

Real estate agent, who lived in Connecticut, showed that he had to stop performing his services in Massachusetts when his office was closed as a non-essential business in March, 2020. He further showed that he experienced a significant diminution of services between March and November, 2020, as a result of the COVID-19 restrictive protocols. Held he is eligible for PUA benefits during that period.

**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 ID: N6-FJV9-KPF2

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 we affirm in part and reverse in part.

The claimant filed a claim for PUA benefits with the DUA, effective March 22, 2020, which was initially approved. However, in a determination issued on November 23, 2020, the claimant was denied benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's determination to deny PUA benefits in a decision rendered on March 19, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had failed to establish that he was unemployed for a COVID-19 listed reason under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and, thus, the claimant was not eligible for PUA benefits. 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 consider additional evidence of the claimant's 2020 work history. 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 had failed to show that the COVID-19 public health emergency substantially diminished his real estate work in Massachusetts in 2020, 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. On May 1, 2020, the claimant filed a claim for PUA benefits, with an effective date of March 22, 2020. The Department of Unemployment Assistance (DUA) determined that the claimant has a benefit rate of \$267 per week on the claim. The claimant's first PUA payment was deposited into his account on May 4, 2020. The claimant was paid benefits on his Massachusetts PUA claim for the week ending March 28, 2020 through the week ending August 22, 2020.
2. The claimant filed the PUA claim using a Connecticut address. The claimant's Connecticut driver's license bears a Connecticut address. The claimant has no documentation showing that he was living in Massachusetts in 2019 or 2020.
3. The claimant is a realtor and is a licensed real estate broker in Massachusetts and Connecticut. The Commonwealth of Massachusetts Division of Professional Records issued the claimant his real estate broker's license bearing a Connecticut address.
4. The claimant worked as an independent contractor for a real estate company located in Massachusetts (Company A) since March 7, 2014. Commission income can be inconsistent and is paid upon the successful transfer of property.
5. The claimant's 2019 Schedule C from a federal tax filing lists his profession as real estate sales and bears a business address in Connecticut.
6. In 2019, Company A paid the claimant commissions in February, March, September, November, and December, totaling \$17,176.50. Company A issued the claimant a 2019 Form 1099-MISC for nonemployee compensation of \$17,176.50. The claimant provided check images from commission payments which differ from the amounts reported in the commission report for two of the reported transaction by \$700.
7. In 2020, Company A paid the claimant commissions in January, February, March, November and December, totaling \$22,444.00. Company A issued the claimant a 2020 Form 1099-NEC for nonemployee compensation of \$22,444.00.
8. All of the claimant's commission activity after March 2020 was for property in Connecticut.
9. The claimant's 2019 state taxes were filed with the State of Connecticut.
10. As of August 31, 2021 (the remand hearing date), the claimant had not filed income taxes for 2020 on the advice of his accountant to wait until the issue on his PUA claim was resolved. The claimant filed an extension for his 2020 federal taxes and an extension for his 2020 state taxes for the state of Connecticut.

11. As of August 31, 2021, the claimant had not filed a 2020 Form 1-NR/PY Massachusetts Nonresident/Part-Year Tax Return. Any filing of a 2020 Form 1-NR/PY Massachusetts Nonresident/Part-Year Tax Return would be up to the claimant's accountant.
12. The claimant filed a claim for regular unemployment benefits through the State of Connecticut with an effective date of April 12, 2020. The Connecticut Department of Labor, Employment Security Division sent the claimant a Monetary Determination of Unemployment Compensation Benefits at his Connecticut address on April 20, 2020 indicating that there is no record of covered employment or wages in the 2019 base period quarters from 01/01/2019 to 12/31/2019.
13. The claimant filed a claim for regular unemployment benefits through the Massachusetts DUA with an effective date of April 12, 2020. The claimant responded to a request for wage information from the DUA dated April 17, 2020 by regular mail posted May 14, 2020 listing his quarterly commissions as wages and including a copy of his 2019 commission report, check images, and his 2019 Form 1099. The DUA determined the claimant to be monetarily ineligible for regular unemployment benefits on May 12, 2020.
14. In 2020, the claimant travelled into Massachusetts to perform real estate services. The claimant regularly reported to work in Company A's Webster, Massachusetts office. While physically in Massachusetts, the claimant networked with other agents, reviewed property listings, visited property sites, took photographs of properties, arranged to show properties, and showed properties. Once a property was under agreement, the claimant scheduled an inspection and obtained smoke certificates from fire departments for insurance binders. Every property required a minimum of 5 visits.
15. The claimant was the listing agent for a 2-family home in [Town A], Massachusetts (MLS# [X]) that was listed on December 10, 2019 and sold on March 23, 2020.
16. The last time the claimant performed work in Massachusetts in 2020 at the 2-family home in [Town A] was on an unknown date on or prior to March 23, 2020.
17. The last time the claimant performed work in Massachusetts in 2020 at Company A's [Town A] office was on an unknown date.
18. On March 24, 2020, Company A's business was deemed non-essential by the Massachusetts Governor and the Webster office closed to real estate agents and the public. Services stopped as real estate agents could not meet and provide services to sellers or buyers, list or show properties, or hold open houses. On March 31, 2020, residential real estate was deemed an essential business. Company A's [Town A] office reopened in a limited capacity; it remained

closed to the public and real estate agents were encouraged to work remotely from home.

19. Business declined in Massachusetts in late March 2020 because of the COVID-19 emergency and the impact it had on conducting real estate sales and rental transactions, essentially eliminating the spring 2020 real estate market. There was a lack of inventory because people did not list their homes due to COVID. It became difficult to show homes because homes that were listed did not want people to visit due to COVID.
20. The claimant continued to work by showing vacant land where distancing protocols were less of a hindrance.
21. The Registry of Deeds in [City B], MA closed on an unknown date in March 2020 and remained closed for an unknown period of time. The Registry of Deeds transitioned to online recording, but this did not affect the claimant's business as the recording of deeds is the responsibility of the closing attorney and not the responsibility of the claimant as a real estate agent.
22. On November 23, 2020, the DUA sent the claimant a Notice of Non-Monetary Issue Determination, informing him that he was not eligible to receive benefits beginning the week ending February 8, 2020.
23. The claimant appealed the DUA's determination.

Credibility Assessment:

There is a difference between the sum of the 2019 checks the claimant submitted and the 2019 commission report. Given that the claimant did not testify that the checks represented all transactions, the 2019 commission report (reflecting total commissions of \$17,176.50) is a business record kept by Company A, and the 2019 commission report was consistent with the Company A-issued 2019 Form 1099-MISC (another business record reflecting nonemployee compensation of \$17,176.50), it is credited that in 2019, Company A paid the claimant commissions totaling \$17,176.50.

The claimant's assertion that he files income taxes in Massachusetts is not credible. The claimant provided no documentation of a Massachusetts tax filing. The only documentary evidence of a state tax filing was an extension form filed with the State of Connecticut. During the remand hearing, the claimant admittedly had not filed his 2020 taxes, pending the outcome of the PUA appeal and the advice of his accountant. At one point, the claimant referred to his 2019 Connecticut tax return during his testimony and could not find any 2019 Massachusetts tax return when questioned. Although the claimant provided a letter from a certified public accounting firm dated March 18, 2021, the letter had no information concerning the claimant's tax filing or the states where he files his taxes, so did not corroborate the

claimant's assertion from the original hearing that he files income taxes in Massachusetts.

The claimant's assertion that he did not know he filed for regular unemployment benefits from Massachusetts is not credible. Agency records establish that the claimant completed an application for Massachusetts regular unemployment benefits effective April 12, 2020 and responded to a request for wage information dated April 17, 2020 with his 2019 commissions. The timeframe of his filing for Massachusetts regular unemployment benefits was simultaneous with his filing for Connecticut regular unemployment benefits, and prior to any filing for Pandemic Unemployment Assistance benefits (filed on May 1, 2020 and the first PUA payment of which was issued to the claimant on May 4, 2020).

The claimant's assertion that Company A's [Town A], Massachusetts office was closed until June 2020 is not credible in light of Company A's letter detailing the initial closure on March 24, 2020 (as a non-essential business) and reopening for real estate agents but not the public on March 31, 2020 (as an essential business).

The claimant's testimony that he travelled into Massachusetts to perform real estate services in 2020 is credible, despite the claimant's lack of a Massachusetts tax filing and address in Connecticut listed throughout various documents in the record. Company A's letter identified that the claimant worked as an independent contractor for them since March 7, 2014. The claimant offered specific testimony that each property requires a minimum of five visits, some of which occur after a property is under agreement. An MLS listing identified the claimant as the listing agent for a Massachusetts property that was listed on December 10, 2019 and did not sell until March 23, 2020. As such, it is more likely than not that the claimant did perform work in Massachusetts in 2020 at the 2-family home in [Town A] on or prior to closing (albeit dates unknown) and it is also more likely than not that the claimant did perform work in Massachusetts in 2020 at the [Town A] office (again dates unknown).

The claimant's testimony that business in Massachusetts declined due to the COVID-19 emergency is credible based upon the claimant's testimony that commission income can be inconsistent, Company A's letter explaining that commissions are paid upon the successful transfer of property, the claimant's testimony that he began showing vacant land where COVID-19 social distancing protocols were less of a hindrance, Company A's explanation about COVID-19 bringing the spring 2020 real estate market to a halt, the 2020 commission report showing no income after the March 23, 2020 closure until November 16, 2020 as compared to 2019 when the claimant also received a commission in September, and the evidence that all of the claimant's 2020 commission activity after March 2020 was for property in Connecticut.

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. 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. 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.¹ In order to qualify for PUA benefits, the claimant must show that he is a covered individual within the meaning of the CARES Act. Among the criteria for eligibility established by the Secretary of Labor in accordance with § 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, is that an individual will be eligible for PUA benefits if the person was "unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities."² Even if not suspended, a significant diminution of a claimant's customary or usual services due to the pandemic has also been determined to constitute an approved COVID-19 listed reason under § 2102(a)(3)(A)(ii)(I)(kk).³ Further, a claimant must file for PUA benefits in the state where he or she was working at the time he or she became unemployed.⁴ Therefore, in order to be eligible for benefits, the claimant must show that he had work in Massachusetts that was negatively impacted by the COVID-19 pandemic.

The consolidated findings provide that the claimant is a real estate agent, who lives in Connecticut, but operates out of a real estate office in Massachusetts and performs work for clients in connection with properties in both Massachusetts and Connecticut. *See Consolidated Findings ## 2–4, 14, and 15.* As a listing agent, he performed work in Massachusetts in early 2020, finally selling a two-family home on March 23, 2020. *See Consolidated Findings ## 15 and 16.* He had to stop working on March 24, 2020, when the real estate office closed in response to the Governor's COVID-19 directive deeming it to be a non-essential business. *See Consolidated Finding # 18.* This evidence demonstrates that the claimant was working in Massachusetts when had to suspend his work activities due to the COVID-19 public health emergency. Because of this, he properly filed his PUA claim in Massachusetts.

Although the real estate office was able to re-open on March 31, 2020, it remained closed to the public. *See Consolidated Finding # 18.* The review examiner found that the COVID-19 emergency effectively eliminated the spring 2020 real estate market, as inventory dropped because people did not want to list or allow others to visit their homes. *See Consolidated Finding # 19.* The record shows that this drop-in real estate activity extended through the third quarter of 2020,

¹ Pub. L. 116-136 (Mar. 27, 2020), § 2102.

² U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20 (Apr. 5, 2020), Attachment I, C(1)(k), p. I-6.

³ *See* UIPL 16-20, Change 6 (Sept. 3, 2021), (kk)(1), p. I-3 – I-4.

⁴ *See* UIPL 16-20, Change 1 (Apr. 27, 2020), Attachment I, B(7), p. I-3.

which runs from July through September.⁵ While the claimant was able to continue working with the distancing protocols by showing vacant land outdoors, he did not generate any income again until November 16, 2020, earning no commissions between March 24 and November 15, 2020. *See Consolidated Finding # 20; and Exhibits 18 and 19.*⁶ This evidence establishes that from the end of March through early November, the claimant experienced a significant diminution of his customary or usual services due to the pandemic.

During the hearing, the claimant asserted that after the few commissions earned in November and December, 2020, the pandemic continued to wreak havoc on his ability to earn income. He described very low inventory, the competition to obtain the seller's listing, and the long odds of getting a property under deposit as a buyer's agent.⁷ However, the letter submitted from the President of Company A, written on April 6, 2021, refers to COVID-19 as having an impact on consumers' behavior only during the second and third quarters of 2020. *See Exhibit 18.* It is possible that the competition which the claimant describes in 2021 is attributable to a long-term change in market forces. Without more, the record lacks substantial evidence to demonstrate that the COVID-19 public health emergency caused the claimant's ongoing diminution of services.

As for the claimant's eligibility period, the evidence shows that claimant received a commission check for \$3,420.00 on March 23, 2020, and then did not earn any income for his services until receiving commission checks totaling \$6,192.00 on November 16, 2020. *See Consolidated Finding # 7 and Exhibit 19.* He is entitled to PUA benefits only for the weeks following the March payment and preceding his payments in November, 2020.

We, therefore, conclude as a matter of law that the claimant has met his burden to demonstrate an inability to perform his usual services for a listed CARES Act reason under § 2102(a)(3)(A)(ii)(I)(kk).

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive PUA benefits for the weeks beginning March 29, 2020, through November 14, 2020, if otherwise eligible. He is not entitled to receive PUA benefits for the week beginning March 22, 2020, or starting with the week beginning November 15, 2020.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 8, 2022

⁵ Exhibit 18 is a letter from the President of Company A, dated April 6, 2021, which states, "real estate activity in the 2nd and 3rd Qtr. Of 2020 was adversely and severely affected by the Covid-19 restrictive guidelines." While not explicitly incorporated into the review examiner's findings, the contents of this letter 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).

⁶ Exhibit 19 is a Company A list of 2020 commissions paid to the claimant. It is also part of the unchallenged evidence in the record.

⁷ This testimony is part of the uncontested record as well.



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

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.

AB/rh