

**While the claimant performed as a comedian in multiple states, she presented evidence showing she had performances scheduled in Massachusetts that were canceled as a result of the COVID-19 pandemic. She was therefore eligible to receive PUA benefits in Massachusetts.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> 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: N6-FJV7-7KMR**

### 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 Pandemic Unemployment Assistance (PUA) benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for PUA benefits with the DUA, effective March 15, 2020, which was denied in a determination issued on November 18, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied PUA benefits in a decision rendered on January 22, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to show that she was working in Massachusetts when her work was impacted by the COVID-19 pandemic. 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 work activities in 2020. The claimant attended the remand hearing. Thereafter, the review examiner issued his 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 eligible for benefits because she failed to show that she was working in Massachusetts when her work was impacted by the COVID-19 public health emergency, 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 filed a claim for Pandemic Unemployment Assistance (PUA) effective March 15, 2020.

2. The claimant is a self-employed comedian who worked mostly in Massachusetts during 2019.
3. The claimant and her husband, as a career move for her, made a permanent move from Massachusetts to California to seek better opportunities for her comedy career. The claimant has no specifics or evidence of this move or her life in California.
4. The claimant has a lengthy tax summary for 2019. The document contains hundreds of specific details on business expenses and business mileage through September 2019. There are very few entries for October, November, and December 2019.
5. The claimant has been able and available for full-time work throughout her claim.

#### Credibility Assessment:

The claimant testified at the remand hearing that she traveled a lot for work, and travel is imperative for her to earn money in comedy. This statement is supported by the extensive and very detailed business mileage records in the claimants 2019 tax summary. The claimant's move to California was for business purposes; she testified that it was a career move. This statement is supported by later testimony that her husband did not have work lined up in California when they left Massachusetts.

The claimant has an impressive record of business mileage and expenses for much of 2019. The claimant's mileage list has more than 200 entries totaling 10,183.21 miles. The list includes travel distances as short as 0.66 miles, 0.31 miles, and 0.28 miles. Each entry has a date, and the vast majority of entries have specific addresses for the start and end locations. Start and end times are measured to the second, and distances are measured in 100ths of a mile. The claimant also has a 2019 business expense list with more than 200 entries totaling \$8,208.67. The list includes expenses as small as \$4.48 for gas, \$2.50 ATM fees, and \$2 for food. Each entry is assigned a category, a 1040 Schedule C category, a merchant, and a date.

After recording several hundred mileage and expense entries during the first nine months of the year, the claimant has almost no entries during the final three months of 2019. The claimant's last business mileage record is for October 3, 2019. The claimant's records show only seven business expenses after October 3, 2019, and each entry is for either promotional materials or her website.

The claimant testified at the remand hearing that she and her husband moved to California sometime in February, 2020, but she does not know the dates when she left Massachusetts or arrived in California. The claimant has no evidence of her move to, or life in, California, and she explained this as a result of the trip and living expenses having been paid for in cash. It is not credible that someone who kept

such meticulous records of business expenses and mileage from January through September 2019 to [sic] have such little information for the last part of 2019, and no records at all of business or life in 2020.

Because the claimant does not know the dates or have any evidence whatsoever of a multiple day business move from Massachusetts to California, it cannot be determined when the claimant moved to California. The claimant's extensive written evidence which essentially ends in October 2019, when considered with vagueness and uncertainty in the claimant's testimony, suggests that she moved to California in October 2019 — not in February 2020, and was living (and possibly attempting to work) in California at the time the pandemic began. Therefore, no findings of fact were made that the claimant moved to California at, or just before, the start of the COVID-19 pandemic.

The claimant submitted images of her own digital calendar, very brief text exchanges, and images from her own website as evidence that she had work scheduled in Massachusetts in April 2020. Even taken together with the claimant's testimony, this information is not substantial; it can all be created on a phone in moments. Within the totality of the evidence — including uncertain testimony, a lack of business and life records for all of 2020, almost no business records for the last three months of 2019, and hundreds of entries for January through September 2019 — these records do not credibly show that the claimant had work scheduled in Massachusetts in April 2020.

Therefore, the claimant's testimony that she had work lined up for 2020 in Massachusetts is not credible, and no findings of fact were made that she had such work.

### 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the statements in Consolidated Finding # 3 and the credibility assessment, which state that the claimant had no evidence. The claimant provided sworn testimony as well as multiple pieces of documentary evidence, even if the review examiner did not find them to be credible. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is not eligible for PUA benefits.

The claimant in this case seeks PUA benefits, a new unemployment benefit program provided under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor.<sup>1</sup> In order to qualify for PUA benefits, the claimant must show that she is a covered individual within the meaning of the CARES Act. An eligible COVID-19 listed reason under the CARES Act at

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<sup>1</sup> Pub. L. 116-136 (Mar. 27, 2020), § 2102.

§ 2102(a)(3)(A)(ii)(I)(gg), is that an individual will be eligible for PUA benefits if they were “scheduled to commence employment and [did] not have a job or [were] unable to reach the job as a direct result of the COVID-19 public health emergency.”

The claimant is a self-employed stand-up comedian who performs at venues in multiple states. *See Consolidated Findings ## 2 and 3.* Considering the state and federal response to the COVID-19 public health emergency, as well as the nature of the claimant’s work to perform in front of live audiences, we can reasonably infer that she would have been unable to engage in any work in Massachusetts when she filed her PUA claim in March, 2020, assuming such work was available.<sup>2</sup> However, a claimant is not eligible for PUA benefits solely on the grounds that they would, theoretically, be unable to work in Massachusetts.

Pursuant to the provisions of the CARES Act, the U.S. Department of Labor (DOL) has issued guidance about qualifying for PUA benefits. Its Unemployment Insurance Program Letter (UIPL) 16-20, Change 1 (Apr. 27, 2020) explains that a claimant “must file [for PUA benefits] with the state where he or she was working at the time of becoming unemployed” and “[i]f an individual worked in more than one state at this time, the individual may file in any of those states.”<sup>3</sup> Therefore, the sole determinative issue in this case is whether the claimant had performances scheduled in Massachusetts that were postponed or canceled as a result of the COVID-19 pandemic.

During both hearings, the claimant consistently testified that she had booked multiple performances in Massachusetts which were later canceled when the venues were shut down as a result of the COVID-19 pandemic. Assuming the claimant’s testimony was the extent of the evidence presented, it would not be unreasonable for the review examiner to conclude that such testimony, by itself, was not substantial evidence. *See McDonald v. Dir. of Division of Employment Security*, 396 Mass. 468, 470 (1986). (a review examiner is not required to believe self-serving, unsupported, evidence, even if it is uncontroverted by other evidence). But in this case, the record includes more.

On remand, the claimant submitted a variety of documents, admitted into evidence as Remand Exhibits 7–14, showing that she was scheduled to perform at multiple venues in Massachusetts in April, 2020, but was unable to do so as a result of the COVID-19 pandemic.<sup>4</sup> The review examiner rejected these documents as not credible. 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). “The test is whether the finding is supported by “substantial evidence.” *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). “Substantial evidence is ‘such evidence as a reasonable mind might

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<sup>2</sup> We note in this regard, that, on March 10, 2020, Governor Baker declared a State of Emergency due to COVID-19 (Exec. Order No. 591), and, on March 23, 2020, he issued COVID-19 Order No. 13, closing all non-essential businesses in Massachusetts. *See DUA UI Policy and Performance Memorandum (UIPP) 2021.03* (Jan. 29, 2021), p. 2.

<sup>3</sup> *See* UIPL 16-02, Change 1, Attachment I, B(7), p. I-3.

<sup>4</sup> These documents, while not explicitly incorporated into the review examiner’s findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). Upon review of the entire record, we believe the review examiner’s assessment is unreasonable in relation to the evidence presented.

The review examiner found Remand Exhibits 7–14 not credible on the ground that it was possible the claimant could have manufactured these documents in anticipation of the hearing. However, he failed to identify any inconsistencies or errors in these exhibits which suggested they were fabricated, or any other material evidence of record that detracted from the credibility of these documents.

Remand Exhibit 8 is a screenshot from the claimant’s website showing she was scheduled to perform at multiple venues in Massachusetts between April 1, 2020, and April 10, 2020. Remand Exhibits 9, 10, and 11 include text messages and cancellation notices that verify the date and location of several performances listed on the claimant’s website and further show that these performances were canceled when the venues shut down as a result of the COVID-19 pandemic. In light of these consistencies, and in the absence of any specific evidence detracting from the credibility of these documents, we conclude that the review examiner’s credibility assessment is unreasonable in relation to the record.

We, therefore, conclude as a matter of law that the claimant has met her burden to show that she was out of work in Massachusetts for the listed COVID-19 reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(gg).

The review examiner’s decision is reversed. The claimant is entitled to receive PUA benefits for the week beginning March 15, 2020, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 9, 2020**



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](http://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