

The claimant worked 8-10 hours a day during the week beginning June 30, 2020, but could not afford to pay any employees and was unable to pay herself wages for the hours worked. As she re-opened her restaurant during this week in order to re-establish her self-employment, she met the able and available to work requirements under the CARES Act and 20 CFR § 625.4(g) to be eligible for PUA benefits.

**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-FPKK-N8P9

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 29, 2020. She certified for benefits for the week beginning May 30, 2020, but was denied benefits for that week in a determination issued on November 16, 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 for that week in a decision rendered on February 8, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment as defined in G.L. c. 151A, §§ 29(a) and 1(r)(2), during the week beginning May 31, 2020, and, thus, was ineligible for 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 was not in unemployment under G.L. c. 151A, §§ 29 and 1(r), because she opened her restaurant for the week beginning May 31, 2020, and worked 8 to 10 hours per day, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) effective 3/29/2020.
2. The claimant lives in Rhode Island.

3. During 2019, the claimant owned a restaurant in Massachusetts that had a net profit of approximately \$33,000. The restaurant was normally open Tuesday through Sunday, serving lunch.
4. The claimant filed the PUA claim, because she was not working and had to close the restaurant due to the pandemic. Restrictions forced the shutdown of all restaurants statewide.
5. The restaurant re-opened during the week beginning 6/2/2020 and the gross income for the week ending 6/6/2020 (plus Sunday 6/7/2020) was \$3,974. It is unknown what the net profit for the week ending 6/6/2020 was.
6. The claimant worked 8-10 hours a day for the days the restaurant was open during the week ending 6/6/2020 (the relevant week).
7. On 11/16/2020, the Department of Unemployment Assistance (DUA) sent the claimant a Notice of Non-Monetary Issue Determination, informing her that she was not eligible to receive PUA benefits for the week ending 6/6/2020.
8. The claimant appealed the DUA's notice.

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 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 findings of fact and deems 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 that the claimant was not in unemployment during the week beginning May 31, 2020, for purposes of receiving PUA benefits.

Specifically, the review examiner determined the claimant was not eligible for benefits because she worked between 40 and 50 hours during the week in question and her restaurant made sales in excess of \$3,000. *See* Findings of Fact ## 5 and 6. Ordinarily, a claimant who works full-time hours during a week is deemed to be unavailable for new employment and would be ineligible for regular unemployment benefits under G.L. c. 151A, §§ 29 and 1(r). However, the claimant in this case seeks PUA benefits, a new unemployment benefit program provided under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and administered by the U.S. Secretary of Labor.¹ Section 2102(h) of the CARES Act directs us to apply the federal Disaster Unemployment Assistance regulations to the PUA program, unless they conflict with the language of the act.

The Disaster Unemployment Assistance regulations at 20 CFR 625.4, provide, in relevant part, as follows:

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

An individual shall be eligible to receive a payment of [Disaster Unemployment Assistance] with respect to a week of unemployment, in accordance with the provisions of this Act and this part if: . . .

(g) The individual is able to work and available for work within the meaning of applicable State law: *Provided*, That an individual shall be deemed to meet this requirement . . . in the case of an unemployed self-employed individual, the individual performs service or activities which are solely for the purpose of enabling the individual to resume self-employment[.] (emphasis in original).

The claimant owned a restaurant in Massachusetts which was forced to shut down in March 2020 due to the pandemic. *See* Findings of Fact ## 3 and 4. Her uncontested testimony was that she re-opened the restaurant for the week beginning May 31, 2020, because the state's closure order had been lifted, and she wanted to determine whether it would be financially practicable to permanently re-open the restaurant.² During the week the restaurant was open, the claimant did not earn enough to be able to pay either herself or any employees.³ As the claimant had no earnings from her work during this week, and the purpose of her work was to attempt to re-establish her means of self-employment, she meets the able and availability requirements of 20 CFR § 625.4(g), and may not be disqualified from receiving PUA benefits.

We, therefore, conclude as a matter of law that the claimant was in unemployment for purposes of receiving PUA benefits during the week beginning May 31, 2020.

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).

³ This testimony is also a part of the unchallenged evidence of record.

The review examiner's decision is reversed. The claimant is entitled to receive PUA benefits for the week beginning May 31, 2020, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 4, 2021



Charlene A. Stawicki, Esq.
Member



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

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