While the claimant elected to be paid wages from her academic year position throughout the 12-month calendar year, DUA shall attribute these wages the weeks in which they were earned. When certifying for benefits, the claimant did not have to report wages paid to her during the summer of 2020 because they were earned during the academic year. Therefore, she did not fail to report material information on her weekly certifications during the summer. However, Board held that the claimant knew or should have known that she needed to report her earnings while working during the 2019-20 and 2020-21 academic years. She is at fault for the overpayments only during the periods that she was actually working for the employer.

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: 0066 9051 34

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to assess interest and penalties on overpaid 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 separated from employment and filed a claim for unemployment benefits with the DUA, effective May 17, 2020, which was approved. Subsequently, the DUA issued a Notice of Disqualification, concluding that the claimant was overpaid benefits in the total amount of $33,313.00 for the period between May 17, 2020, though January 2, 2021 (Issue ID # 0060 7288 77). The present case arises from a separate DUA determination, a Notice of Fault and Fraud Finding, issued on April 2, 2021, in which the agency imposed a one-time penalty assessment of 15% of the overpayment amount, a separate 12% interest penalty on any remaining balance of overpaid benefits, and a compensable week disqualification. The claimant appealed this determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's determination and upheld the assessment of interest and penalties in a decision rendered on October 13, 2022. We accepted the claimant's application for review.

The assessment of interest and penalties was based upon the review examiner's conclusion that the claimant's overpayment was due to fraud, and, thus, she was subject to such penalties pursuant to G.L. c. 151A, §§ 69(a) and (e). 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 reasonably should have known that she needed to report all wages earned, including those earned from the instant employer, on her weekly certification for benefits because the questions

on the certification form are clear and straightforward, 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 effective date of the claim is May 17, 2020.

2. The claimant's weekly benefit amount was $823.00, and her earnings disregard was $274.33.

3. Since 2009, the claimant has worked full-time at a high school (the first employer). She is the Director of the Special Education Department. In 2020, the claimant earned an annual salary of $99,333.70. Her gross weekly pay was $1,910.26.

4. In 2020, the school year ended on June 15, 2020 and began again on September 1, 2020.

5. In the spring of 2020, the claimant was assured of a position with her employer in the fall of 2020.

6. On June 15, 2020, the claimant received a lump sum payment covering her weekly pay between June 15, 2020 and September 1, 2020.

7. In 2014, the claimant began working on a seasonal basis for a local restaurant as a server (the second employer). The restaurant is typically open from April 1st until the week before Thanksgiving.

8. The first employer is the claimant's primary employer.

9. Due to the COVID-19 pandemic, the claimant could not work for the second employer due to the COVID-19 pandemic [sic].

10. The claimant filed for a claim for unemployment effective May 17, 2020 because she could not work for the second employer.

11. The claimant filed for unemployment benefits for all weeks between the week beginning May 17, 2020 through the week ending January 2, 2021.

12. For each week the claimant certified for unemployment benefits, she answered 'No' to the question 'did you work during the reporting period listed above?'

13. For each week the claimant certified for unemployment benefits, she answered 'No' to the question 'During the week listed above, did you receive or apply for income from any other sources that you have not previously reported to us?'

14. During all weeks claimed, the claimant was working full-time for the first employer.

15. The claimant physically worked full-time during the weeks from the week beginning May 17, 2020 through the week ending June 20, 2020 and from the week beginning August 30, 2020 through the week ending January 2, 2021. The claimant had reasonable assurance that she would resume her job on September 1, 2020.

16. For each week the claimant certified for unemployment benefits, she was receiving her wages from the first employer for full-time work amounting to $1,910.25 per week.

17. The claimant did not report her earnings or time worked for the first employer because she was applying for benefits due to the loss of her job with the second employer.

18. On April 2, 2021, the Department of Unemployment Assistant (the DUA) issued a Notice of Disqualification denying the claimant benefits [sic] Chapter 151A, Sections 29(a) and 1(r) from May 17, 2020 through January 2, 2021 because her earnings were in excess of her weekly benefit amount ($823.00) plus her earnings disregard ($274,33.00). On April 2, 2021, the DUA issued a Notice of Fault Finding disqualifying the claimant from receiving benefits under Chapter 151A Section 69(a) where the claimant received an overpayment of unemployment benefits because she gave information that she either knew, or reasonable should have known, was inaccurate; or because she could have given information, but did not, that she knew, or reasonably should have known. was inaccurate.

19. The claimant appealed the Notice of Fault Finding.

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 Finding of Fact # 14 as inconsistent with the evidence of 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 at fault for the overpayments received during the entire period between May 17, 2020, and January 2, 2021.

The review examiner issued her decision pursuant to the following provisions under G.L. c. 151A, § 69:

> (a) The department may recover . . . any amounts paid to an individual through error, . . . If any individual fails to pay when due any amount paid to said individual because of such individual's *failure knowingly to furnish accurate information concerning any material fact,* including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amounts shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.
>
> …
>
> (e) At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the individual's *misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material*, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment . . . .

(Emphasis added.)

The DUA regulations at 430 CMR 4.23, define the phrase "failure knowingly to furnish accurate information" in G.L. c. 151A, § 69(a), to mean that the overpayment resulted from a claimant's decision to furnish information which she knew, or should have known, to be incorrect, or a failure to furnish information which the claimant knew, or should have known, to be material to determining her eligibility for benefits. We, therefore, must assess both whether the claimant omitted or misrepresented material information on her weekly certifications and whether she knew or should have known that the information she failed to disclose was material to determining her eligibility for benefits.

One of the inquires material to determining the claimant's eligibility for benefits is whether she received remuneration for wage-earning services performed for any employer during the week or weeks in which she certified for benefits. Consistent with this requirement, the review examiner found the claimant at fault for the overpayment in question because she had failed to report the remuneration paid to her by the instant employer when certifying for benefits.

"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 6 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; . . .

> Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. If the length of the period to which the remuneration applies is not clearly identified, such period shall be determined by dividing such remuneration by the amount of the individual's average weekly wage.

Pursuant to the definition of remuneration articulated in G.L. c. 151A, § 1(r)(3), the DUA must apply any wages received by the claimant to the week or weeks in which it was earned, even if the employer disburses those wages to the claimant at a later date. For example, the DUA will attribute an award of back pay to the weeks in which the claimant actually performed the wage-earning services for which he received that award, even if the money was disbursed weeks after the employee actually performed those services. *See* Meyers v. Dir. of Division of Employment Security, 341 Mass. 79, 82 (1960). The same principle applies to the claimant's wages from her full-time position as the Director of the Special Education Department. *See* Board of Review Decision 0059 4161 70 (Jun. 28, 2022) (school employee was in unemployment during the summer even though he continued to be paid because his earnings were attributable to his academic-year work).

There is no dispute that the employer paid the claimant $1,910.25 per week for her work as the Director of the Special Education Department during each week between May 17, 2020, and January 2, 2021. Finding of Fact # 16. There is also no dispute that the claimant failed to report these wages when certifying for benefits. Findings of Fact ## 11–13. However, the claimant was not working full-time for the instant employer during the entire 33-week period on appeal. Because the claimant's position with the instant employer is an academic year position, she necessarily was not performing wage-earning services during the period beginning June 16, 2020, through August 31, 2020 (the summer of 2020). Finding of Fact # 15. Accordingly, while the claimant was receiving her normal weekly wages from the employer during the summer of 2020, the law requires that the DUA consider those wages as having been *earned* prior to June 16, 2020.

Applying this analysis, the record shows that the claimant did not have any remuneration to report when certifying for benefits during the summer of 2020. Consequently, the claimant's failure to report the wages paid to her during this period is not a failure to furnish information material to determining the claimant's eligibility for benefits. As the claimant did not omit material information about her earnings during the summer of 2020, the record does not support a conclusion that the claimant was at fault for the overpayment during the 11-week period between June 14, 2020, and August 29, 2020.

However, as the claimant was performing wage-earning services for the instant employer and receiving remuneration for such work during the periods between May 17, 2020, and June 15, 2020, and between September 1, 2020, and January 2, 2021, her earnings during these weeks are information material to her eligibility for benefits. As the claimant failed to report the remuneration she received during these weeks, the question before us is whether, at the time she submitted the incorrect information, she knew or reasonably should have known that she was providing inaccurate information. A person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and

circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

After assessing the claimant's testimony, the documentary evidence of record, and all other information material to the claimant's state of mind, the review examiner rejected the claimant's testimony that she failed to report these earnings because she misunderstood the substance of the questions on the certification form. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence. Accordingly, we accept the review examiner's legal conclusion that the claimant was at fault for the overpayment during the two periods in question as based on substantial and credible evidence.

We, therefore, conclude as a matter of law that the claimant did not fail to furnish material information to the DUA within the meaning of G.L. c. 151A, § 69(a), during the period between June 14, 2020, and August 29, 2020. We further conclude that the erroneous payments from the Unemployment Compensation Fund paid to the claimant during the period between May 17, 2020, and June 15, 2020, and the period between September 1, 2020, and January 2, 2021, were due to submissions or omissions, which the claimant knew or should have known were misrepresentations of material fact within the meaning of G.L. c. 151A, § 69(e).

The review examiner's decision is affirmed in part and reversed in part. The claimant remains obligated to return the overpaid benefits in the amount of $33,313.00. However, she is not required to pay interest on the $14,153.00 paid to the claimant during the period between June 14, 2020, and August 29, 2020. This amount is not subject to a 15% penalty, and the claimant is not subject to a compensable week disqualification during these weeks. The claimant shall be required to pay interest and a 15% penalty on the $19,160.00 paid to the claimant during the periods between May 17, 2020, and June 13, 2020, and September 1, 2020, and January 2, 2021.

N.B. The record indicates that the claimant was not receiving remuneration during the period between June 16, 2020, and August 31, 2020. For this reason, we are asking the agency to investigate the claimant's eligibility for benefits under the provisions of G.L. c. 151A, §§ 29 and 1(r), during this period.



BOSTON, MASSACHUSETTS
DATE OF DECISION - December 11, 2024

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.

LSW/rh