

Under the federally authorized temporary policy changes adopted by the DUA during the pandemic, the claimant may not be disqualified under G.L. c. 151A, § 29(a) or 1(r) for failing to meet the work search requirements. As there was no evidence to suggest the claimant was incapable of or unavailable for work during the periods before and after his business was not operating under a PPP loan, he remained eligible for benefits during both periods.

**Board of Review
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Issue ID: 0048 5178 70

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 affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 7, 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 January 15, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment, as defined in G.L. c. 151A, §§ 29(a) and 1(r), and, thus, was ineligible for benefits. 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, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in total or partial unemployment because he was not actively searching for work, 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 is the President, Treasurer, Secretary, and Vice President of a corporation organized in Massachusetts on 3/22/06 for the purpose of selling jewelry.
2. The claimant's company sells jewelry to other small businesses and to larger customers, such as museums.

3. The company has nine employees, including the claimant, and four independent contractors.
4. The claimant worked full-time and earned \$1,346.15 per week prior to the COVID-19 pandemic.
5. The claimant filed an unemployment insurance claim and obtained an effective date of his claim of 3/29/20.
6. The claimant requested benefits for the weeks beginning 3/29/20 to 5/16/20, and from 7/12/20 to 10/31/20.
7. The claimant spent an average of three to four hours per week working for the corporation in April, the first half of May, and all of July, August, September, and October 2020.
8. The claimant worked at three to four days per week, at least twenty hours per week, in the latter half of May and all of June 2020, after receiving a PPP business loan.
9. The company had two locations in Maine. One location closed on 10/31/20, after the landlord terminated the company's lease.
10. The claimant worked fewer hours after the start of the pandemic because customers cancelled orders after their businesses temporarily shut down during the pandemic.
11. The claimant's company experienced an 80% decrease in income from April to October 2020, compared to April to October 2019.
12. The claimant spoke with a friend who books talent for events and magazine covers, about the possibility of being her assistant, in July 2020. They spoke again in August 2020 and had client meetings in September 2020 and October 2020. In November 2020, the client informed the claimant's friend that the project was on hold.
13. In April, May, and July 2020, the claimant spoke with other business owners that sell jewelry about possibly working together. He found that their businesses were suffering in the same manner as his business, and they could not collaborate or offer the claimant work.
14. In August 2020, the claimant asked a local contractor if there was any painting work or construction work available. There was no work available.
15. The claimant applied for and interviewed for a Director of Alumni position at a school in Pennsylvania, in October 2020. He was not offered the position.

16. The claimant reported to DUA that he was waiting for his company to resume business and that he was not generating enough business to pay himself, each week, when he requested benefits and was asked whether he searched for work from 3/29/20 to 5/16/20, and from 7/12/20 to 10/31/20.

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 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 not in unemployment during the entire period on appeal because he failed to show that he was looking for work.

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. . . .

The review examiner concluded that the claimant was ineligible for benefits from the period beginning March 29, 2020, because he was not actively seeking work. We disagree.

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are actively seeking full-time work. In this case, because the period in question began on March 29, 2020, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.¹ The U.S. Department of Labor (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements.²

¹ See EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

In accordance with the EUISSA and the DOL guidance, the DUA waived the “work search requirements until such time as the COVID-19 emergency measures have been lifted.” DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2. This temporary policy has been made retroactive to March 8, 2020. UIPP 2021.02 (Jan. 22, 2021), p. 2. This means that the claimant may not be disqualified under G.L. c. 151A, § 24(b), for failure to actively search for work.

However, we must also consider whether the claimant was capable of and available for work during the period on appeal. A claimant is not considered to be available for other, paid full-time work, if he is devoting a major portion of his time to his own business. *See* Board of Review Decision 0018 1355 49 (Aug. 2, 2016) (where claimant devoted a minor portion of her time to self-employment, limited to weekends and evenings, held her self-employment did not interfere with her employability or availability to work full-time elsewhere)³; *see also* DUA Adjudication Handbook, Chap. 4, p. 18.

When the claimant received a PPP business loan that allowed him to operate his business for six weeks from mid-May through the end of June, he was working three to four days a week, at least 20 hours per week. *See* Finding of Fact # 8. During this time, it is fair to say the claimant was devoting a major portion of his time to his own business and that he was not available for other suitable work, and he was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r).

Outside of this six-week period, from the week beginning March 29, 2020, through May 16, 2020, and again from the week beginning July 5, 2020, and thereafter, the claimant was only able to work minimal hours because he did not have sufficient clients or income to operate his business. The review examiner found that he was working only three to four hours per week. *See* Findings of Fact ## 7 and 10. Because there is nothing in the record indicating that the claimant was not capable of or available for other suitable work if it had been offered to him, we see no reason to deny him benefits under the provisions of G.L. c. 151A, §§ 29(a) and 1(r) during either period.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from the week beginning March 29, 2020, through May 16, 2020. He is denied benefits from the week beginning May 17, 2020, through July 4, 2020. The claimant is entitled to receive benefits from the week beginning July 5, 2020, and for subsequent weeks thereafter, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 2021



Paul T. Fitzgerald, Esq.
Chairman

³ Board of Review Decision 0018 1355 49 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.



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.

LSW/rh