

Claimant occupational therapist who worked for seven different base period employers was not disqualified under Mattapoisett because her on-call work for the instant employer was subsidiary to her work for several of her other base period employers.

**Board of Review
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Issue ID: 0051 4850 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, which was determined to be effective August 16, 2020. On September 3, 2020, the DUA issued a determination disqualifying the claimant from benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant¹, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 16, 2021.

Benefits were denied after the review examiner determined that the claimant established on-call work in her base period that was not subsidiary to her other base period employers, she continued to work on-call in her benefit year, and she was not considered to be "in unemployment" pursuant to 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 accepted the claimant's application for review. Our decision is based upon our review of the entire record, including information available to us from the DUA's UI Online computer database.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is not in unemployment, beginning August 16, 2020, is supported by substantial and credible evidence and is free from error of law, where the claimant's work with this employer was of an on-call nature and the claimant had other base period work where she worked longer and was paid more than with the instant employer.

Findings of Fact

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

¹ Where the instant employer did not respond to DUA fact-finding requests during the adjudication process for this issue, it is not an interested party in this case pursuant to G.L. c. 151A, § 38(b).

1. The claimant is an occupational therapist.
2. The claimant worked on-call for employer [A] from June 15, 2018, to August 16, 2020. This employer paid her \$20,318 between July 1, 2018, and June 30, 2019.
3. The claimant worked on-call for the present employer [B], from March 29, 2019, to August 16, 2019. This employer pays her \$50 for her initial evaluation and \$40 for each visit thereafter. It paid her \$1,652 between July 1, 2019, and June 30, 2020.
4. The claimant worked full-time for employer [C] full-time [sic] from November 25, 2019, to December 26, 2019. She was paid \$43 an hour. The employer then transferred the claimant to a per diem position, which paid her \$75 for an initial visit and \$65 for any other visit. This employer paid her \$9,540 between July 1, 2019, and June 30, 2020.
5. The claimant worked on-call for employer [D] from January 13, 2020, to August 15, 2020. She was paid \$60 for an evaluation and \$50 for all other visits. This employer paid her \$1,675 between July 1, 2019, and June 30, 2020.
6. The claimant worked a full-time temporary assignment for employer [E] from April 2, 2020, to June 12, 2020. She was paid \$602 a week for 31-32 hours of work. This employer paid her \$4,986.70 between July 1, 2019, and June 30, 2020.
7. The claimant worked on-call for the employer [F] from June 4, 2020, to August 15, 2020. She was not paid any wages between July 1, 2019, and June 30, 2020.
8. The claimant worked for the present employer 1.5 hours the week of August 16, 2020, for which she was paid \$120.
9. On August 16, 2020, the claimant filed a claim for benefits which was effective August 16, 2020. Her benefit rate on this claim was \$729.
10. The base period for the claimant's 2020 claim is July 1, 2019, to June 30, 2020.
11. On September 3, 2020, DUA issued Notice of Disqualification 0051 4850 80-01, stating that the claimant was disqualified, under MGL c. 151A, Section 29(b)&1(r)(1) from receiving benefits for the period, starting August 15, 2020, because she had accepted a contract to work on call and was therefore not in partial unemployment during any week in which she worked any hours.

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 original 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. As discussed more fully below, however, we reject the review examiner's legal conclusion that the claimant's work for this employer was not subsidiary to her other base period employers.

The issue to be decided in this case is whether, as of the effective date of her unemployment claim, the claimant was in unemployment. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), and provides, in relevant part, as follows:

“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. . . .

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), and provides, in relevant part, as follows:

“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

In her decision, the review examiner, in part, concluded the following:

If the on-call employment is subsidiary to a full-time employment or if it was started during the benefit year, then it will be treated as part time rather than on-call employment. If it is less than full time hours and earnings are less than the benefit rate plus the earnings disregard, the claimant shall be eligible for partial unemployment benefits, if all other eligibility requirements are met.

The present employer was not subsidiary to the other claimant's employers. A primary employer is usually a full-time employer. All but two of the claimant's other employer were on-call, like the present employer. One of the two remaining employers was full time, but for only a few weeks and then also reverted to on-call. The remaining employer provided a temporary full-time assignment for 12 weeks, but three of the on-call employers provide higher total base period wages than this one full-time employer. When the claimant's work history for the base period is taken as a whole, the present employer was not subsidiary.

As the claimant worked on-call for the present employer, and the employment was not subsidiary, or started during the benefit year, the claimant is not in total or partial unemployment in any week that she performed any hours of work for this employer. If she worked no hours for this employer, she would be in total unemployment in relation to the present employer. Her eligibility for partial or total unemployment would, however, still be affected by any other employment she had during that week.

The review examiner's conclusion here is inconsistent with the Board's decision in a similar case where a claimant performed on-call work for numerous base period employers. *See* Board of Review Decision 0021 5572 01 (Dec. 15, 2017).

By focusing her analysis on the on-call nature of her work with the employer, the review examiner applied the holding of Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984). In Mattapoisett, the claimant was hired to be a part-time police officer. He worked on-call, whenever he was needed, under the terms of his employment contract. Some weeks he worked, and other weeks he did not work at all. There was no indication that he worked for any other employer while also working for the Town of Mattapoisett. The Court found that the claimant was not in partial unemployment in the benefit year, because “[t]o characterize [the claimant] who agreed to be part-time and on-call as ‘partially employed’ when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term.” *Id.* at 549. It held that “the Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee.” *Id.*

The principles of Mattapoisett were then applied by the Appeals Court in Town of Bourne v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 916 (1987) (rescript opinion). In Bourne, the claimant's only employment was as a substitute teacher who worked part-time and only when needed. The Appeals Court found that the reasoning of Mattapoisett controlled the outcome of the case. Importantly, the Court noted that “a person separated from full-time employment in non-disqualifying circumstances may be eligible for partial unemployment benefits if subsequently employed part-time.” 25 Mass App. Ct. 916, *citing* Mattapoisett, 392 Mass. at 548. However, it declined to hold that the claimant was eligible for benefits under that theory, because the claimant had never advanced, over the course of the proceedings within the agency, that she was eligible for benefits based on her prior full-time employment or filed a claim for benefits based on that employment.

In the prior Board decision cited above, we noted the holdings in Mattapoisett and Bourne address claimants who base their claims solely on on-call employment with one employer. Here, however, as in our previous case, the claimant's monetary eligibility for benefits derives from multiple base period jobs. Thus, we consider whether the claimant's work for this employer was primary or subsidiary employment. The DUA distinguishes between primary and subsidiary part-time jobs worked contemporaneously during the base period by examining the number of

hours, wages earned, duration of the employment, and whether a particular job was other than the claimant’s primary occupation. *See* DUA Adjudication Handbook, Ch. 6, § 2(A).²

A copy of the claimant’s base period wages was entered into the record as Exhibit # 10. The claimant had seven base period employers, six of which were referenced in the review examiner’s findings. It shows the following:

	3Q 2019	4Q 2019	1Q 2020	2Q 2020
Instant Employer		\$ 220	\$1,160	\$ 272
Employer [A]	\$10,626	\$1,394	\$7,605	\$ 693
Employer [C]		\$4,320	\$5,220	
Employer [D]			\$1,275	\$ 400
Employer [E]				\$4,986.70
Employer [F]	[no wages reported by this employer]			
Employer [G]³	\$12,040			\$1,720

As to the quarterly wages, because a review of the claimant’s base period wages shows that her work for the instant employer is subsidiary employment, we decline to hold that this job was her primary employment. In each of the quarters where she performed services for this employer, she earned less than she did for any other employer for which she also worked during the same quarter.

As to the claimant’s other base period employers, during her base period she worked longer for Employer [A] than any other employer, it paid her substantially more than any other employer during this base period, and her benefit rate would be significantly lower if the wages from Employer [A] did not exist.⁴ The claimant’s work for the instant employer is subsidiary to her work for Employer [A].

The claimant worked and earned the most for Employer [E] during the final quarter of her base period, and her separation from that employer was determined to be non-disqualifying on July 24, 2020 (Issue ID # 0046 4861 47). The claimant’s work for the instant employer is subsidiary to her work for Employer [E].

The claimant earned substantially more from her work with Employer [C] than she did from the instant employer in the two quarters where she performed services for both, but Employer [C] is

² *See also* 430 CMR 4.74, which sets forth the same criteria for deciding whether a claimant’s most recent work was full-time or part time to determine if a “constructive deduction” should be applied to a claimant’s weekly benefit amount.

³ During the hearing, the claimant testified that she last performed services for employer [G] in August of 2019, and that the money reported during the second quarter of 2020 represented back pay that the employer owed to her. The claimant’s payments from this employer, while not explicitly incorporated into the review examiner’s findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and it 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).

⁴ On September 2, 2020, the claimant was determined to be eligible for benefits under G.L. c. 151A, §§ 29 and 1(r) (Issue ID # 0051 4949 84). Employer [A] did not appeal that determination.

not an interested party on this claim. The claimant's work is subsidiary to her work for Employer [C].

The claimant earned only slightly more from Employer [D] in each of the two quarters where she performed services for both employers. With regard to that employment, a different review examiner concluded (as we do here) that the claimant performed services for Employer [D] on a part-time, on-call basis, and that the claimant was eligible for partial unemployment benefits based on her subsidiary employment for this employer. *See* Issue ID # 0051 4884 54 (Nov. 25, 2020). The claimant's work for the instant employer and Employer [D] was similarly subsidiary to the previously referenced base period employers.

In the instant case, we need not determine which of the seven base period employers was the claimant's primary base period employer, because the claimant's work for the instant employer is subsidiary to several of her other employers.

Because we conclude that the work with this employer was not primary base period employment, we conclude as a matter of law that the reasoning from Mattapoissett does not disqualify the claimant from receiving benefits pursuant to G.L. c. 151A, §§ 29 and 1(r), based on her work for this employer.⁵

The review examiner's decision is reversed. The claimant is entitled to receive benefits, if otherwise eligible, beginning August 16, 2020, in any week in which she has less than a full-time schedule of work and earns less than her benefit rate, after taking into account the earnings disregard.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 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.

⁵ We note that, despite our decision here, the claimant's eligibility for benefits remains impacted by a determination disqualifying her under G.L. c. 151A, §§ 29 and 1(r), on September 3, 2020. The claimant has not appealed this disqualification in Issue ID # 0051 4840 46.

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