

Because the claimant, who is co-owner of the employer, performed minimal unpaid work for his business after COVID-19 caused a substantial business slowdown, he was eligible for benefits under G.L. c. 151A, §§ 29 and 1(r). However, as he was not searching for work outside of his own business, he became ineligible for benefits when DUA re-instated the work search requirement.

**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 filed a claim for unemployment benefits with the DUA, effective December 6, 2020, which was denied in a determination issued on January 13, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 10, 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, he was not eligible for benefits. 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 an unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), because he continued to perform unpaid services for his corporation and failed to actively search for new employment during the period he certified for benefits, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant is the President of the corporation known as [Company A] located in [Town A], Massachusetts. The claimant and his Co-owner both hold 32 shares in the corporation.

2. The business incorporated on 7/9/68. It is still active and has not dissolved.
3. The corporation had a total of 4 employees which included the claimant as the President, his Co-Owner as the Treasurer and Secretary, a Business Manager and a Shipping and Receiving employee.
4. The claimant has not paid himself a salary since 12/1/20. He formerly grossed \$2,555.77 weekly for forty hours of work per week. His hours were reduced to 20 hours at the time he filed his claim.
5. Since 11/27/20 the claimant has been checking emails, checking the answering machine and checking on orders. The claimant is not compensated for the time that he does this. The claimant performs no other services for the corporation because there is no work on-going within the company.
6. The claimant is not working full time because the business has been slow. The company did have a profit over the last three years. In 2018 the corporation had a profit of \$418,231, 2019 the profit was \$452,643 and in 2020 the company saw a profit of \$50,683.
7. The claimant has been attempting to generate new business by actively searching for work for the corporation.
8. The claimant has not used any of his own personal money towards keeping the business going.
9. The claimant intends to resume working full time for the corporation once business picks up. He is not actively searching for work for himself in the labor market.
10. The claimant filed his first claim on 12/6/20.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 4 that states the claimant's hours were reduced to 20 hours per week as unsupported by the record. In adopting the remaining findings, we deem 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 entire period on appeal.

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. . . .

Ordinarily, under federal and Massachusetts law, 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. In this case, because the claimant seeks benefits from March 29, 2020, the effective date of his claim, through the present, 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.¹ The U.S. Department of Labor has 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.²

The review examiner disqualified the claimant on the grounds that he did not actively search for work outside of his own business. *See* Findings of Fact # 9. However, in accordance with the EUISSA and the DOL guidance, the DUA temporarily waived the work search requirements until the COVID-19 emergency measures have been lifted.³ Consistent with this guidance, the DUA reinstated the work search requirements for all claimants as of June 15, 2021.⁴

In accordance with the temporary work search waiver and the claimant’s demonstrated intent to return to full employment in his business, the claimant may not be disqualified on the grounds that he did not actively search for new employment between December 6, 2020, the effective date of his claim, and June 14, 2021. However, as the DUA has re-instated the work search requirement beginning June 15, 2021, the claimant’s decision not to seek work outside of his business means that he was no longer in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), as of that date.

We further note that the claimant has not performed any work for the employer other than checking emails and voicemails and has not received a salary for his services since December 1, 2020.

¹ *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ *See* DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2.

⁴ *See* UIPPP 2021.04 (May 20, 2021) pp. 2–3.

Findings of Fact ## 4 and 5. Because the work performed by the claimant during this period was minimal and he did not receive remuneration for these services, there is nothing in the record to suggest that he was not available for other full-time, suitable work during the period he certified for benefits.

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during the weeks of his claim where he was working minimal hours in self-employment and the work search requirements were waived. We further conclude that he was neither in total nor partial unemployment under these sections of law after the DUA reinstated the work search requirement.

The review examiner's decision is affirmed in part and reversed in part. The claimant entitled to receive benefits for the week of December 6, 2020, through June 12, 2021, if otherwise eligible. He is denied benefits beginning June 13, 2021, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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

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