

**Board of Review
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Issue ID: 0060 4100 09

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, which was denied in a determination issued on January 28, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed in part and overturned in part the agency's initial determination, awarding benefits for the period between March 29, 2020, and May 23, 2020, for the week of October 25, 2020, and for the period between December 13, 2020, and December 26, 2020, but denying benefits for the remainder of the weeks on appeal, in a decision rendered on February 7, 2022. We accepted the claimant's application for review.

Benefits were denied for certain weeks after the review examiner determined that the claimant was not in partial or total unemployment during those weeks, and, thus, he was disqualified under G.L. c. 151A, §§ 29 (a) and 1(r). 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 any week in which he performed some wage-earnings services for the employer because he owned all shares of the employer corporation and had control over his own wages, 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 a dentist who holds all corporate titles and owns all shares of this employer's dental practice corporation.
2. The claimant has complete control over how much money the corporation pays him for his services as a dentist.
3. The corporation is active and there are no plans to dissolve this corporation.

4. The claimant never permanently separated from his employment with this corporation.
5. During the weeks at issue the claimant paid himself gross weekly wages of \$400.00 if the claimant worked 40 or more hours during the week. When the claimant worked less than 40 hours the claimant paid himself at a rate of \$10.00 per hour for his dental services.
6. When the dental office was temporarily closed due to [COVID-19] issues no staff, including the claimant, was paid anything by the corporation employer.
7. The weeks the corporation dental office was closed due to [COVID-19] issues were: the week beginning Sunday, 03/29/20 through Saturday 05/23/20, and Sunday, 10/25/20 through Saturday, 10/31/20 and Sunday, 12/13/20 through Saturday 12/26/20.

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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's controlling ownership of shares precludes him from being in partial unemployment.

To be eligible for unemployment benefits, the claimant must show that she 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
- (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. . . .

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 effective date of this claim is March 29, 2020, we must also consider application of the 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 In response to the COVID-19 public health emergency, and in accordance with the EUISSA and the DOL guidance, the DUA waived the work search requirement from March 8, 2020, through June 15, 2021. *See* UI Policy & Performance Interoffice Memorandum (UIPP) 2021.04 (Jun. 15, 2021), pp. 1–2.

The review examiner concluded that the claimant was in total unemployment during the period during the period between March 29, 2020, and May 23, 2020, during the week of October 25, 2020, and during the period between December 13, 2020, and December 26, 2020, because the employer's office was closed due to the COVID-19 public health emergency. We agree that the claimant was in total unemployment during these three distinct periods.

However, the review examiner disqualified the claimant for the remainder of the weeks on appeal in part because the claimant owned a controlling share of the employer's stock and therefore controlled his own salary. We recognize that the agency must closely scrutinize cases in which an owner or part-owner of a company argues that he or she is in unemployment. Because unemployment benefits are to be paid to those who are out of work through no fault of their own, the agency must analyze whether the claimant's unemployment was compelled by circumstances affecting the business or whether the claimant voluntarily put himself or herself in a state of unemployment. *See Jahn v. Dir. of Division of Employment Security*, 397 Mass. 61 (1986). In this case, we believe that the claimant's ability to control his salary is not the sole determinative factor in assessing his eligibility for benefits.

A claimant will be in partial unemployment pursuant to G.L. c. 151A, § 1(r)(1), during any week that they work less than a full-time schedule or earn gross wages totaling less than their weekly benefit amount. The claimant's pay records, which were admitted into evidence as Exhibits 7 and 9, show that he worked a full-time schedule during the week of June 6, 2020, and then again from the week beginning August 9, 2020, and indefinitely thereafter.² As he was working full-time hours during these two periods, we concur with the review examiner's conclusion that the claimant was not in unemployment during those weeks.

However, the same records show that he worked less than a full-time schedule during the period between May 24, 2020, and June 5, 2020, as well as during the period between June 14, 2020, and August 8, 2020. *See* Exhibits ## 7 and 9. While the claimant did control his own pay rate, the decrease in hours he experienced during these two periods was unrelated to either his ownership stake in the corporation or his ability to set his own wages. *See* Findings of Fact ## 4 and 5. Rather, the claimant was unable to work a full-time schedule during these weeks because of the impact that the COVID-19 public health emergency had on his patients and his ability to

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

² Exhibits 7 and 9, while not explicitly incorporated into the review examiner's Findings of Fact are part of the unchallenged evidence introduced at the hearing and placed in the record and 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).

conduct business.³ As the claimant's loss of hours during these two periods was a direct result of circumstances beyond his control, we do not believe that his authority over the employer precludes a finding that the claimant was in partial unemployment.

While there is no indication that the claimant searched for work during these two periods, the temporary work search waiver implemented by the DUA remained in place until June 15, 2021, well after the claimant had resumed his full-time work schedule.⁴ Therefore, the claimant may not be denied benefits during these two periods on the grounds that he was not searching for work. Similarly, as there is no indication from the record that the claimant was unavailable for other suitable work during these two periods, we do not believe this factor precludes the claimant's eligibility 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 his office was closed due to the COVID-19 pandemic. We further conclude that he was in partial unemployment under these sections of law during any week in which he worked less than a full-time schedule.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from March 29, 2020, through June 5, 2020, and again from June 14, 2020,

³ The claimant's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings of fact, is also part of the uncontested evidence of record.

⁴ See UIPP 2021.04 (Jun. 15, 2021), pp. 1–2.

through August 8, 2020, if otherwise eligible. The claimant is denied benefits for the week of June 6, 2020, and again from August 9, 2020, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 21, 2022



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.

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The claimant was in total unemployment during any week in which he did not work for the employer. While he had a controlling share of the employer's stock and, therefore, controlled his own wages, this did not automatically preclude a finding that he was in partial unemployment during any week in which he was unable to work a full-time schedule. As there were several weeks where claimant did not have enough hours to work a full-time schedule as a result of to the impact of the COVID-19 pandemic, a circumstance beyond his control, he was in partial unemployment during those weeks.