

The claimant, sole owner of the employer, was not available for work through May 6, 2023, because he continued to perform substantial work in self-employment. Held he remained ineligible when the employer transferred the claimant's duties to an independent contractor beginning May 7, 2023. Even though the transfer of work meant the claimant was no longer performing any work in self-employment, he chose to hire the independent contractor and transfer all of his work to that contractor. Thus, he created his own unemployment and was ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
100 Cambridge Street, Suite 400
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: 0079 2599 83

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 31, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 5, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment beginning February 5, 2023, 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 remanded the case to the review examiner to obtain additional information about the claimant's availability for work. 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not available for full-time work, and therefore not in unemployment because he continued to perform work for the instant employer while certifying for benefits, 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 and credibility assessment are set forth below in their entirety:

1. The claimant is the sole owner of an IT Service company. He owns the business as an LLC and it is taxed as an S-Corp. He began the business in 2015.
2. The claimant's business used a Form 1120-S for its 2022 federal income tax filing. Its ordinary business income was reported as a loss of \$99,860 on line 21.
3. The claimant paid himself \$80,000 in 2022.
4. The claimant's business experienced loss of revenue during the pandemic and after pandemic associated loan assistance ceased, so the claimant stopped paying himself as of the end of December 2022 so he could meet payroll.
5. The claimant continues to receive a weekly check with net pay of \$0 after \$90 per week deductions for life and disability insurance.
6. From 1/1/23 through 5/7/23, the claimant continued to do the same tasks he always did for his company such as looking for new clients, marketing, and other day-to-day operational duties.
7. On 5/7/23, the claimant hired an independent contractor to perform those tasks at the rate of \$16 per hour on an as needed basis.
8. The claimant has not performed any tasks for his business since hiring the part-time independent contractor on 5/7/23.
9. The claimant expects to have to be off the payroll for only a short time and has no plans to close his business.
10. The claimant filed a claim on 2/11/23 and it is effective 2/4/23.
11. Since 2/4/23, the claimant has looked for work on average about twelve times per week. He typically looks for work online using common job search sites. He searches for jobs in the management field.
12. From 2/4/23 until 5/7/23, the claimant looked for work and contracts for his business and for himself as a separate employee. Beginning 5/7/23, the claimant has solely searched for work for himself as he hired an independent contractor to search for work for his business at that time.
13. The claimant has applied for approximately 75 different full-time positions since he filed his unemployment claim.

Credibility Assessment:

The claimant's testimony was credible as he provided straight-forward, consistent and rational responses to all questions asked. His testimony is supported by the documentation he provided for the record.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, while we agree with the review examiner's conclusion that the claimant is not entitled to benefits, we reached such a conclusion on different grounds for a portion of the relevant period.

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

(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.

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. Relevant to this case, a claimant who is performing work for his own business is not considered to be available for other paid full-time work if he is devoting a major portion of his time to his own business. *Compare* Board of Review Decision 0018 1355 49 (Aug. 2, 2016) (because the claimant devoted a minor portion of her time to self-employment, limited to weekends and evenings, it did not interfere with her availability for other, full-time work). This principle is true regardless of whether the claimant is being paid for the work he performs in self-employment.

Prior to filing for benefits, the claimant worked full-time for the instant employer.¹ While he chose to stop drawing a salary beginning in January, 2023, the claimant continued to perform his same

¹ The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed into the record, and it 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).

duties for the employer in the same or similar capacity through May 6, 2023. Consolidated Findings ## 3–6. We, therefore, agree with the review examiner’s conclusion that the claimant was not available for work as required under G.L. c. 151A, §§ 29 and 1(r), through that date because he was spending a major portion of his time working in self-employment.

Beginning May 7, 2023, however, the employer reassigned all the claimant’s duties to a newly retained independent contractor. Consolidated Findings ## 7 and 8. Because of this change, the employer no longer had work available for the claimant, the claimant was not receiving any remuneration, and was regularly searching for full-time work outside of his own business. Consolidated Findings ## 4, 8, and 11. While the consolidated findings suggest that the claimant met the definition of total unemployment articulated in G.L. c. 151A, § 1(r)(2), beginning the week of May 7, 2023, we remain unconvinced that he is entitled to benefits.

The purpose of the unemployment statute is to provide temporary relief to persons who are out of work and unable to secure work through no fault of their own. Connolly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24 (2011) (further citations omitted). Consistent with the legislative purpose of G.L. c. 151A, in cases where an owner or part-owner of a company argues that he is in unemployment, the Massachusetts Supreme Judicial Court has instructed the agency to closely scrutinize whether the claimant’s unemployment was compelled by circumstances affecting the business, or whether the claimant voluntarily put himself in a state of unemployment. See Jahn v. Dir. of Division of Employment Security, 397 Mass. 61 (1986). Applying this decision, the Board has denied benefits because the claimant owned a controlling share of his employer, and, therefore, “had complete information and control over the” decisions that resulted in the “termination of his employment.” Board of Review Decision BR-117413-CTRM (Aug. 25, 2011). The same analysis is applicable to the specific facts of this case.

The review examiner issued her decision denying the claimant benefits on May 5, 2023. Two days later, the employer retained the services of an independent contractor and reassigned all the claimant’s duties to that contractor. Consolidated Findings ## 7 and 8. Had the claimant not chosen to retain an independent contractor and reassign all his duties to that individual, he likely would have remained unavailable for work, as he would have continued performing substantial work in self-employment. *See* Consolidated Findings ## 6–8.

As sole owner of the instant employer, the claimant had full direction and control of its business operations, including the decision to retain the services of an independent contractor and assign work to that contractor. *See* Consolidated Findings ## 1, 3–5, 7, and 8. Therefore, we believe that it is self-evident that the claimant made the decisions that resulted in his unemployment beginning the week of May 7, 2023.

Further, nothing in the record indicates that the claimant was compelled by financial circumstances to make the changes that caused his unemployment. *C.f.* Board of Review Decision 0015 9635 27 (Dec. 24, 2015) (claimant owner of the employer’s corporation was in unemployment through no fault of her own when she chose to cease operating her business, because the corporation was losing money, had large outstanding debts, could not secure further financing, and had little chance of becoming profitable). While the employer in this case had experienced a loss of revenue in 2022, the claimant testified that he expected that short-term loss would not have any long-term impact on his business operations. Consolidated Findings ## 2 and 9. The employer retained all

its staff, and the claimant conceded that he anticipated being able to resume paying himself shortly. Consolidated Findings ## 4 and 7. Absent other evidence indicating that the employer was in dire financial circumstances, the record does not support a conclusion that claimant was compelled by pressing financial circumstances to put himself in unemployment.

We understand that the claimant's choice to retain an independent contractor may have been a reasonable business decision. However, the issue is not whether the claimant's business and personal financial decisions were reasonable or logical, but whether the Legislature intended that unemployment benefits should be denied under the circumstances.

Upon review of the record in its entirety, we believe that a reasonable mind would not accept the conclusion that the claimant was involuntarily unemployed. To the contrary, the sequence of events shows that the claimant voluntarily put himself in a state of unemployment by electing to have his business retain an independent contractor to assume his job responsibilities. As the claimant "[had] created his own unemployment", awarding him benefits would be contrary to the purpose of the unemployment statute. Jahn, 397 Mass at 63.

We, therefore, conclude as a matter of the law that the claimant was not in total or partial unemployment under G.L. c. 151A, §§ 29 and 1(r), between February 5, 2023, the effective date of his claim, and May 6, 2023, because he was not available for work. We further conclude that the claimant is not entitled to benefits beginning the week of May 7, 2023, because he created his own unemployment.

The review examiner's decision is affirmed. The claimant is denied benefits for the week of February 5, 2023, and for subsequent weeks, until such time as he meets the requirements of the law.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 2024



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.

LSW/rh