

Claimant whose employer denied his request to perform light duty work while on a medical leave of absence was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and entitled to benefits for the period beginning when the employer stopped paying him remuneration through the date when the DUA reinstated the work search requirement as of June 13, 2021.

**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: 0064 7033 88

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 on a leave of absence from the employer beginning on February 5, 2021. He subsequently filed a claim for unemployment benefits with the DUA, effective February 21, 2021, which was denied in a determination issued on August 26, 2021. 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 January 26, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was unable to work while on his leave of absence, and, thus, he was disqualified under G.L. c. 151A, §§ 29 and 1(r), beginning February 7, 2021, through the end of his leave of absence on August 28, 2021. 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 further evidence about the claimant's ability to work and whether he had requested light duty work from the employer. 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, as well as information available to us in the DUA's UI Online electronic database.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was incapable of working and, therefore, was disqualified from receiving any unemployment benefits while on his medical leave of absence, 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 worked as a Custodian for the employer, a custodian business, from 4/21/15 through 2/5/21 when he last performed work before filing a new claim for unemployment benefits on 2/22/21.
2. The claimant was hired to work full time 40 hours a week, earning \$25.35 an hour.
3. On 2/5/21, the claimant fell and injured his back. He went to the emergency room and was discharged from the hospital that same day. The claimant's doctor provided him with medical documentation to stay out of work.
4. The claimant requested and was approved for a medical leave of absence from his employer from 2/5/21 until 8/26/21.
5. The claimant requested the leave of absence. The employer would have had continuing work available to the claimant had the claimant not requested the leave.
6. During the leave of absence, the claimant could have performed his job with reasonable accommodations granted by the employer. Given the claimant's position as a Custodian he could've performed work if the employer accommodated him by adhering to his Doctor's restrictions regarding lifting. The claimant did request from his supervisor to return to work with limitations on 2/29/21 [sic]. The supervisor told the claimant he could not return to work until he was able to work without restrictions.
7. The claimant was medically capable of performing suitable work remotely from home. There was no work the claimant could've performed from home unless he had training as he has no computer skills. Because he had no computer skills the claimant did not search for work, [sic] he could perform from home. Between June 15 and August 26, 2021, the claimant did not keep a work search log of his efforts to find work because he planned on returning to work with the instant employer.
8. The claimant did not ask the employer for any type of suitable work he could perform remotely from home, because he did not have the computer skills to perform such work at home.
9. The claimant returned to work on 8/27/21.
10. The claimant received gross weekly income of \$986.80 during the first (4) weeks of his leave. The remaining weeks of his leave were unpaid.
11. The claimant did not provide any work search logs. He did provide medical documentation regarding his medical condition which was uploaded and marked as Remand Exhibit 6 consisting of 26 pages.

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, we reject the review examiner's legal conclusion that the claimant was ineligible for benefits for the entire duration of his leave of absence and conclude that he was eligible for benefits for part of the time he was on a medical leave of absence, as set forth below.

In order to be eligible for benefits, the claimant must be in unemployment within the meaning of the unemployment statute. 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; 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.

"Remuneration" is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

For the purpose of this subsection, "Remuneration", 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, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, "remuneration" shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine. . . .

The review examiner disqualified the claimant beginning February 7, 2021. However, the only relevant period before us is the period for which the claimant seeks unemployment benefits. Since the effective date of his unemployment claim is February 21, 2021, we consider only whether the claimant is eligible for benefits after that date.

The review examiner found that the claimant fell and injured his back on February 5, 2021, and that his physician provided him with documentation excusing him from work. Consolidated Finding # 3. As a result of this injury, the claimant requested and was approved for a leave of absence by his employer from February 5, 2021, through August 26, 2021. Consolidated Finding # 4. The claimant was medically cleared to work and returned to his job with the employer on August 27, 2021. Consolidated Finding # 9.

The review examiner also found that the claimant was cleared by his medical provider to return to work with certain restrictions, that he asked the employer to return to work performing tasks within the parameters of his doctor's orders¹, and that the employer would not allow the claimant to return to work until he was able to work without restrictions. Consolidated Finding # 6.

The claimant's circumstances are similar to those of the claimant in Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work). Here, the review examiner credited the claimant's testimony and evidence that he was willing and able to perform work within the parameters set by his doctors, and that his employer declined to offer him any light duty work until he was capable of performing his regular job without restrictions.

Since the record shows that the claimant was capable of working in some capacity, we reject the review examiner's conclusion that he was completely disqualified under G.L. c. 151A, §§ 29 and 1(r) on this basis. He was eligible for benefits during some of the time he was on his leave of absence. However, further analysis indicates he was not eligible for benefits for the entire period he was on leave.

One additional requirement for being in total unemployment is that the claimant may not receive any remuneration. G.L. c. 151A, §§ 29(a) and 1(r)(2). From the beginning of his leave of absence on or about February 5, 2021, and for four weeks thereafter (*i.e.*, through the week ending March 6, 2021), the review examiner found that the employer paid the claimant \$986.80 each week. Consolidated Finding # 10. As such, these payments constitute remuneration under G.L. c. 151A, § 1(r)(3), and, from February 7 through March 6, 2021, the claimant was not in total unemployment.

¹The limitations on the claimant's activities included lifting no more than ten pounds, avoiding picking up items from the floor, not pushing objects weighing more than ten pounds, bending over, and prolonged standing and walking. *See* Remand Exhibit # 6. These medical restrictions, while not explicitly incorporated into the review examiner's findings, 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).

Pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), the claimant could be eligible for partial unemployment benefits during any week in which he did not work full-time hours, was not refusing any hours, and earned less than his weekly benefit rate plus earnings disregard. Based upon the claimant's full-time, base period earnings, DUA's UI Online system shows that the claimant's weekly benefit rate was \$628.00, with an earnings disregard of \$209.33. Thus, the claimant could be eligible for partial unemployment benefits during any week in which he was unable to obtain full-time hours and earned less than \$837.33. If the claimant earned \$837.33 or more, he would not be in partial unemployment and he would not be eligible for any benefits. Since the claimant's weekly pay for the first four weeks of his leave of absence exceeded \$837.33, the claimant was also not in partial unemployment from the beginning of his claim through March 6, 2021.

The definition of total unemployment also requires that the claimant show that he was unable to obtain suitable work. Ordinarily, this means that a claimant has to be actively looking for work. However, in response to the COVID-19 public health emergency, and in accordance with the EUISSA and the U.S. Department of Labor (DOL) guidance, the DUA waived the work search requirement from March 8, 2020, through June 12, 2021. *See* DUA UI Policy and Performance Memorandum (UIPP) 2021.04 (Jun. 15, 2021), p. 1–2. Here, the review examiner found that the claimant did not search for work during his leave of absence. Consolidated Finding # 7. Thus, once the work search requirement was reinstated, the claimant no longer met the definition of being in total unemployment.

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), during a portion of his leave of absence.

The review examiner's decision is affirmed in part and reversed in part. The claimant is not entitled to benefits from the week beginning February 21, 2021, through March 6, 2021, or from the week beginning June 13, 2021, through August 28, 2021. The claimant is entitled to receive benefits during the period from March 7, 2021, through June 12, 2021, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 6, 2022



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JPCA/rh