

The claimant, who worked a part-time schedule, did not turn down any work, and earned less than her weekly benefit amount plus earnings disregard, was entitled to partial unemployment benefits. Additionally, the sick time the claimant received during a period of regular employment constitutes remuneration.

**Board of Review
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Issue ID: 0039 6081 80

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA on March 15, 2020. On May 11, 2020, the DUA issued a Notice of Disqualification to the claimant under G.L. c. 151, §§ 29(b) and 1(r), which denied benefits to the claimant for the week ending March 21, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 17, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's pay and work hours during the week ending March 21, 2020. Only the claimant participated in 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 decision, which concluded that the claimant was neither in total nor partial unemployment during the week ending March 21, 2020, is supported by substantial and credible evidence and is free from error of law, where the record shows that during that week, the claimant worked part-time and earned less than her weekly benefit amount plus earnings disregard.

Findings of Fact

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

1. The claimant was laid off from the instant employer. When the claimant was laid off from the instant employer on 3/15/20, she did not receive a definite return to work date. She was told she would tentatively return on 4/1/20.
2. The claimant filed her claim for unemployment insurance benefits on 3/15/20.
3. The claimant was found eligible for weekly benefits in the amount of \$636, with an earnings disregard of \$212.
4. During the week beginning 3/15/20 through 3/21/20, the claimant taught three classes for the instant employer. She earned gross earnings of \$169.95 for three hours of work and received \$229.19 in sick pay from this employer.
5. During the week ending 3/21/20, the claimant also worked for [Employer A]. ([Employer A d/b/a]). She had gross earnings in the amount of \$256.65 from [Employer A d/b/a] during the week ending 3/21/20. She did not receive any vacation/sick pay from this employer during this week. The claimant could not determine how many hours she worked during the week ending 3/21/20 for [Employer A d/b/a]. (Paystub by [Employer A d/b/a] uploaded as Remand Exhibit 5).
6. During the week ending 3/21/20, the claimant did not work for [Employer B]. She had no gross earnings because she did not work any hours, nor did she receive any vacation/sick pay from this employer during the week in question.
7. During the week ending 3/21/20, the claimant did not work for [Employer C], Inc. She had no gross earnings because she did not work any hours, nor did she receive any vacation/sick pay from this employer during the week in question.
8. On 5/11/20, the Department issued the claimant a Notice of Disqualification under Sections 29(a) & (b) & 1(r) of the Law as a result of her receipt of remuneration.
9. The claimant appealed the Disqualification.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was neither in total nor partial unemployment, as the claimant's reduced schedule and remuneration amount during the week in question rendered her eligible for partial unemployment benefits.

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; 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.

“Remuneration” is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, “remuneration” shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine. . . .

We remanded this case to the review examiner to obtain clarification regarding the claimant’s earnings and schedule of hours during the week ending March 21, 2020. After remand, the review examiner found that during this week, the claimant earned \$169.95 and received \$229.19 in sick pay from the instant employer. The claimant also earned \$256.65 from a second employer. The claimant argued that her sick pay should not be considered remuneration. We disagree. The claimant received the sick pay during a period of regular employment, as she worked part-time for the employer that week, and under the statute, such pay constitutes remuneration. Thus, the claimant’s total earnings for the week ending March 21, 2020, were \$655.79, which is less than her weekly benefit amount plus earnings disregard ($\$636.00 + \$212.00 = \$848.00$).

The review examiner found that the claimant worked three hours for the instant employer during the week ending March 21, 2020, and she could not determine how many hours she worked for

the second employer during that week. However, the claimant testified during the remand hearing that she believed she worked approximately five or six hours for the second employer that week, and the hours she reported to the DUA at the time she requested benefits were accurate.¹ This testimony is corroborated by records in the DUA's UI online record-keeping system, where the claimant's weekly certification for the week ending March 21, 2020, reports that she worked a total of 11 hours that week between the instant employer and the second employer. Since the claimant worked three hours for the instant employer, we can reasonably conclude that she worked eight hours for the second employer.

Because the claimant worked a part-time schedule of hours and earned less than her weekly benefit amount plus earnings disregard, and there is no indication in the record that she refused suitable work from any employer, we conclude as a matter of law that she was in partial unemployment during the week ending March 21, 2020.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 21, 2020, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 23, 2020



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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

¹ 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).

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.

SVL/rh