

Claimant established she was affected by COVID-19 in Massachusetts when she was furloughed from freelance work as an illustrator as of August 30, 2020. Where the claimant continued to work as an illustrator through August 29, 2020, she was not eligible for PUA benefits until August 30, 2020.

**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-FRM8-7NTK

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.

The claimant filed a claim for PUA benefits with the DUA, effective April 5, 2020, which was denied in a determination issued on December 30, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner modified the agency's initial determination in a decision rendered on May 11, 2021, affirming the denial of PUA benefits from February 8, 2020, through August 29, 2020, but reversing and awarding PUA benefits beginning on August 30, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to show that her work was affected by COVID-19 prior to August 30, 2020, since she continued her freelance work for a dressmaker until she was furloughed effective August 30, 2020. Thereafter, the review examiner concluded the claimant's work was impacted by the COVID-19 pandemic, and she was 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 was not eligible for PUA benefits because she failed to show that she was unemployed due to the COVID-19 public health emergency prior to August 30, 2020, 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 PUA benefits, with an effective date of April 5, 2020. The Department of Unemployment Assistance (DUA) determined that the claimant has a benefit rate of \$267 per week on the claim.
2. The claimant filed the PUA claim using a Florida address. The claimant moved to Massachusetts from New York in September of 2019. She filed her 2019 state income taxes with Massachusetts as a part-year resident. The claimant left Massachusetts in October of 2020.
3. At the time of the COVID-19 emergency in Massachusetts, the claimant was living in Massachusetts and working as a freelance independent contractor illustrating bridal gowns for a custom dressmaker based in California. The claimant has an email dated August 25, 2019, from the dressmaker establishing the terms of her work. The claimant has her 2019 Form 1099-MISC which shows her nonemployee compensation from this dressmaker was \$24,594.50.
4. In 2020, the claimant continued her freelance illustration work for this dressmaker and was paid a total of \$29,600. Payment for the illustrations the claimant invoiced for the two-week period ending August 30, 2020 was late. On November 5, 2020, the claimant received an email from the dressmaker stating that her work was being furloughed effective August 30, 2020.
5. While continuing to operate as a freelance illustrator, the claimant pursued an opportunity to become a flight attendant through a major airline. She intended to continue her freelance illustration work while working for the airline.
6. The claimant accepted a job offer from the airline on February 18, 2020. The claimant has an email dated March 11, 2020 stating that flight attendant training was being postponed due to COVID-19. On June 19, 2020, the claimant received an update email stating that due to COVID-19, flight attendant training will not resume in 2020.
7. The claimant certified in her PUA application that she does not have a history of full-time work and was scheduled to start a job with a new employer that she cannot start, or the offer was withdrawn as a result of COVID-19. She also certified in her PUA application that she had to quit her job, was laid off, or had her hours reduced as a result of COVID-19. In addition, she certified in her PUA application that she is self-employed, an independent contractor, or a gig worker and COVID-19 has severely limited her ability to perform her normal work.
8. On December 30, 2020, the DUA sent the claimant a Notice of Non-Monetary Issue Determination, informing her that she was not eligible to receive benefits beginning the week ending February 8, 2020.
9. The claimant appealed the DUA's determination.

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. As discussed more fully below, we believe that the review examiner's findings of fact support the conclusion that the claimant was eligible for PUA benefits as of August 30, 2020.

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 she is unemployed, partially unemployed, or unable or unavailable to work for a listed COVID-19 related reason under the CARES Act. § 2102(a)(3)(A)(ii)(I). An eligible COVID-19 listed reason under the CARES Act § 2102(a)(3)(A)(ii)(I)(kk), is a self-employed individual who experiences a significant diminution of her customary or usual services because of the public health emergency. *See* U.S. Department of Labor Unemployment Insurance Program Letter 16-20, Change 6 (Sept. 3, 2021), Attachment I, p. I-4.

At the time of the COVID-19 pandemic health emergency, the claimant was living in Massachusetts and working as a freelance contractor illustrating bridal gowns for a dressmaker based in California. *See* Finding of Fact # 3. The claimant had a contract to begin this work as of August 25, 2019. Thereafter, the claimant earned \$24,594.50 performing these services in 2019. *See* Finding of Fact # 3 and Exhibits ## 11 and 16². The claimant continued to perform her illustrating services for the dressmaker into 2020, until she was furloughed effective August 30, 2020. *See* Finding of Fact # 4 and Exhibit # 17³.

While continuing to perform her work as a freelance illustrator, the claimant applied to become a flight attendant with a major airline. On February 18, 2020, the claimant accepted a job offer from the airline. *See* Finding # 6 and Exhibit # 8. However, on March 11, 2020, the airline informed the claimant that training—and, thus, her employment—was being postponed due to COVID-19. *See* Finding # 6 and Exhibit # 13. On June 19, 2020, the claimant received another email from the airline, informing her that flight attendant training would not resume in 2020. *See* Finding of Fact # 6 and Exhibit # 14.

When filing for PUA benefits, the claimant checked off boxes claiming she did not have a recent history of full-time work and was scheduled to start a job with a new employer, “[which] was withdrawn as a result of COVID-19”; she “had to quit my job, was laid off, or had my hours reduced as a result of COVID-19”; and that she was a “self employed, an independent contractor,

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

² The review examiner mistakenly identified this exhibit during the hearing as Exhibit # 13. However, this exhibit was introduced after Exhibit # 15 had already been entered into evidence. Consequently, this exhibit is properly identified here as Exhibit # 16.

³ The review examiner mistakenly identified this exhibit during the hearing as Exhibit # 14. However, this exhibit was introduced after Exhibit # 16 had already been entered into evidence. Consequently, this exhibit is properly identified here as Exhibit # 17.

... and COVID-19 has severely limited” her ability to perform her normal work. *See* Finding of Fact # 7 and Exhibit # 1.

We agree with the part of the review examiner’s analysis concluding that the claimant established she was eligible for PUA after her furlough that took effect on August 30, 2020. The review examiner accepted as credible the claimant’s testimony that the demand for wedding dresses had been impacted by the COVID-19 pandemic and restrictions placed on events such as weddings. Although the claimant continued performing services from Massachusetts during the earlier months of the pandemic, her work slowed down and came to a halt on August 29, 2020. Thus, we conclude, as a matter of law, that the claimant has met her burden to show that she was out of work in Massachusetts for a COVID-19 reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(kk), as of August 30, 2020.

We also note that the review examiner credited the claimant’s assertion that she had an offer of additional employment as a flight attendant with a major airline, which was postponed due to the COVID-19 public health emergency and that this took place before she stopped working as an illustrator. *See* Finding of Fact # 6. By itself, this could qualify as a separate listed COVID-19 related reason under § 2102(a)(3)(A)(ii)(I)(gg).

However, in order to be eligible for any unemployment benefits, the claimant must have been in a state of unemployment. Because she continued working for the dressmaker until August 30, 2020, she was not in total unemployment, as defined by G.L. c. 151A, §§ 29(a) and 1(r)(2). We also consider whether she was in partial unemployment. G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded....

In this case, the claimant’s weekly benefit rate is \$267.00, with an earnings exclusion of \$134.00. Thus, she only qualifies for partial unemployment benefits during weeks where she earned less than \$401.00. Neither the findings nor the other evidence in the record demonstrate that she earned less than \$401.00 a week before her furlough.

We, therefore, further conclude as a matter of law that, prior to August 30, 2020, the claimant did not establish that she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is affirmed. The claimant is denied PUA benefits from February 2, 2020, through August 29, 2020. The claimant is entitled to receive PUA benefits starting August 30, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 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.

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.

JPCA/rh