

While the employer expected the claimant to work a full-time schedule, there was insufficient suitable work available for the claimant to actually work a 40-hour week. Because he worked on commission, this lack of available work caused a substantial decrease in salary, meaning that he was in partial unemployment during any week he earned less than his weekly benefit amount plus earnings disregard for both his 2020-01 and 2021-01 claims. However, because there was no evidence that he was searching for work after the DUA lifted the temporary work search waiver, he was ineligible for benefits after that point.

**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 IDs: 0071 7653 26
0071 2064 01**

Introduction and Procedural History of this Appeal

The claimant appeals two decisions 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 two claims for unemployment benefits with the DUA, which were denied in two determinations issued on August 3, 2021, and August 21, 2021. The claimant appealed both determinations to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determinations in Issue ID # 0071 7635 26 and Issue ID # 0071 20264 01 and denied benefits in two decisions rendered on February 16, 2022.¹ We accepted the claimant's application for review of both decisions.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during either period on appeal and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with both decisions. Only the employer responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decisions, which concluded that the claimant was not in unemployment where the employer expected him to continue working a full-time schedule even though business had slowed substantially due to the COVID-19 pandemic, are supported by substantial and credible evidence and are free from error of law.

Findings of Fact

¹ Issue ID # 0071 7635 26 pertains to the claimant's eligibility for benefits under his 2020-01 claim. Issue ID # 0071 2064 01 pertains to the claimant's eligibility for benefits under his 2021-01 claim. As both issues were heard at the same time, have the same operative facts, and are governed by the same section of law, our decision shall address the claimant's eligibility for benefits under both his 2020-01 and 2021-01 claims.

The review examiner's findings of fact in Issue ID # 0071 2064 01 and Issue ID # 0071 7635 26 are set forth below in their entirety:

1. The claimant began working for the employer as a full-time, Internet Sales Manager in December 2007 [and] remains still employed.
2. The claimant is paid on a straight commission basis with an expected schedule of 40 hours a week 8 a.m. to 5 p.m. Monday through Friday. The claimant would work flexible hours when needed to communicate with client [sic] in different time zones.
3. In March 2020, [orders] for the employer slowed due to COVID-19.
4. The claimant and other sales staff where informed to work remotely from home during the pandemic. The claimant and employees were told they were expected to work their regular schedule.
5. The claimant filed an unemployment insurance claim with an effective date of 4/5/2020 and a subsequent unemployment insurance claim with an effective date of 4/11/2021.
6. The claimant reduced his working hours to 8 to 20 hours a week since clients were not placing orders.
7. The employer was not aware that the claimant reduced his hours.
8. The employer assumed that the claimant was working 40 hours a week as expected.
9. The employer has not reduced the claimant's schedule.
10. The claimant continues to work 8 to 20 hours a week currently.
11. The employer assumes that the claimant continues to currently work 40 hours a week remotely.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's 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 was not in unemployment during both periods 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. . . .

The review examiner denied the claimant benefits on the grounds that he was not working a full-time 40-hour work schedule in accordance with the employer’s expectations. Findings of Fact ## 6 and 8. On the record before us, we do not believe the review examiner’s analysis is consistent with the language in or the intent of G.L. c. 151A, § 1(r).

Any employer may expect its employees to work a full-time schedule, but that expectation alone is insufficient to show that there was enough suitable work available for a claimant to work full-time hours in any given week. Such a singular reliance on an employer’s expectations could, in some cases, result in an inequitable application of the law based solely on a claimant’s remuneration structure. Because of this concern, the statutory language of G.L. c. 151A, § 1(r), requires us to consider the actual availability of suitable work and the actual amount of remuneration received by a claimant who works solely on commission.

Despite the claimant’s efforts to generate new business during both periods on appeal, there was no dispute that the COVID-19 public health emergency caused a substantial decrease in available work. Findings of Fact ## 3 and 6. As the claimant was paid solely on commission, this decrease in work necessarily caused the claimant to experience a corresponding decrease in salary. *See* Finding of Fact # 2. Both the decrease in available work and the claimant’s corresponding loss of income were a result of factors outside of the claimant’s control and unrelated to the employer’s expectations surrounding the claimant’s work schedule. We, therefore, believe the record in both cases before the Board is sufficient to show that the claimant was in partial unemployment within the meaning of the law during any week in which he worked fewer than 40 hours and earned less than his weekly benefit amount.

While the operative facts in Issue ID # 0071 2064 01 and Issue ID # 0071 7653 26 are consistent, each pertains to a different claim for benefits. Issue ID # 0071 2064 01 relates to the claimant’s 2020-01 claim, which ran from April 5, 2020, to April 3, 2021. His weekly benefit amount for this claim was determined to be \$357. Therefore, the claimant was in partial unemployment under his 2020-01 claim during any week in which he earned less than \$476 (\$357 + \$119 in earnings disregarded). The claimant’s paycheck history, which was admitted into evidence as Exhibit 11,

shows that he did not earn more than \$476 during any week in which he claimed benefits during the period between April 5, 2020, to April 3, 2021.² Therefore, the claimant was in partial unemployment during this period.

Issue ID # 0071 7653 26 pertains to the claimant's 2021-01 claim for benefits, which ran from April 11, 2021, to April 9, 2022. His weekly benefit amount for this claim was determined to be \$125. Accordingly, the claimant was in partial unemployment under this claim during any week in which he earned less than \$167 (\$125 + \$67 in earnings disregarded). While Exhibit 11 only contains information about the claimant's salary through the pay period ending August 6, 2021, the record contains sufficient information for us to adjudicate the claimant's eligibility for benefits throughout the duration of his 2021-01 claim. The evidence provided confirms that the claimant earned gross wages of less than \$167 during the period between April 11, 2021, and May 13, 2021. As such, we conclude that he was in partial unemployment within the meaning of the law during those weeks. Because his weekly earnings exceeded \$167 between May 14, 2021, and June 25, 2021, he cannot have been in total or partial unemployment during that period and is, therefore, not eligible for benefits during this time.

While the record shows that the claimant's earnings once again dipped below the \$167 threshold beginning June 26, 2021, there is no indication from the record that the claimant was searching for work during the pendency of his 2021-01 claim. In response to the COVID-19 public health emergency, the DUA waived the work search requirement from March 8, 2020, through June 15, 2021. Thus, claimants were required to actively search for work starting the week beginning June 13, 2021.³ For this reason, the claimant was not in unemployment within the meaning of G.L. c. 151A, § 29, after that date regardless of his gross weekly earnings.

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r) in any week during which he earned less than his weekly benefit amount plus earnings disregard for his 2020-01 claim, and in any week in which he earned less than his weekly benefit amount plus earnings disregard during his 2021-01 claim through June 12, 2021.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week of April 5, 2020, through April 3, 2021. He is further entitled to benefits for the week beginning April 11, 2021, through May 15, 2021. The claimant is not entitled to benefits during the week beginning May 16, 2021, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 28, 2022

² Exhibit 11, while not explicitly incorporated into the review examiner's Findings of Fact, is part of the unchallenged evidence introduced at the hearing and placed in the record and is 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).

³ *See* UI Policy & Performance Interoffice Memorandum (UIPP) 2021.04 (Jun. 15, 2021), p. 1-2.



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.

LSW/rh