

Spin instructor was in total unemployment when her employer shut down due to the COVID-19 public health emergency. During this time, she was available for remote work, but the employer never assigned any to her. Upon her return, she remained in partial unemployment because she continued to be available for all suitable work, but her hours had been drastically reduced.

**Board of Review
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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. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant was temporarily furloughed from her position with the employer on March 15, 2020. She filed a claim for unemployment benefits with the DUA, effective March 8, 2020, which was initially approved, but in a determination issued on March 18, 2021, she was denied for six weeks beginning May 17, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination and denied benefits indefinitely, beginning March 8, 2020, in a decision rendered on July 30, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and, thus, she was not eligible for benefits. 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 work which the employer may have had available for the claimant during her layoff. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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, a spin instructor, was ineligible for benefits because she was incapable of working without access to a spin bike, 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 was hired as a part-time spin instructor for the employer, a community service organization, in 2015. The claimant did not perform any other services for the employer.
2. The claimant's supervisor was the Associate Executive Director (Director).
3. On 03/14/2020, the employer closed down as a result of the COVID-19 public health emergency.
4. Prior to the employer closing down, the claimant worked between ten (10) and fifteen (15) hours a week for the employer.
5. In March of 2020, the employer applied for a loan through the Paycheck Protection Program (PPP). In April of 2020, the employer received a loan to continue paying employees from 04/26/2020 through 06/26/2020.
6. Leading up to 04/26/2020, the Director sent emails to employees, including the claimant, regarding the PPP loans and inquiring as to employees' ability and availability for remote work.
7. After the employer closed down because of the COVID-19 public health emergency on or about 03/15/2020, until it reopened again in July of 2020, the employer had remote work available for its employees. The available remote work was dependent on the role the employee had prior to the employer closing down.
8. The remote work that was available to the claimant was calling members of the employer's fitness programs to check in with the members and make sure they were healthy. The employer had up to nineteen (19) hours a week of remote work available for the claimant.
9. The remote work was only available from 05/03/2020 through 06/27/2020, which was the period of time covered by the PPP loans. The remote work was unavailable once the employer reopened in July of 2020.
10. On 05/03/2020, the claimant's supervisor reached out to the claimant via email regarding the available remote work.
11. The claimant accepted the possibility of remote work and signed a Temporary Telecommuting Policy on 05/03/2020.
12. The claimant's supervisor did not offer the claimant any remote work on behalf of the employer between 05/03/2020 and 06/27/2020.
13. The claimant never followed up with her supervisor, nor did she follow-up with anyone else at the employer regarding the offered remote work. The claimant

never contacted human resources about why she was not followed up with regarding remote work.

14. The claimant was available for remote work but did not know what type of work she could have done for the employer. The claimant was available for forty (40) hours of remote work.
15. The claimant did not perform any remote work for the employer between 05/03/2020 through 06/27/2020 when the employer had remote work available for her. The employer's pay records do not indicate that the claimant was paid for any services provided by the claimant on behalf of the employer, during the time that the employer had remote work available for the claimant.
16. On 05/22/2020, the claimant was paid \$507.00. The claimant did not perform any services to earn the \$507.00, as the payments were made as a result of the employer receiving PPP loans. The \$507.00 represents two weeks of wages from 05/03/2020 through 05/16/2020, with a total of thirty-two and three-tenths hours (13.30) [sic] hours worked.
17. The claimant did not report the \$507.00 as earnings as she was attempting to return it. The claimant ended up keeping the \$507.00.
18. The employer reopened for training purposes on 07/10/2020. The employer reopened and recalled their employees between 07/11/2020 and 07/13/2020. The claimant returned to work on 07/14/2020.
19. When the claimant returned to work for the employer, she worked between six (6) and ten (10) hours a week, which is four (4) to five (5) hours less per week than what she worked prior to the COVID-19 public health emergency. The claimant worked all hours available to her.
20. The claimant separated from employment on 05/14/2021.
21. The claimant made no attempts to avail herself of the remote work that was offered to her.

Credibility Assessment:

There were no major differences between the claimant's or the employer's testimony. Both parties offered credible testimony and documentation, including the documentary evidence presented at the original and remand hearings.

The claimant's supervisor, who would have been able to provide testimony surrounding when and how the claimant was contacted regarding remote work in addition to whether the remote work was offered and accepted by the claimant, did not testify at the hearing, as he has separated from the employer prior to the hearing.

Consequently, no substantial and credible evidence was produced to show that remote work was actually offered to the claimant.

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.

Although Consolidated Finding # 4 states that the claimant had worked 10 to 15 hours per week prior to the employer closing, timesheets submitted into evidence show that, in fact, she was working up to 19 hours per week.¹ To the extent the last portion of Consolidated Finding # 16 suggests that the employer's \$507.00 payment was for hours worked, we reject it as misleading, inasmuch as this is inconsistent with other findings which state the claimant did not perform any services for that payment. Finally, we reject Consolidated Finding # 21 and the portion of Consolidated Finding # 13 which suggest that the claimant was offered remote work, as these are inconsistent with Consolidated Finding # 12, wherein the review examiner found that the claimant's supervisor did not offer the claimant any remote work.

In adopting the remaining findings, we deem 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant has not established that she was in unemployment as defined under the Massachusetts Unemployment Insurance statute.

There is no dispute that the claimant was placed on furlough beginning March 14, 2020, when the employer had to shut down due to the COVID-19 public health emergency. See Consolidated Finding # 3. She opened an unemployment claim, effective March 8, 2020, and returned to work on a limited basis beginning the week of July 5, 2020. The question before us is whether she was in unemployment as defined in G.L. c. 151A, §§ 29 and 1(r).

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

¹ Remand Exhibit 9 includes copies of the employer's timesheet records for the claimant from January 13 through August 8, 2020. While not explicitly incorporated into the review examiner's findings, the hours shown in these records are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

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.

Although the claimant’s unemployment claim was made effective March 8, 2020, timesheets entered as Remand Exhibit 9 show that she worked 19 hours that week. *See also* Consolidated Finding # 4. Because she continued working her usual part-time hours, she was not entitled to benefits. *See Town of Bourne v. Dir. of Division of Employment Security*, 25 Mass. App. Ct. 916 (1987).

However, this changed the following week when the employer had to shut down due to the COVID-19 public health emergency. *See* Consolidated Finding # 3. The consolidated findings show that during the weeks between March 15, 2020, and July 4, 2020, the claimant did not perform any work while she was on furlough. In order to meet the definition of total unemployment, the claimant must further establish that she was capable of, available for, and unable to obtain suitable work.

In this case, because the claimant seeks benefits beginning in March, 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.² The U.S. Department of Labor (DOL) also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual’s circumstances.³

The DOL has stated that individuals may be considered available for work if they are available for any work for all or a portion of the week claimed, provided any limitation upon their availability does not constitute a withdrawal from the labor market.⁴ In response, the DUA announced that, if an individual is in total unemployment while on any type of unpaid leave of absence, the claimant is not subject to disqualification under G.L. c. 151A, §§ 29, 1(r), or 24(b), as long as the reason for the claimant’s inability to work is related to COVID-19 and the claimant remains available for some type of suitable work.⁵

The claimant testified that she was available to work up to 40 hours a week, if it had been assigned. *See* Consolidated Finding # 14.⁶ The statute is not specific as to the type of work that she must be

² *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

³ *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

⁴ *See* IPL 10-20, 4(b).

⁵ *See* DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 24, 2020), pp. 3 and 4.

⁶ This portion of the claimant’s testimony is also part of the unchallenged evidence in the record.

available for, except that it must be suitable work which the claimant is able to perform. Even if the claimant could not teach spinning classes while the employer's facility was closed because she did not have her own spinning bike, her availability to perform remote work of another nature satisfies this requirement. Apparently, the employer had planned to offer such work, having the claimant call members of its fitness programs, but, for whatever reason, it was never offered to the claimant. See Consolidated Findings ## 7–9 and 12.

The consolidated findings also show that once the furlough ended in July, the employer provided the claimant with fewer hours, working six to 10 hours a week, a sharp reduction from the 10–19 hours a week that she had been working prior to the furlough. See Consolidated Findings ## 4 and 19; see also Remand Exhibit 9. They further provide that the claimant remained available for whatever work was made available to her. See Consolidated Finding # 19.

Inasmuch as nothing in the record indicates that the claimant was incapable of performing remote work during her furlough or teaching a full load of spin classes after the employer re-opened, we are satisfied that she was also capable of performing suitable work.

To be in unemployment, the statute also requires that the claimant be “unable to obtain suitable work.” This ordinarily means that a claimant must actively search for work to be eligible for benefits. The claimant's work search efforts were not addressed during the hearing. However, pursuant to the temporary flexibilities authorized by the federal government during the pandemic, the DUA waived the work search requirement from March 8, 2020, until the week ending June 12, 2021.⁷ Therefore, she was not required to demonstrate that she was looking for work.

Finally, we must consider whether the \$507.00 payment to the claimant on May 22, 2020, had any effect on the claimant's eligibility for benefits. If this payment had been for the performance of services, it would be disqualifying remuneration pursuant to G.L. c. 151A, § 1(r)(3). However, Consolidated Findings # 16 makes clear that the claimant did not perform any work to earn that \$507.00 payment. Apparently, it was given to the claimant as money received from a PPP loan, meant as payment for remote work during the period May 3 through 16, 2020, but, again, no one from the employer actually assigned any work. See Consolidated Finding # 16. During the hearing, the employer's Chief Human Resources Officer testified that they obtained the loan to provide income to their employees during the furlough.⁸ Perhaps, then, it is best characterized as a supplemental unemployment benefit paid by the employer to help the claimant maintain income during a period of unemployment. This is not treated as remuneration. See DUA Adjudication Handbook, Chapter 9, pp. 16–18.

We, therefore, conclude as a matter of law that the claimant has demonstrated that she was in total unemployment during her furlough, and that, upon her return to work, she remained in partial unemployment, as those terms are meant under G.L. c. 151A, §§ 29 and 1(r).

⁷ See UIPP 2021.03 (Jan. 29, 2021), p. 7; and UIPP 2021.04 (May 20, 2021), p. 2.

⁸ This, too, is part of the unchallenged testimony presented during the hearing.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning March 8, 2020. The claimant is entitled to receive benefits for the week beginning March 15, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 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.

AB/rh