

The claimant, who worked full-time at 40 hours a week, was paid 40 hours of sick time and unpaid for the other 40 during a two-week pay period. As the wages he received for the 40 hours were compensation only for one week of work, the review examiner erred in attributing the remuneration to both weeks during the applicable pay period. While was not in unemployment during the first week of this pay period because his earnings exceeded his weekly benefit amount, he was in total unemployment during the second week when he did not work and did not have any earnings.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0052 4017 81

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 approved in part and denied in part in a determination issued on October 20, 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 the claimant benefits for the period between April 5, 2020, and May 2, 2020, and during the period between June 14, 2020, and July 4, 2020, but awarded benefits during the period between May 3, 2020, and June 13, 2020, in a decision rendered on February 24, 2022. We accepted the claimant's application for review.

Benefits were denied between April 5, 2020, and May 2, 2020, and between June 14, 2020, and July 4, 2020, after the review examiner concluded that the claimant was not in unemployment under G.L. c. 151A, §§ 29 and 1(r), during either period, but were awarded for the weeks of May 3, 2020, through June 13, 2020, because the review examiner concluded that the claimant was in unemployment and thus, was not disqualified during that period. 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 unemployment during the periods between April 5, 2020, and May 2, 2020, and June 14, 2020, and July 4, 2020, because he earned more than his weekly benefit amount plus disregard, but was in unemployment during the period between May 3, 2020, and June 13, 2020, because he earned less than that amount, 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 March 6, 2017, the claimant started working fulltime for the employer, a medical center, as a Senior Data Support Analyst.
2. The claimant was paid an annual salary of approximately \$117,000.
3. The employer paid the claimant on a biweekly basis.
4. The claimant was always able and available to work for the employer.
5. The claimant's last [day] of work performing tasks for the employer was on April 3, 2020. At this point in time, the employer placed the claimant on a furlough leave of absence due to budgetary circumstances. The employer initially was planning on recalling the claimant back to work.
6. The claimant's gross paid wages for the pay period running from March 22, 2020, through April 4, 2020, was \$4,519.47 for a total of 80 hours. On April 9, 2020, the employer issued the claimant a paycheck for this earnings period.
7. The claimant filed an initial unemployment claim effective the week beginning April 5, 2020. On this claim, the claimant's weekly unemployment benefit rate was \$823.00. On this claim, the claimant's weekly earnings exclusion amount is \$274.33.
8. On June 23, 2020, the employer presented the claimant with a Separation Agreement and Full Release of claims listing in part: "Your last date of employment with [employer] will be July 3, 2020 [the "Separation Date"]." The claimant eventually sighed [sic] this document and received a separation payment from the employer.
9. The claimant was not recalled to work by the employer as initially planned. On July 3, 2020, the employer discharged the claimant from work for a lack of work.
10. While the claimant was on furlough status and not working with the employer from after April 3, 2020, through July 3, 2020, the claimant received wages during some weeks and other weeks were unpaid.
11. The Department of Unemployment Assistance (hereinafter DUA) received paychecks from the claimant for the earnings period running from the Pay Period Beginning April 5, 2020, through the Pay Period Ending July 11, 2020. The DUA updated the claimant's gross wages from the week beginning April 5, 2020, through the week ending July 4, 2020, based upon the paystub information.

12. The claimant's paystubs list the following information for the Pay Periods running from the week beginning April 5, 2020, through the week ending July 11, 2020, as follows:

Pay Period Beginning Sunday	Period Ending Saturday	Gross Earnings
April 5, 2020	April 18, 2020	\$4,519.47
April 19, 2020	May 2, 2020	\$4,519.47
May 3, 2020	May 16, 2020	\$0.00
May 17, 2020	May 30, 2020	\$458.90
May 31, 2020	June 13, 2020	\$0.00
June 14, 2020	June 27, 2020	\$2,263.60
June 28, 2020	July 11, 2020	\$9,466.08

13. On the paystub for the Pay Period Beginning May 17, 2020, through Pay Period Ending May 30, 2020, the employer listed the gross earnings of \$498.50 broken down as \$451.17 in holiday pay and \$7.73 for a LTD Imputed payment.

14. On the paystub for the Pay Period Beginning June 14, 2020, through Pay Period Ending June 27, 2020, the employer listed the gross wage amount of \$2,255.87 next to the Description Column ESL-F the employer listed the dates of June 14, 2020, through June 27, 2020. Next to another description column titled Unpaid Absence the employer listed the following dates June 14, 2020, through June 27, 2020, and listed 40 hours.

15. On the paystub for Pay Period Beginning June 28, 2020, through July 11, 2020, issued on July 11, 2020, the employer listed the following breakdown for the gross earnings:

<u>Description</u>	<u>Dates</u>	<u>Amount</u>
ET Termination Payout	6/28/20-7/4/20	\$4,503.28
Holiday PTO	6/28/20-7/4/2020	\$451.17
Lump Sum Payment	6/28/20-7/4/2020	\$4,511.73
Total Gross Earnings:		\$9,466.18.

16. On the paystub for the Pay Period Beginning June 28, 2020, through July 11, 2020, the claimant assumes that the ET Termination Payout and Lump Sum Payment was allocated vacation/sick pay issued to the claimant upon separation from work.
17. The DUA records regarding the claimant list the claimant did not report any earnings to the DUA for the weeks ending April 18, 2020, through April 25, 2020, and the week ending June 20, 2020, through the week ending June 27, 2020.
18. On October 20, 2020, the DUA issued the claimant a Notice of Disqualification under Sections 29(a), (b) & 1(r) of the Law for the period of time running from April 5, 2020, through the week ending July 4, 2020. On the Notice of Disqualification, the DUA wrote in part: “You failed to accurately report your gross earnings for the week in which you worked. You are entitled to partial benefits for any week in which you are employed less than a full-time schedule of hours and earn less than your allowable amount. You are entitled to partial benefits in any week in which you earn less than your weekly benefit amount plus one third.” On the Notice of Disqualification, the DUA also wrote: “You are eligible to receive partial benefits for any week in which your employment is less than a full-time schedule of hours and your gross earnings are less than your allowable amount which is \$823.00 + \$274.33.” As a result of the Notice of Disqualification, the claimant was overpaid \$5,692 in previously received benefits for the weeks ending April 18, 2020, through April 25, 2020, and the weeks ending June 20, 2020, through June 27, 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. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. While we concur with the review examiner’s assessment of the claimant’s unemployment status during most of the time period on appeal, we reject the review examiner’s legal conclusion that the claimant was not in unemployment within the meaning of the law during the week of June 14, 2020.

To be eligible for unemployment benefits, the claimant must show that he 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. . . .

“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. . . .

Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. If the length of the period to which the remuneration applies is not clearly identified, such period shall be determined by dividing such remuneration by the amount of the individual’s average weekly wage.

Prior to being placed on furlough, the claimant worked full-time, 40 hours a week, as Senior Data Support Analyst. Finding of Fact # 1. He would get paid \$4,519.47 bi-weekly for 80 total hours of work. Findings of Fact ## 3, 6, and 12. However, his paystub for the pay period between June 14, 2020, and June 27, 2020, indicates that the claimant received gross wages in the amount of \$2,255.87 for 40 hours sick leave, and was not compensated for 40 hours of “unpaid absence.” Finding of Fact # 14. On its face, this information indicates the claimant only received compensation for one week of work during the two-week pay period. This interpretation is affirmed by the claimant’s uncontested testimony that these earnings were sick leave time disbursed to compensate him for a week of wages lost while he was furloughed.¹ Therefore, the record confirms that the \$2,255.87 paid to the claimant during this pay period was compensation for a single week of work.

We do note that the paystub does not specify which week the claimant was entitled to his sick pay and which week he was on an unpaid absence. *See* Finding of Fact # 14. Under such circumstances, the law requires that we attribute any earnings to the week in which it reasonably would be considered to apply. *See* G.L. c. 151A, § 1(r)(3). Therefore, in the absence of any

¹ The claimant’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).

evidence to the contrary, we conclude these 40 hours of work can reasonably be attributed to the first week of the applicable pay period — the week beginning June 14, 2020.

Because the claimant's earnings during the week of June 14, 2020, exceeded \$1097.33, the sum of his weekly benefit amount plus earnings disregard, he was not in unemployment. *See* Finding of Fact # 7. Concomitantly, however, such a conclusion means that the claimant was in total unemployment during the week of June 21, 2020, as he did not perform any wage-earnings services and did not have any earnings during that week.

A review of the record confirms that the review examiner properly attributed the remainder of the claimant's wages to the correct weeks in accordance with G.L. c. 151A, § 1(r)(3).

We, therefore, conclude as a matter of law that the claimant was in total unemployment during the week of June 14, 2020.

The review examiner's decision is affirmed in part and reversed in part. The claimant denied benefits during the period between April 5, 2020, and May 2, 2020. He is entitled to benefits during the period between May 3, 2020, and June 20, 2020, if otherwise eligible. The claimant is not entitled to benefits during the period between June 21, 2020, and July 4, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 6, 2022



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

LSW/rh