

Where the employer put the claimant on a paid leave of absence due his heightened risk of contracting COVID-19, and continued to pay him as he had been paid prior to the pandemic-imposed leave of absence, the claimant was not in total unemployment because he was receiving remuneration. He was also not in partial unemployment because his weekly pay exceeded his weekly benefit rate plus earnings disregard.

**Board of Review
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Issue ID: 0036 2615 84

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA on March 27, 2020, which was approved in a determination issued on April 15, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits from March 29, 2020, through May 23, 2020, in a decision rendered on November 3, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in unemployment, because the employer had no suitable work available for him, and, thus, the claimant was entitled to benefits pursuant to G.L. c. 151A, §§ 29(a) and 1(r). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the employer's appeal, as well as information available through the DUA's UI Online database.

The issue before the Board is whether the review examiner's decision, which concluded that claimant was in unemployment when the employer had no suitable work available to him while he was on a paid leave of absence, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant had worked as a Delivery Driver for the employer, an auto supply company, from 3/7/06 through 3/26/20 when he was placed on a leave of absence.

2. The claimant had been hired to work part time. He worked 12 hours one week and 18 hours the next week. The claimant grossed \$153 during the weeks he worked 12 hours and \$229.50 the weeks he worked 18 hours.
3. On 3/26/20, after the Governor shut down the Commonwealth and told those who were compromised should [sic] stay home, the employer told the claimant due to his age and risk of contracting coronavirus he wanted him to stay home and he would continue to pay him each week until more information regarding the pandemic became available.
4. The claimant remained on an imposed leave between 3/26/20 and 5/25/20 when he quit.
5. The employer did ask the claimant to return to work on 3/30/20, 4/9/20, 4/23/20 and on 5/14/20. The claimant told the employer he was not comfortable returning due to the pandemic. The employer allowed him to remain on leave with pay.
6. On 5/25/20, the claimant reached out to the employer and told him he was going to file for unemployment benefits because he could make more money collecting. The employer told the claimant he was not laying him off. The claimant told the employer at that time he would not be returning so the employer accepted his resignation.
7. The claimant had told the employer in January of 2020 that he would be retiring on his birthday 6/9/20.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was in unemployment and eligible for benefits while on a paid leave of absence.

To be eligible for unemployment benefits, the claimant must show that he was in a state of unemployment. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(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.

Based on the employer’s undisputed testimony, the review examiner found that on March 26, 2020, the employer placed the claimant on a leave of absence because his age put him at greater risk of contracting COVID-19. *See* Finding of Fact # 3. The claimant declined the employer’s various requests to return to work between March 26 and May 14, 2020, due to the pandemic, and the employer allowed him to remain on a paid leave of absence, receiving the same pay as he had earned prior to his layoff. *See* Finding # 5. On May 25, 2020, the claimant told the employer he was going to file for unemployment benefits, the employer replied he would not lay the claimant off, and the claimant said he would not return to work. *See* Finding of Fact # 6.

Because the review examiner found the employer had no suitable work available for the claimant while he was out of work due to the pandemic, she concluded he was “in unemployment” and entitled to benefits. While it is true that the claimant’s age placed him at higher risk for contracting COVID-19, and that the proffered work was thus not “suitable” pursuant to emergency regulations promulgated to alleviate hardships caused by the COVID-19 pandemic¹, the review examiner’s conclusion failed to consider that the claimant was on a paid leave of absence. He was receiving remuneration, as defined in the sections of the law cited above.

First, with regard to “total unemployment,” although the claimant performed no wage-earning services and had no suitable work available to him during his leave of absence, he received remuneration from the employer. Thus, we conclude, as a matter of law, that the claimant is ineligible for benefits because he is not in “total unemployment” as set forth in G.L. c. 151A, §§ 29(a) and 1(r)(2).

Second, with regard to “partial unemployment,” a claimant may be entitled to partial benefits if his remuneration for each week is less than his weekly benefit rate plus earning. We take administrative notice that the DUA’s UI Online computer database shows the claimant’s weekly benefit rate is \$95.00 and his earnings disregard is \$31.67. He is ineligible for partial unemployment benefits in any week that he earns at least \$126.67. The review examiner found that the claimant’s regular schedule required him to work alternately 12 hours in one week and 18 hours the next. The claimant’s gross wages were \$153.00 during the weeks he worked 12 hours, and \$229.50 during the weeks he worked 18 hours. *See* Finding # 2. In both cases, his earnings exceeded his weekly benefit rate plus earnings disregard.

We, therefore, conclude as a matter of law that the claimant was ineligible for benefits while on his paid leave of absence pursuant to G.L. c. 151A, §§ 29(a), 29(b), and 1(r).

¹ *See* 430 CMR 22.00 and 430 CMR 23.00.

The review examiner's decision is reversed. The claimant is denied benefits from March 29, 2020, through May 23, 2020.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - November 24, 2020



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

JPCA/rh