

The claimant is an on-call employee who works less than a full-time schedule and whose hours varied from week to week. Because he receives a daily retention bonus exchange for remaining available to work, he is performing wage earning services each week. Therefore, pursuant to the holding in Mattapoisett, the claimant is not in unemployment under G.L. c. 151A, §§ 29 and 1(r) even in weeks where the employer does not offer him any hours.

**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: 0082 8829 85
 0083 7543 56
 0083 8811 57
 0084 2057 50
 0084 2058 29
 0084 2058 67**

Introduction and Procedural History of this Appeal

The claimant appeals six decisions by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits for all but six weeks during the period between December 3, 2023, and September 14, 2024. 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 December 3, 2023. The DUA denied the claimant benefits beginning December 3, 2023, in three determinations issued on November 6, 2024, and three determinations issued on November 15, 2024. The claimant appealed these determinations to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner modified the agency's initial determination, awarding the claimant benefits only for six weeks during the period between December 3, 2023, and September 14, 2024, in six decisions rendered on January 16, 2025. We accepted the claimant's application for review in each of these decisions.¹

Benefits were awarded between December 17, 2023, and January 13, 2024, and for the weeks of April 28, 2024, and May 19, 2024, after the review examiner determined that the claimant was in total unemployment during those weeks, and, thus, was not disqualified under G.L. c. 151A, §§ 29(b) and 1(r). She further concluded the claimant was not in total unemployment during the remainder of the weeks between December 3, 2023, and September 14, 2024, and, therefore, was

¹ Each of these decisions addresses whether the claimant was in total or partial unemployment. Issue ID # 0082 8829 86 pertains to the week beginning December 3, 2023. Issue ID # 0084 2057 50 pertains to the week beginning January 21, 2024. Issue ID # 0084 2058 29 pertains the week beginning April 14, 2024. Issue ID # 0084 2058 67 pertains to the week beginning April 28, 2024. Issue ID # 0083 7543 56 pertains to the week beginning September 8, 2024. Issue ID # 0083 8811 57 pertains to the week beginning September 8, 2024. As all six issues were heard at the same time, pertain to the same material facts, and are governed by the same sections of law, we have consolidated the appeals into one decision, which addresses the claimant's eligibility during the entire period.

disqualified under G.L. c. 151A, §§ 29(b) and 1(r). 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 decisions, which concluded that the claimant, as an on-call employee, was only entitled to unemployment benefits during the six weeks in which he did not work and was not offered any suitable work, are supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact in Issue ID # 0084 2057 50, Issue ID # 0084 2058 29, Issue ID # 0084 2058 67, and Issue ID # 0084 2895 91 are set forth below in their entirety:

1. The claimant started working as a Hazardous Materials Tanker Driver for the employer, a gas company, on 12/8/22.
2. The claimant is a union member.
3. The claimant is 17 out of 21 on the seniority list for his job title.
4. The employer offers Hazardous Materials Tanker Drivers work based on seniority.
5. The claimant is not guaranteed a specific number of hours of work each week.
6. The claimant is paid a \$150 per day retention bonus on days he is not offered work. He must remain in good standing and maintain good attendance to receive the retention bonus.
7. The claimant filed an unemployment insurance claim and obtained an effective date of his claim of 12/3/23. The benefit year end date of the claim is 11/30/24.
8. The weekly benefit rate for the above claim is \$639. The weekly earnings exclusion is \$213. The benefit rate plus earnings exclusion is \$852.
9. The employer did not offer the claimant work during the following weeks: 12/17/23 to 12/23/23; 12/24/23 to 12/30/23; 12/31/23 to 1/6/24; 1/7/24 to 1/13/24; 4/28/24 to 5/4/24; and 5/19/24 to 5/25/24.
10. The claimant was capable of working and available to work full-time for this employer during the weeks beginning 12/17/23 to 12/23/23; 12/24/23 to 12/30/23; 12/31/23 to 1/6/24; 1/7/24 to 1/13/24; 4/28/24 to 5/4/24; and 5/19/24 to 5/25/24.

11. The claimant worked 12/3/23 to 12/9/23; 12/10/23 to 12/16/23; 1/21/24 to 1/27/24; 1/28/24 to 2/3/24; 2/4/24 to 2/10/24; 4/14/24 to 4/20/24; 5/5/24 to 5/11/24; [and] 9/8/24 to 9/14/24.
12. The claimant worked all the hours offered to him by the employer for the weeks beginning 12/3/23 to 12/9/23; 12/10/23 to 12/16/23; 1/21/24 to 1/27/24; 1/28/24 to 2/3/24; 2/4/24 to 2/10/24; 4/14/24 to 4/20/24; 5/5/24 to 5/11/24; and 9/8/24 to 9/14/24.

The review examiner's findings of fact in Issue ID # 0083 7543 56 and Issue ID # 0083 8811 57 are set forth below in their entirety:

1. The claimant started working as a Hazardous Materials Tanker Driver for the employer, a gas company, on 12/8/22.
2. The claimant is a union member. He is 17 out of 21 on the seniority list for his job title.
3. The employer offers Hazardous Materials Tanker Drivers work based on seniority.
4. The claimant is not guaranteed a specific number of hours of work each week.
5. The claimant is paid a \$150 per day retention bonus on days he is not offered work. He must remain in good standing and maintain good attendance to receive the retention bonus.
6. The claimant filed an unemployment insurance claim and obtained an effective date of his claim of 12/3/23. The benefit year end date of the claim is 11/30/24.
7. The weekly benefit rate for the above claim is \$639. The weekly earnings exclusion is \$213. The benefit rate plus earnings exclusion is \$852.
8. The employer did not offer the claimant work during the following weeks: 12/17/23 to 12/23/23; 12/24/23 to 12/30/23; 12/31/23 to 1/6/24; 1/7/24 to 1/13/24; 4/28/24 to 5/4/24; and 5/19/24 to 5/25/24.
9. The claimant was capable of working and available to work full-time for this employer during the weeks beginning 12/17/23 to 12/23/23; 12/24/23 to 12/30/23; 12/31/23 to 1/6/24; 1/7/24 to 1/13/24; 4/28/24 to 5/4/24; and 5/19/24 to 5/25/24.
10. The claimant worked 12/3/23 to 12/9/23; 12/10/23 to 12/16/23; 1/21/24 to 1/27/24; 1/28/24 to 2/3/24; 2/4/24 to 2/10/24; 4/14/24 to 4/20/24; 5/5/24 to 5/11/24; [and] 9/8/24 to 9/14/24.

11. The claimant worked 8.75 hours at his regular rate of pay, including a .75 hour paid break and 1 hour at his overtime rate of pay. His gross earnings for that week were \$324.06.
12. The claimant worked all the hours offered to him by the employer for the weeks beginning 12/3/23 to 12/9/23; 12/10/23 to 12/16/23; 1/21/24 to 1/27/24; 1/28/24 to 2/3/24; 2/4/24 to 2/10/24; 4/14/24 to 4/20/24; 5/5/24 to 5/11/24; and 9/8/24 to 9/14/24.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decisions 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. There appears to be a typographical error in Finding of Fact # 11 of Issue ID # 0083 7543 56 and Issue ID # 0083 8811 57. Consistent with the uncontested evidence in the record, we believe the review examiner intended to find that the claimant worked 8.75 hours during the week of September 8, 2024. 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 entitled to benefits.

G.L. c. 151A, § 29, authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." Total unemployment is defined at G.L. c. 151A, § 1(r)(2), and provides, in relevant part, as follows:

"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.

Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), and provides, in relevant part, as follows:

"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....

The review examiner denied the claimant benefits during each week that he performed work for the instant employer, because she concluded that the claimant worked as an on-call employee. As the claimant is not guaranteed work each week and works variable hours based on his employer's needs, we agree that the claimant is an on-call employee. Finding of Fact # 5.

Because the claimant continues to work on call for the instant employer during his benefit year, we must consider the Supreme Judicial Court's (SJC) holding in Town of Mattapoisett v. Dir. of

Division of Employment Security, 392 Mass. 546 (1984). In Mattapoisett, the claimant was hired to be a part-time police officer. He worked on-call, whenever he was needed, under the terms of his employment contract. Some weeks he worked, and other weeks he did not work at all. The Court held that the claimant was not in partial unemployment in the benefit year, because “[t]o characterize [the claimant] who agreed to be part-time and on-call as ‘partially employed’ when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term.” Id. at 549. It further held that “the Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee.” Id.

Pursuant to the court’s holding in Mattapoisett, the claimant is not in partial unemployment during any week that he works or is offered suitable work. *See e.g.*, Board of Review Decision 0059 9186 48 (Jan. 5, 2022). Accordingly, the review examiner properly denied the claimant benefits in each week that he performed work as a Hazardous Materials Tanker Driver (tanker driver) for the instant employer. *See* Findings of Fact ## 10 and 12. Given the particular facts of this case, however, we believe that she erred in awarding the claimant benefits during the weeks that the employer did not offer the claimant work as a tanker driver. *See* Finding of Fact # 9.

Here, the claimant’s employment agreement requires that he remain capable of and available to work as a tanker driver on an ongoing basis. *See* Finding of Fact # 5. In rendering himself so available, we can reasonably infer that the claimant is refraining from engaging in activities that he would otherwise be free to do during his time off. By taking such steps, the claimant is providing the employer with a service. In exchange for this service, the employer pays the claimant a \$150 retention bonus. Findings of Fact ## 3–5. Therefore, the claimant’s daily retention bonus is remuneration within the meaning of G.L. c. 151A, § 1(r)(3), which defines “remuneration” as “any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses . . . received by an individual (1) from his employing unit for services rendered to such employing unit. . . .”

Because the claimant performs a service for his employer each day that he is available to work as a tanker driver and he is paid remuneration for this service, he is not in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2). Pursuant to the SJC’s holding in Mattapoisett, the claimant also is not in partial unemployment within the meaning of G.L. c. 151A, § 1(r)(1), because he is an on-call employee.

We, therefore, conclude as a matter of law that the claimant is not entitled to benefits beginning the week of December 3, 2023, because he was not in total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).

The review examiner’s decision is affirmed in part and reversed in part. The claimant is denied benefits for the week of December 3, 2024, and for subsequent weeks, until such time as he meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 7, 2025



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