

**Real estate broker demonstrated that his Massachusetts work was significantly diminished for several months because he was limited in his ability to meet with people and show properties. He is eligible for PUA benefits during that time.**

**Board of Review  
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**Issue ID: N6-FJVH-5TK5**

### 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 8, 2020, which was initially approved, then denied in a determination issued on December 3, 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 March 15, 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 lost work in Massachusetts 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 submitted with the claimant's Board appeal. 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 did not establish that he lost real estate work in Massachusetts due to the COVID-19 public health emergency, is supported by substantial and credible evidence and is free from error of law, in light of the additional evidence presented at the remand hearing.

### 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 effective March 8, 2020. The Department of Unemployment Assistance (DUA) determined the claimant's benefit rate would be \$478.00 per week.

2. The claimant is a Massachusetts resident and resides in [Town A], Massachusetts.
3. The claimant owns an automobile registered in Massachusetts. The registration lists his Massachusetts address.
4. The claimant has a P.O. Box in [Town B], New Hampshire. Years ago, the claimant planned to move to [Town B], New Hampshire. He signed up for a P.O. Box in [Town B] (which borders [Town A], Massachusetts). He did not ultimately move to [Town B], NH but kept the P.O. box for convenience.
5. Other than the [Town A], MA residence and the P.O. Box in New Hampshire, the claimant does not have a share in or own other property.
6. The claimant is a self-employed real estate broker licensed in Massachusetts.
7. The claimant's real estate business is not incorporated.
8. On his 2019 Federal income tax returns, the claimant lists the P.O. Box in [Town B], New Hampshire as his home address. On the Schedule C for 2019, the [Town A], MA address is listed as the business address.
9. The claimant reported his earnings from his real estate broker business on his 2019 Federal and Massachusetts income taxes and Schedule C.
10. The claimant received a deposit in September 2019 in the amount of \$574.74. This was a tax refund check from the Massachusetts Department of Revenue.
11. The claimant received a \$3,300 commission check from his real estate brokerage work in September of [2019] for work performed in the weeks prior.
12. The claimant did not work in 2019 after the commission check was deposited on September 12, [2019].
13. As of the date of the hearing, the claimant had not filed his 2020 income tax returns.
14. The claimant received a 1099 in 2020 from two sources. The 1099's match commission checks dated January 31, 2020, and February 20, 2020. The claimant's bank statements show deposits in the corresponding amounts. These earnings were for work performed in January and February of 2020.
15. The claimant received a loan from the Small Business Administration in the amount of \$9,000.00 on June 17, 2020.

16. The claimant received a commission check for services performed for a property in [Town C], Massachusetts on November 25, 2020 in the amount of \$24,400.00 for work performed in the prior weeks. This was deposited into his bank account.
17. The claimant's work performed in the 2020 calendar year included work resulting in the commission checks dated in [sic] January 31, 2020, February 20, 2020, and November 25, 2020.
18. The claimant is 74 years old.
19. The COVID-19 public health emergency limited the claimant's ability to meet and/or show properties.
20. On December 3, 2020, the DUA sent the claimant a Notice of Non-Monetary Issue Determination Informing the claimant they were not eligible to receive PUA benefits beginning the week ending February 8, 2020.
21. The claimant appealed the DUA's determination.

Credibility Assessment:

The claimant is a Massachusetts resident. He is a licensed real estate broker in Massachusetts and has been self-employed for many years. The claimant is 74 years old. When the COVID-19 pandemic began he was unable to show properties or meet with potential clients. Due to his age and susceptibility to complications from COVID-19, he was severely limited in his ability to continue his normal work. The claimant offered credible testimony and documentary evidence, including copies of his driver's license and real estate broker's license, 2019 Federal and Massachusetts income tax returns, 2020 1099's and bank statements/checks showing income in January and February of 2020. The claimant's testimony is credible and supported by the documentation that was provided.

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 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, we disagree with the review examiner's legal conclusion that the claimant is ineligible 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 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 self-employed individuals will be eligible for PUA benefits if they “experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency, even absent a suspension of services.”<sup>2</sup> 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.<sup>3</sup> 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.

Although the claimant filed his PUA claim using a New Hampshire address, the consolidated findings provide that he actually lives and works as a self-employed real estate broker in Massachusetts. *See Consolidated Findings ## 2, 4, 6, and 8.* He was performing this work in 2019 and in January and February, 2020. *See Consolidated Findings ## 9, 11, 14, and 17.*

Consolidated Finding # 19 provides that the COVID-19 public health emergency limited the claimant’s ability to meet with people and show properties. Although it would have been more helpful for the review examiner to explore in more detail what exactly made it difficult to meet with people and show properties, it is common knowledge that, from the onset of the pandemic in March, 2020 until COVID-19 vaccinations became available in early 2021, direct in-person contact was discouraged as a public health measure.<sup>4</sup> As a result, we can reasonably infer that the claimant’s inability to show properties and the significant reduction in his customary work activity were attributable to this public health response to the pandemic.

The consolidated findings further indicate that the claimant began working again in the weeks prior to November 25, 2020, as he received a \$24,000.00 commission for a real estate transaction on this date. *See Consolidated Finding # 16.* The review examiner failed to obtain testimony as to the exact period of work for which this payment is attributed. Nonetheless, based upon the claimant’s testimony that he performed work over January and February to earn his January 31, and February 20, 2020, commissions, we can reasonably infer that the November 25, 2020, payment is attributable to work performed in November, 2020. *See Consolidated Finding # 14.*<sup>5</sup>

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

<sup>2</sup> U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20, Change 6 (Sept. 3, 2021), Attachment I, C(1)(k), p. I-6.

<sup>3</sup> *See* UIPL 16-20, Change 1 (Apr. 27, 2020), Attachment I, (kk)(1), p. I-4.

<sup>4</sup> On March 10, 2020, the Governor declared a state of emergency due to COVID-19. *See* Executive Order No. 591. On March 23, 2020, the Governor issued COVID-19 Order No. 13, closing all non-essential businesses immediately. The Department of Health also issued Safer at Home advisories, recommending that all individuals limit travel outside the home. DUA UI Policy and Performance Memo (UIPP) 2021.03 (Jan. 29, 2021), p. 2.

<sup>5</sup> This portion of the claimant’s testimony supports the portion of Consolidated Finding # 14, which states that the earnings for these payments were based upon work performed in January and February of 2020. While not explicitly incorporated into the review examiner’s findings, it is part of the unchallenged evidence introduced at the hearing and placed in 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).

Thus, we can also infer that, as of November, 2020, the pandemic was no longer prohibiting the claimant from meeting with people or showing properties.

We, therefore, conclude as a matter of law that the claimant has demonstrated that he experienced a significant diminution of his customary work activities because of the COVID-19 public health emergency, as meant under the CARES Act, § 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 PUA benefits from March 8 through October 31, 2020, if otherwise eligible. The claimant is not entitled to receive PUA benefits, as of the week beginning November 1, 2020.



Charlene A. Stawicki, Esq.  
Member

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 31, 2022**



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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.

AB/rh