

**Board of Review
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Issue ID: 0044 9053 27

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 we reverse.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 30, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 18, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during the week of May 24, 2020, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 not in unemployment because she earned in excess of her weekly benefit amount plus earnings disregard, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On May 14, 2019, the claimant started working part-time for the employer, a retail store and kitchen, as a Sales Associate. The claimant's schedule varied weekly.
2. The claimant was always able and available to work for the employer while employed by the employer.
3. The Owner and the President were the claimant's supervisors.
4. The claimant was paid by the hour by the employer.

5. The employer's payroll period runs from Monday to Sunday.
6. The Department of Unemployment Assistance (hereinafter DUA) week runs from Sunday to Saturday.
7. Prior to filing an initial unemployment claim, the claimant's last date of work for the employer was sometime during the pay period running from March 16, 2020, through March 22, 2020. After this time, the employer temporarily did not have work available for the claimant due to the [COVID]-19 pandemic.
8. The claimant filed an initial unemployment claim effective the week beginning March 22, 2020. The claimant's weekly unemployment benefit rate is \$240. The claimant's weekly earnings exclusion amount is \$80.
9. During the week running from Sunday May 24, 2020, through Saturday May 30, 2020, the claimant returned to work for the employer. During this week, the claimant worked a total of 13.5 part-time hours from Thursday to Saturday.
10. The claimant's last date of work for the employer was on May 31, 2020. On this date the claimant worked 2.5 hours for the employer.
11. On June 3, 2020, the employer issued the claimant a paycheck for the pay period running from Monday May 25, 2020, through Sunday May [31], 2020 in the gross amount of \$377.00 listing 26 hours of work at a rate of pay of \$14.50 per hour. The employer paid the claimant more hours than the claimant had worked during this time period. The employer issued the claimant extra pay through a Payment Protection Program (PPP) in connection with the [COVID]-19 pandemic that the employer had received for funding.
12. The claimant erroneously reported her gross earned wages from the employer's establishment to the Department of Unemployment Assistance (hereinafter DUA) benefits for the week ending May 30, 2020, as \$189. The claimant did not realize the employer had increased her hourly rate and also paid her more than the hours than what she had worked until after she had already reported her wages to the DUA. The claimant reported her gross wages to the DUA to the best of her ability. The claimant noticed she was paid more gross wages than expected upon receipt of her paycheck.
13. The claimant notified the employer that she believed she was overpaid by the employer in the paycheck dated June 3, 2020.
14. The claimant subsequently resigned from the employer's establishment over concerns about how the employer paid the claimant more wages than the claimant actually worked on her June 3, 2020, paycheck.

15. The employer had reached out to the employer’s payroll service provider on how to resolve the matter with extra pay that the claimant received with no resolve.
16. On June 12, 2020, the claimant had a cashier’s check drafted to the employer’s establishment in the amount of \$145.00. The claimant wanted to return the money that she believes the employer had overpaid her on the paycheck issued on June 3, 2020. The employer did not cash this cashier’s check.
17. The claimant’s gross pay for just the 13.5 hours she worked during the week running from Sunday May 24, 2020, through Saturday May 30, 2020, was \$195.75.
18. The employer submitted a questionnaire to the DUA regarding the claimant’s wages. On the questionnaire, the employer listed the following information:

“Week	Earnings	Notes
5/24/2020	377	Worked 16 hours, was paid for 26
5/31/2020	0	
6/7/2020	0”	

19. The DUA updated the claimant’s gross wages for the week running from Sunday May 24, 2020, through Saturday May 30, 2020, based upon the information the employer provided on the questionnaire.
20. On June 30, 2020, the DUA issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) & 1(r) of the Law for the 1 week running from Sunday May 24, 2020, through May 30, 2020. On the Notice of Disqualification, the DUA wrote: “You are ineligible to receive benefits beginning 5/24/2020 through 5/30/2020 because your earnings are in excess of your allowable amount which is \$233 + \$77.67.” As a result of the Notice of Disqualification, the claimant was overpaid \$721.00 in previously received benefits for the week ending May 30, 2020. The claimant appealed the Notice of 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner’s original conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact except as follows. We reject finding of fact # 17 as inconsistent with the evidence of record. In adopting the remaining findings, we deem 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 not in unemployment during the week of May 24, 2020.

To be eligible for unemployment benefits, the claimant must show that she is in a state of unemployment within the meaning of the statute. 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.

After review, we conclude that the review examiner erred in finding that the claimant earned in excess of her weekly benefit amount plus earnings disregard during the week of May 24, 2020, through May 30, 2020.

As an initial matter, we concur with the review examiner’s conclusion that the additional pay the claimant received through the employer’s Payment Protection Plan (PPP) does constitute remuneration within the meaning of the law. Finding of Fact # 11. While the claimant’s paycheck indicated that she was paid for 10 hours of work that she did not perform, the employer explained that it used the additional money from the PPP to pay employees time-and-a-half in an effort to retain employees during the COVID-19 public health emergency.¹ As these additional wages were part of the claimant’s compensation for the hours she worked during the period in question, the additional PPP wages shall be treated as remuneration for the purpose of determining the claimant’s eligibility for benefits.

The claimant’s gross earnings listed on the paycheck in question totaled \$377.00 for 16 hours of work. Finding of Fact # 11. When broken down hourly, this \$377.00 translates to approximately \$23.56 per hour. However, the paycheck in question covered the claimant’s work from the period between Monday, May 25, 2020, through Sunday, May 31, 2020. *Id.* The DUA calculates a claimant’s weekly wages based on a week that begins on a Sunday and ends on the following Saturday. Therefore, for the purpose of calculating the claimant’s eligibility for benefits, this paycheck covers portions of a two-week period. During the first week, between May 24, 2020, and May 30, 2020, the claimant worked 13.5 hours and earned gross wages of \$318.09 (13.5 hours x \$23.56). During the second week, between Sunday, May 31, 2020, and Saturday, June 6, 2020, she worked 2.5 hours and earned gross wages of \$58.91 (2.5 hours x 23.56).

¹ The employer’s uncontested testimony in this regard, while not explicitly incorporated into the review examiner’s findings of fact, is part of the unchallenged evidence introduced at the hearing and placed in the record and is thus properly referred to in our decision today. 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).

As the claimant's weekly benefit rate plus earnings disregard totals \$320.00 (\$240.00 plus \$80.00), the record confirms that she was in partial unemployment during both the weeks of May 24, 2020, and May 31, 2020. However, a review of the claimant's UI Online profile confirms that she reported earnings of \$189.00 for the week of May 24, 2020, and did not report any wages during the week of May 31, 2020. As the record shows the claimant's gross earnings in each of the two weeks exceeded the amount she reported when certifying for benefits, overpayments should be generated for each week in question.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r) during the weeks of May 24, 2020, and May 31, 2020.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 24, 2020, through June 6, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 6, 2022



Paul T. Fitzgerald, Esq.
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 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.

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The claimant received time and a half for each hour worked during a two-week period through the employer's Payment Protection Plan. However, as her earnings in each of the

two weeks was less than her weekly benefit amount plus earnings disregard, she was in partial employment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during both weeks.