The claimant declined suitable work in order to prevent the part-time wages from affecting the amount of his unemployment benefits. Held he was not in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2), during those weeks, and he was not entitled to any benefits. A constructive deduction was not appropriate, because he had not separated from the part-time employer. During another week when he worked some hours, he was in partial unemployment pursuant to G.L. c. 151A, § 1(r)(1), but subject to a lost time charge, because he declined additional hours of suitable work.

Board of Review
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Issue ID: 0074 1862 27

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 November 28, 2021, which was approved in a determination issued on December 23, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and awarded benefits subject to a constructive deduction in a decision rendered on August 27, 2022. We accepted the employer's application for review.

The review examiner determined that the claimant was not in total or partial unemployment under G.L. c. 151A § 29(a), (b) and § 1(r). Although disqualified, the review examiner merely imposed a constructive deduction of the claimant's weekly benefit amount. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in total or partial unemployment but was subject to a constructive deduction 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 began working on call for the instant employer, a parking garage facility management company in 2013. As of August 24, 2022, (the hearing date), the claimant was still employed by the employer.

2. The claimant's supervisors were the managers.

3. During the claimant's employment with the instant employer, the claimant worked full-time for a different employer (the Primary Employer). In approximately December 2021, the claimant was laid off by the Primary Employer.

4. During the claimant's base period from October 1, 2020, through September 30, 2021, the claimant earned $81,749.50 from the Primary Employer, $4,010.24 from a different subsidiary employer, and $216.00 from the instant employer.

5. During the week beginning December 5, 2021, the claimant worked 16 hours for the instant employer and was paid $216. The claimant was offered additional hours but refused.

6. During the weeks beginning December 12, 2021, through December 26, 2021, the claimant did not work any hours for the instant employer. The claimant was offered hours but refused.

7. The claimant refused hours with the instant employer because he did not want to reduce his unemployment benefits.

8. The claimant filed a claim for unemployment benefits with an effective date of November 28, 2021.

9. The claimant's weekly benefit amount was determined to be $974.00, with a $324.67 earnings disregard.

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.

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. For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.
>
> (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. . . .

Pursuant to these provisions, 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.

For the week beginning December 5, 2021, the claimant performed 16 hours of work and was paid $216. He refused an additional 12 hours of work, with an hourly rate of pay of $14.25, because he did not want his wages to affect his unemployment benefits. *See* Finding of Fact # 5.[1] The review examiner concluded that the claimant was not in total or partial unemployment during this week. We disagree. During the week beginning December 5, 2021, the claimant performed less than a full weekly schedule of work and earned $216, which was less than his weekly benefit amount of $974.00. *See* Findings of Fact ## 5 and 9. This means that the claimant was in partial unemployment pursuant to G.L. c. 151A, §1(r)(1). However, he is subject to a lost time charge because he refused additional hours for reasons other than failure of his employer to furnish a full-time weekly schedule of work.

The pertinent DUA regulation at 430 CMR 4.04(6) states:

> The cash value of time lost for reasons other than failure to furnish full-time work shall be determined by multiplying the average hourly earnings for the week by the number of hours lost. If it is not possible to ascertain the average hourly earnings for the week of such "lost time", such lost earnings shall be computed at four percent of the benefit rate for each hour lost.

Pursuant to this regulation, the lost time charge for the week beginning December 5, 2021, is $171.00 (his hourly rate of pay, $14.25, multiplied by hours refused, 12).

For the weeks beginning December 12, 2021, December 19, 2021, and December 26, 2021, the claimant performed no work at all. Finding of Fact # 6. We consider whether he was in total unemployment. The review examiner found that he turned down offered hours of work because he did not want the wages from his part-time employment to affect the amount of unemployment benefits that he received. *See* Findings of Fact ## 6 and 7. The offered work is presumed to be suitable, as it was his usual job. It does not become unsuitable merely because the wages might reduce his weekly unemployment benefits. Because he turned down suitable work during these

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

three weeks, the claimant was not in total unemployment under G.L. c. 151A § 1(r), and he was ineligible for any unemployment benefits.

The next issue to address is whether the claimant's weekly benefit amount is subject to a constructive deduction. The DUA regulation at 430 CMR 4.76(1) provides that a constructive deduction is imposed on a claimant's weekly benefit amount when he *separates from part-time work* for any disqualifying reason under G.L. c. 151A § 25(e). In this case, the claimant did not separate. He was still employed by the employer as of the date of the hearing. Finding of Fact # 1. For this reason, we reject the review examiner's conclusion that the claimant was subject to a constructive deduction.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment for the week beginning December 5, 2021, subject to a lost time charge pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), and 430 CMR 4.04(6). We further conclude that the claimant was not in total unemployment for the weeks beginning December 12, 2021, December 19, 2021, and December 26, 2021, pursuant to G.L. c. 151A § 29(a) and 1(r)(2).

The review examiner's decision is affirmed in part and reversed in part. The claimant is eligible for benefits for the week beginning December 5, 2021, subject to a lost time charge of $171.00, if otherwise eligible. The claimant is ineligible for benefits for the weeks beginning December 12, 2021, December 19, 2021, and December 26, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 26, 2023

Paul T. Fitzgerald, Esq.
Chairman

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.

MR/rh