

Recoverable draws on commission are remuneration because their purpose is to compensate claimants for services rendered to their employers. Where a draw on commission is recovered, it is considered earnings attributed to the weeks in which the draw was recovered. If not recovered, the draws are earnings attributed to the weeks in which they were originally received. Here, because the employer recovered the claimant's draws later in his employment, held he had no earnings in the weeks the draws were originally received. However, as the claimant performed an average of 40 hours of work per week for the employer during this same period, he did not meet the definition of being in unemployment under G.L. c. 151A, §§ 29 and 1(r), because was not available for full-time work.

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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 between August 30, 2020, and October 17, 2020. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective May 31, 2020, which was denied for the period between August 30, 2020, and October 17, 2020, in a determination issued on December 17, 2022. 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 June 17, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment between August 30, 2020, and October 17, 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 remanded the case to the review examiner to obtain additional evidence about the claimant's earnings during the period at issue. Only the claimant attended 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 between August 30, 2020, and October 17, 2020, because the recoverable draws on commission he received during those weeks constituted remuneration, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant filed his claim for unemployment benefits on May 31, 2020. The effective date of the claim is May 31, 2020. The claimant's weekly benefit amount is \$823. The claimant's earnings disregard is \$274.33.
2. The claimant received the Guide to Benefits and Employment Services. The claimant was aware that he was required to report if he were to work and his earnings when certifying for unemployment benefits.
3. The claimant began working for the instant employer on September 1, 2020. The claimant was hired to work as a Sales Director. The employer is a Cyber Security business.
4. The claimant was on a 90-day probationary period with the employer. The claimant was being paid weekly by a recoverable draw against commission. The claimant was provided with benefits with the employer, including health insurance.
5. The employer provided the claimant with an email when hired, indicating in part "The calculation of any Sales Commissions and or Performance Bonus' due to you will first take into consideration the Draw Payment(s) made to you on account and under the Recoverable Draw Compensation Program. In the event that the Draw Payment is only partially or not at all earned back by you in the form of Sales Commissions, any outstanding amount of such Draw Payment shall be carried over for purposes of calculating Sales Commissions due to you, until such time as the Draw Payment is earned back by you, in full, in the form of Sales Commissions and/or Bonuses..."
6. The employer's practice was to not pay any commissions earned until 30 days after the customer pays the invoice in full.
7. The claimant was receiving a gross weekly draw in his commission in the amount of \$3,365.20. The claimant was paid by direct deposit.
8. The claimant was working for the employer remotely. The claimant's hours worked varied each week. The claimant could work anywhere from 2 hours to 80 hours a week.
9. The claimant was completing the weekly certifications to receive unemployment benefits during the period of August 30, 2020, through October 17, 2020.
10. On each of those weekly certifications, the claimant responded "No" to the question "Did you work during the reporting period listed above? This includes full-time, temporary, self, or military employment."

11. The claimant checked the box indicating “I certify that the information I have provided is true and correct. I know that Massachusetts Law provides penalties and or imprisonment for false statements to obtain benefits and that DUA actively pursues fraudulently collected benefits. I hereby acknowledge that DUA will verify my information to assure its accuracy.”
12. The claimant received unemployment benefits for the week ending September 5, 2020, in the amount of \$1,123. The claimant received unemployment benefits for the weeks ending September 12, 2020, through October 17, 2020, in the amount of \$823 each week.
13. Between August 30, 2020, and October 17, 2020, the claimant received recoverable draws against his commission. The employer recovered those draws in full in a lump sum between the period of January 1, 2021, through March 31, 2021. The employer took the lump sum payment from the claimant’s commissions earned and the end of year performance bonuses that were due and payable during the first quarter of 2021.
14. On December 17, 2022, a Notice of Disqualification was issued under Section 29(b) of the Law, indicating “You failed to accurately report your gross earnings for the week in which you worked. You are not entitled to benefits for any week in which you earn more than your allowable amount.” “You are ineligible to receive benefits beginning 8/30/2020 through 10/17/2020 because your earnings are in excess of your allowable amount which is \$823.00 + \$274.33. Important Information Due to the amount of unreported Earnings for the weeks in question, you are determined to be ineligible for benefits during the weeks you earned an amount in excess of your weekly benefit amount plus the Earnings disregard (one third of the weekly benefit amount), and eligible for partial benefits during the weeks you earned an amount less than your weekly benefit amount. Because you knew, or should have known, the Earnings must be reported when you claimed benefits; the overpayment is due to fault/fraud on your part.” The claimant filed an appeal to that determination.

Credibility Assessment:

During the remand hearing of September 19, 2023, the claimant provided direct testimony that the draws for the period of August 30, 2020, through October 17, 2020, were recovered in full by the employer in a lump sum payment occurring during the first quarter of 2021, with the exact date being unknown. The claimant did not have documentation in support of that payment.

The claimant testified that he attempted to secure documentary evidence as to that recovery, but the employer did not respond to his email request for that information. (The claimant did not have a subpoena issued for such documents.) The claimant was able to provide an excerpt from an email communication, provided by the

employer at the time of hire, containing information on the employer's Recoverable Draw Compensation Program.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. While we agree with the review examiner's legal conclusion that the claimant was not entitled to benefits between August 30, 2020, and October 17, 2020, we reach this conclusion on different grounds.

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 initially denied the claimant benefits because she concluded that the recoverable draws on commission the claimant received during the weeks between August 30, 2020, and October 17, 2020, constituted disqualifying remuneration. *See Consolidated Findings ## 7 and 13.* Remuneration is defined, in relevant part, at G.L. c. 151A, § 1(r)(3), as the following:

[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

(Emphasis added). The plain language of G.L. c. 151A, § 1(r)(3), identifies commissions as remuneration. At the initial hearing, however, the claimant asserted that the Massachusetts Court of Appeals had twice concluded that a recoverable draw against commission was not considered remuneration under the law. As the Board was unable to identify the two decisions referred to by the claimant at the initial hearing, we requested that he provide additional information about those cases on remand.

In response, the claimant submitted a written statement, which was admitted into evidence as Remand Exhibit 6, containing the names of and citations for each of these two cases.¹ However, neither a search of the citations nor the names provided in that statement yield a decision issued by the Massachusetts Court of Appeals.² Absent such appellate precedent, we are guided by the plain language of the unemployment statute.

The term ‘remuneration’ encompasses “*any consideration, whether paid directly or indirectly. . . received by an individual . . . from his employing unit for services rendered to such employing unit.*” G.L. c. 151A, § 1(r)(3) (emphasis added). Draws on commission, whether recoverable or not, are payments made by an employer to compensate the claimant for services rendered to the employer. As such, they serve the same compensatory function as other forms of remuneration. Further, recoverable draws on commission are not included amongst the forms of compensation expressly enumerated as exempt from the otherwise broad statutory definition of remuneration. *Id.* Therefore, recoverable draws on commission are remuneration under G.L. c. 151A, § 1(r)(3).

Although we agree that recoverable draws on commission constitute disqualifying remuneration, given the particular facts of this case, the review examiner erred in attributing that remuneration to the period between August 30, 2020, and October 17, 2020.

Remuneration paid to a claimant during his or her benefit year must be attributed to the week or weeks in which that remuneration was *earned*, rather than the weeks in which they were paid. Board of Review Decision 0059 4161 70 (Jun. 28, 2022). Here, the recoverable draws on commission were an advance on the claimant’s potential future earnings. For this reason, it would be improper to attribute said draws on commission to the week or weeks in which they were paid. On the other hand, draws on commission compensated him for work performed during a week in which he otherwise would not have had any earnings. In this regard, they also bear the characteristics of wages earned during the week in which they are paid.

To address this apparent contradiction, we believe that the proper attribution of recoverable draws on commission is contingent upon whether the employer has recovered the draws previously disbursed to the claimant. Where an employer elects not to recover those draws from the claimant’s earnings, the initial draws on commission no longer bear the characteristics of an advance. Instead, the recoverable draws on commission are compensation earned by the claimant for the work performed during the weeks in which the draws are paid.

However, if the employer does recover the draws from a claimant in subsequent weeks, the initial draw payments retain the characteristics of an advance on future earnings. Such payments are attributed to those subsequent weeks, when the claimant would have kept all of the earnings from work if not for the earlier draw.

¹ Remand Exhibit 6 is 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).

² The two cases referenced by the claimant were Dolan v. Dep’t of Unemployment Assistance, 422 N.E. 2d 1026 (Mass. App. Ct. 1981), and Flynn v. Dep’t of Unemployment Assistance, 429 N.E.2d 1226 (Mass. App. Ct. 1981). Neither case was found at the citations listed. The case found at 422 N.E. 2d 1026 is Mitchell v. Peterson, a 1981 case heard by the Appellate Court of Illinois, Fifth District, Fifth Division. The case found at 422 N.E.2d 1226 is City of Chicago ex rel. Konstantelos v. Duncan Traffic Equipment Co., a 1981 case heard by the Appellate Court of Illinois, First District, Third Division.

In the case before us, had the employer not recovered the draws on commission paid to the claimant between August 30, 2020, and October 17, 2020, those draws would have been earnings properly attributed to the weeks of August 30, 2020, through October 17, 2020. Because the instant employer did recover the draws from the claimant's earnings during the period of January 1, 2021, through March 31, 2021, the original draws on commission are earnings properly attributed to the weeks between January 1, 2021, through March 31, 2021. Consolidated Findings ## 7 and 13.

Inasmuch as we attribute the draws given to the claimant between August 30, 2020, and October 17, 2020, to the later period, the review examiner erred in concluding that the claimant was not in unemployment on the basis of these draw payments. However, the claimant is still not entitled to benefits during August 30, 2020, and October 17, 2020.

Pursuant to G.L. c. 151A, §§ 29 and 1(r), claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. The claimant testified that he worked between two and eighty hours per week for the instant employer in the period between August 30, 2020, and October 17, 2020. Consolidated Finding # 8. Absent more detailed information about the work he performed for the employer during this period, we infer that the claimant worked an average of 40 hours per week. This is the equivalent of full-time work. This means that the claimant was not available for other full-time work between August 30, 2020, and October 17, 2020.

We, therefore, conclude as a matter of the law that recoverable draws on commission are remuneration under G.L. c. 151A, § 1(r)(3). We further conclude that the claimant was not in total or partial unemployment between August 30, 2020, and October 17, 2020, pursuant to G.L. c. 151A, §§ 29 and 1(r), because he was not available for full-time work.

The review examiner's decision is affirmed. The claimant is denied benefits for the week of August 30, 2020, through October 17, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 2024



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.

LSW/rh