

The claimant was in partial unemployment during the week in which the employer reduced her full-time hours to part-time due to business needs related to the COVID-19 pandemic.

**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: 0059 0372 62

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 on July 31, 2020. On November 27, 2020, the DUA issued to the claimant a Notice of Disqualification under G.L. c. 151A, §§ 29(a) and 1(r), which denied benefits for the week beginning July 26, 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 benefits in a decision rendered on February 10, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was fully employed during the week beginning July 26, 2020, and, thus, was disqualified under G.L. c. 151A, §§ 29(a) 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 afford the parties an opportunity to provide additional evidence about the claimant's work schedule for the week beginning July 26, 2020. 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 during the week beginning July 26, 2020, because she worked a full-time schedule of hours, 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 are set forth below in their entirety:

1. The claimant has worked as an Occupational Therapist for the employer, a contract rehab business, from 6/1/18 through 4/3/20[.] She has not separated.

2. The claimant was hired to work full time, 32 to 40 hours a week, earning \$32.00 an hour.
3. The claimant went out on a medical leave of absence from 4/4/20 until 4/29/20, when she started her maternity leave under FMLA. The claimant's maternity leave ended 7/24/20 and she returned to work on 7/28/20. The claimant is normally scheduled from Tuesday to Saturday during the week.
4. The claimant began back to work as of 7/28/20. During the week beginning 7/26/20, the claimant worked 11 hours. During the week beginning 8/2/20, the claimant worked 20 hours. The claimant's hours were reduced due to [COVID-19]. As of the week beginning 8/9/20, the claimant returned to full time hours and continued to work full time until 11/9/20, when she went out on leave again.
5. The claimant worked full-time during the weeks beginning 8/9/20 to week ending 11/7/20, when she was placed on imposed leave by the employer.

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. 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment during the week beginning July 26, 2020.

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 claimant usually works a full-time schedule of 32 to 40 hours each week. *See* Consolidated Finding # 2. After the initial hearing, the review examiner concluded that, during the week beginning July 26, 2020, the claimant worked a full-time schedule of hours, as the claimant had testified that she was "scheduled to work full-time" that week. After taking the claimant's testimony and reviewing the additional documentary evidence submitted by the claimant during

the remand hearing, including an employee labor log generated by the employer, the review examiner found that the claimant worked only 11 hours during the week beginning July 26, 2020, and that her hours had been reduced as a result of the COVID-19 pandemic. *See* Consolidated Finding # 4. The claimant testified that her hours were reduced because, as the claimant works at a nursing home, the employer had fewer patients and did not have work to offer her.¹

Since the claimant performed some work during this week, she was not in total unemployment. However, because the employer offered her only a part-time schedule of work, and there is no indication in the record that she was refusing work from the employer during that week, she was in partial unemployment.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment during the week beginning July 26, 2020, within the meaning of §§ 29(b) and 1(r)(1).²

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 26, 2020, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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

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 We note that the claimant's eligibility for the week beginning July 26, 2020, is also addressed in Issue ID # 0059 4104 91.

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.

JMO/rh