

Claimant's sworn testimony about the reason he lost his job is not contradicted nor improbable. It is the best available evidence and must be considered. The CARES Act requires only self-certification, not documentary evidence of a claimant's reasons for being unemployed. Where he was let go because the employer's workplace was too crowded and it could not maintain a 6-foot distancing safety protocol, the Board held the claimant was unemployed for an approved reason under the CARES Act, and he qualifies for PUA benefits.

**Board of Review
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Issue ID: N6-FMNJ-JLF8

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 August 9, 2020, which was denied in a determination issued on October 14, 2020. 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 January 12, 2021. We accept 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, he was not eligible for PUA benefits. 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 decision, which concluded that the claimant did not establish that he was unemployed due to a qualified COVID-19 reason, is supported by substantial and credible evidence and is free from error of law, where the evidence shows that he lost his job due to necessary COVID-19 social distancing protocols.

Findings of Fact

The review examiner's findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) which was determined to be effective August 9, 2020.

2. The claimant's home address is in [City A], Massachusetts.
3. Prior to filing for benefits, the claimant held a short-term position with a shipping facility in [City B], Massachusetts.
4. The claimant worked at the shipping facility, from July 22, 2020 until August 16, 2020.

Ruling of the Board

In accordance with our statutory obligation, we review the decision 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 has not demonstrated an approved COVID-19 reason for being unemployed.

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 requirements to be considered a covered individual for PUA benefits is that the claimant self-certify that he is unemployed for a reason listed under § 2102(a)(3)(A)(ii)(I)(aa) – (kk).

The claimant had a job working at a shipping facility from July 22 through August 16, 2020. Finding of Fact # 4. After losing that job, he sought PUA benefits. *See* Finding of Fact # 1. At the hearing, the claimant consistently testified that he stopped working because his manager told him that the shipping facility where he worked was too crowded, COVID-19 was coming back, it's supposed to be 6-feet, and he was being let go. Although this testimony is not reflected in the findings of fact, it is referenced in the Conclusion and Reasoning section of the review examiner's decision.²

The review examiner mischaracterizes this testimony as "argument." It is not argument but a factual assertion. During the hearing, the review examiner asked the claimant if he had a document which stated the reason for his separation from the shipping facility. The claimant said that he did not get one. Because the claimant was unable to provide supporting documentary evidence or recall the name of his manager, the review examiner concluded that the claimant was "unable to provide any evidence that his termination was related to any qualified COVID-19 reason." We disagree.

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

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

It is unclear whether the review examiner misunderstood that this testimony was evidence, or simply found it not to be credible. First, we note that the claimant’s statement about the reason for losing his job was provided under oath during the hearing as sworn testimony. It is evidence. Second, the CARES Act merely requires that an individual self-certify that he is unemployed for an approved COVID-19 reason, not that he prove it with written evidence.³

Had the claimant been able to produce a letter from his former employer stating the reason for losing his job, that would have been helpful, corroborating evidence. He could not, however, because he never received such a document. “If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered.” New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 471 (1981), *quoting* L.L. Jaffe, Judicial Control of Administrative Action 598, 608 (1965). Under these circumstances, his testimony was the best available evidence. Because it was neither contradicted nor improbable, it must be considered.

“The review examiner bears ‘[t]he responsibility for determining the credibility and weight of testimony, . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). 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 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).

Aside from not being able to show supporting documentary evidence, the review examiner seems to have attributed little weight to the claimant’s asserted reason for layoff because he could not recall the name of his manager.⁴ This manager would be someone who supervised the claimant’s work several months ago for less than four weeks. We do not think a lapse of memory on this type of detail is so significant as to reasonably constitute the review examiner’s sole basis for discrediting this important testimony.

Because the claimant’s sworn testimony about losing his job, that the shipping facility was too crowded, and that the employer could not maintain a 6-foot distancing requirement is not contradicted nor improbable, we consider whether it constitutes an approved COVID-19 reason under the CARES Act.

The U.S. Department of Labor recently issued new guidance about qualifying for PUA benefits. Its Unemployment Insurance Program Letter (UIPL) 16-20, Change 4 (Jan. 8, 2021) provides updated examples of the approved COVID-19 listed reasons under the CARES Act. Specifically,

³ *See* CARES Act, § 2102(a)(3)(A)(ii).

⁴ The claimant does provide a name and telephone number on appeal to the Board. However, we decline to remand this matter simply to put this into the record, because his manager’s name is not material to our decision.

the CARES Act, § 2102(a)(3)(A)(ii)(I)(jj), lists as an approved reason that the individual is unable to work because “the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency.” The examples under UIPL 16-20, Change 4 include that where a business, or a portion of a business, shuts down due to necessary social distancing protocols, the resulting unemployment of the affected individual would be considered a direct result of COVID-19.⁵ The UIPL emphasizes that its examples are not an exhaustive list, but that states may consider other circumstances that align with one of the listed reasons and are applied in a manner consistent with the UIPL’s examples.⁶

Here, the claimant became unemployed because the facility where he worked was too crowded and the employer could not maintain a safe 6-foot social distancing protocol. The U.S. Centers for Disease Control and Prevention advises that people remain at least 6 feet apart from other people who are not in the same household in order to reduce the spread of COVID-19.⁷ Although the claimant’s former employer did not shut down, we are satisfied that the claimant became unemployed due to necessary social distancing protocols, a circumstance which aligns with the U.S. Department of Labor’s examples of the approved reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(jj).

We, therefore, conclude as a matter of law the claimant has shown that he is unemployed due to an approved COVID-19 reason under the CARES Act.

The review examiner’s decision is reversed. The claimant is entitled to receive PUA benefits for the week beginning August 16, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 11, 2021



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.

⁵ See UIPL 16-20, Change 4, Attachment I, C(1)(jj), p. I-8.

⁶ See UIPL 16-02, Change 4, Attachment I, C(1), p. I-5.

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (Feb. 10, 2021).

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