged for each day the claimant was not in compliance with § 24(b). If the claimant ordinarily worked **part-time**, charge lost time for the number of hours the claimant ordinarily would be available to work each day.

(Emphasis in original.)

Turning the facts of the case before us, it is clear that the employer had part-time work available for the claimant, with the exception of the week ending December 28, 2019, (when full-time work was available). Because the claimant was unavailable for work one or more days during the weeks at issue, we conclude that the claimant should be charged lost time, in accordance with the statute, regulation, and policy cited above. It was undisputed during the hearing that the claimant was paid \$13.25 per hour.³ As to the number of hours the claimant worked, it is also undisputed that the claimant worked: 7.45 hours on November 23, 2019; 6.97 hours on December 7, 2019; 6.55 hours on December 14, 2019; and 6 hours on January 2, 2020. So, the claimant worked an average of 6.74 hours per shift or day. This number, times \$13.25 per hour, equals \$89.33. Thus, for each day the claimant was unavailable for work, she should be charged \$89.33 of lost time, which is the average amount she would have earned if she were available for work.

³ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

We now address each week. For the week ending November 30, 2019, the claimant was not available for work on two days that the employer's park was open. Therefore, she is subject to a lost time charge of \$178.66 for that week.

For the week ending December 7, 2019, the claimant was unavailable for one day. Therefore, she is subject to a lost time charge of \$89.33 for that week.

For the week ending December 14, 2019, the claimant was unavailable for one day. Therefore, she is subject to a lost time charge of \$89.33 for that week.

For the week ending December 21, 2019, the claimant was unavailable for one day. Therefore, she is subject to a lost time charge of \$89.33 for that week.

For the week ending December 28, 2019, the claimant was unavailable for four days. Therefore, pursuant to the DUA's lost time policy, she is disqualified from receiving benefits for this week. We note that, even if a lost time charge was applied, it would be in the amount of \$357.32 for the week, and the claimant would be ineligible for benefits anyway.

For the week ending January 4, 2020, the claimant was unavailable for two days. Therefore, she is subject to a lost time charge of \$178.66 for that week.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits for the period from November 24, 2019, through January 4, 2020, is not supported by substantial and credible evidence or free from error of law, because the claimant, who was unavailable for some days during that period of time, should be subject to lost time charges, rather than a complete disqualification from the receipt of benefits.

The review examiner's decision is affirmed in part and reversed in part. The claimant is eligible to receive benefits for the period from November 24, 2019, through January 4, 2020, if otherwise eligible, subject to the lost time charges noted in this decision.



Paul T.

BOSTON, MASSACHUSETTS

Fitzgerald, Esq.

DATE OF DECISION - May 18, 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 June 1, 2020⁴. 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

⁴ See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.