

Pursuant to G.L. c. 151A, §§ 29 and 1(r), the claimant was in partial unemployment during the weeks that the employer reduced his schedule to less than full-time, he did not refuse work, and he earned less than his weekly benefit amount plus earnings disregard.

**Board of Review
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Issue ID: 0051 2928 37

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 effective May 17, 2020. On June 11, 2021, the DUA issued a Corrected Notice of Disqualification denying benefits to the claimant. 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 to deny benefits but implemented an earlier end date of January 16, 2021. The review examiner's decision was rendered on October 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 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 work schedule in 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 not in unemployment, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the employer reduced the claimant's hours during several of the weeks at issue.

Findings of Fact

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

1. The claimant worked as a Licensed Practical Nurse for the employer, a community care provider, from June 3, 2019, until becoming separated from employment on January 19, 2021.

2. The claimant worked full-time for the employer. The claimant normally worked 40 hours or more per week.
3. The claimant was paid \$28.84 per hour on the day shift, \$32.84 on the evening shift and \$34.84 on the overnight shift.
4. The claimant was working a set schedule with the employer of Monday, 7:00 a.m. to 11:00 p.m., Thursday 3:00 p.m. to 11:00 p.m. and Saturday and Sunday from 7:00 a.m. to 7:00 p.m.
5. The claimant filed his initial claim for unemployment benefits on May 25, 2020. The effective date of the claim is May 17, 2020 (Claim ID# 2020-01). The claimant's weekly benefit amount is \$823. The claimant's earnings disregard is \$274.33.
6. The claimant worked for the employer the week of May 17, 2020, through May 23, 2020. The claimant worked one day, May 21st, for a total of 8.5 hours. The claimant's rate of pay was \$32.84 per hour (evening shift). The claimant's gross earnings for the week ending May 23, 2020, were \$279.14.
7. The claimant worked for the employer the week of May 31, 2020, through June 6, 2020. The claimant worked on May 31st, June 4th, and June 6th, for a total of 25.5 hours. The claimant's rate of pay was \$32.84 per hour (evening shift). The claimant's gross earnings for the week ending June 6, 2020, were \$558.28.
8. The claimant worked for the employer the week of June 14, 2020, through June 20, 2020. The claimant worked on June 14th and June 20th, for a total of 17 hours. The claimant's rate of pay was \$32.84 per hour (evening shift). The claimant's gross earnings for the week ending June 20, 2020, were \$558.28.
9. The claimant worked for the employer the week of August 23, 2020, through August 29, 2020. The claimant worked on August 23rd at a rate of \$32.84 per hour (evening shift) and on August 24, 2020, at a rate of \$28.84 per hour (day shift), for a total of 17 hours. The claimant's gross earnings for the week ending August 24, 2020, was [sic] \$524.28.
10. The claimant did not work his full-time hours of work during the weeks ending May 23, 2020, June 6, 2020, June 20, 2020, and August 29, 2020, because the employer did not have work available. The claimant had been notified by the employer that for various reasons they were having difficulty getting patients.
11. The claimant worked all of the available hours during the weeks ending May 23, 2020, June 6, 2020, June 20, 2020, and August 29, 2020, and did not refuse any work offered by the employer.
12. Thereafter, the claimant returned to working his normal full-time hours with the employer.

13. The claimant's last day of work for the instant employer was January 19, 2021. The claimant did not perform any services thereafter and was not paid by the employer for any days beyond January 19, 2021.
14. The claimant filed his claim for unemployment benefits on May 25, 2021. The effective date of the claim is May 16, 2021 (Claim ID# 2021-01). The claimant's weekly benefit amount is \$654. The claimant's earnings disregard is \$218.
15. On June 11, 2021, the claimant was issued a Notice of Disqualification under Section 29(b) of the Law, indicating "You are employed and working a full-time schedule of working hours." "You are not considered to be in unemployment within the meaning of the cited section of the law and are not entitled to receive benefits beginning 5/17/2020 and through 5/22/2021." The claimant filed an appeal to that determination.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 3 which indicates that the pay rate of \$32.84 was only for the evening shift, as the claimant testified during the remand hearing that this pay rate was for both weekday evening shifts and day and evening shifts on the weekends.¹ We further reject the portion of Consolidated Finding # 7 which states that the claimant's gross earnings for the week ending June 6, 2020, were \$558.28. Based on the portion of the finding stating that the claimant worked 25.5 hours that week at a pay rate of \$32.84, the claimant's gross earnings total \$837.42. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, the consolidated findings support an award of benefits to the claimant for several of the weeks at issue.

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

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).

(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 originally concluded that the claimant was working full-time and, therefore, was not in unemployment as of the start of his claim, May 17, 2020, and through his separation from the employer on January 19, 2021. However, because Exhibit # 13 included texts from the employer referring to closures in April, May, and June of 2020, and biweekly paystubs showing less than full-time hours, we remanded the case to obtain more specific information regarding the weeks in which it appeared the claimant only worked part-time hours for the employer. We focused our remand questions on the weeks ending May 23, 2020, June 6, 2020, June 20, 2020, and August 29, 2020, because these are the four weeks during the period at issue for which the claimant is seeking to receive benefits, as he is not disputing that he worked full-time hours during other weeks.

Because the claimant performed wage-earning services for the employer during all the weeks between May 17, 2020, and the week ending January 16, 2021, he was not in total unemployment during this period of time. *See Consolidated Findings ## 6–13.* Furthermore, the claimant was not in partial unemployment during the weeks ending May 30, 2020, June 13, 2020, June 27, 2020, through August 22, 2020, and September 5, 2020, through January 16, 2021, as there is no dispute that the claimant worked full-time during these weeks. *See Consolidated Finding # 12.* However, the consolidated findings and documentary evidence in the record establish that the claimant was in partial unemployment during the weeks ending May 23, 2020, June 6, 2020, June 20, 2020, and August 29, 2020. *See Consolidated Findings ## 6–11.*

The consolidated findings show that the claimant normally worked at least 40 hours per week, but the employer reduced his schedule to less than full-time during the four weeks below due to a lack of work. *See Consolidated Findings ## 2 and 10.* The claimant worked 8.5 hours and earned \$279.14 during the week ending May 23, 2020, and he worked 25.5 hours and earned \$837.42 during the week ending June 6, 2020. *See Consolidated Findings ## 6–7.* The claimant also worked 17 hours and earned \$558.28 during the week ending June 20, 2020, and he worked 17 hours and earned \$524.28 during the week ending August 29, 2020. *See Consolidated Findings ## 8–9.* Because the claimant worked less than a full-time schedule of hours, he did not refuse any hours of work offered by the employer, and his earnings for each week were less than his weekly benefit rate of \$823.00 plus his earnings disregard of \$274.33, the claimant was in partial unemployment during these four weeks. *See Consolidated Findings ## 5–9 and 11.*

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, §§ 29(a), 29(b) and 1(r), the claimant was neither in total nor partial unemployment during the weeks that he worked full-time, and he was in partial unemployment during the weeks that he worked a part-time schedule of hours.

The review examiner's decision is affirmed in part and reversed in part. We affirm that part of the decision denying benefits to the claimant for the weeks ending May 30, 2020, June 13, 2020, June 27, 2020, through August 22, 2020, and September 5, 2020, through January 16, 2021. However, we reverse the part of the decision denying benefits to the claimant for the weeks ending May 23, 2020, June 6, 2020, June 20, 2020, and August 29, 2020, as the claimant was entitled to partial benefits during these weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2022



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

SVL/rh