

PUA claimant was refused documentation from her former employer showing that her reduction in hours and eventual layoff in March and April of 2020 were due to the effects of the COVID-19 public health emergency. Under the best evidence rule and in light of the CARES Act standard to self-certify to a listed COVID-19 reason for losing work, her sworn testimony and other corroborating evidence was sufficient to establish that the closure of the claimant's workplace was due to COVID-19.

**Board of Review
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Issue ID: N6-H83J-9PL6

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 April 19, 2020, which was denied in a determination issued on June 11, 2021. 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 December 1, 2021. Benefits were denied after the review examiner determined that the claimant had failed to establish that she 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. We accepted the claimant's application for review.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant could not show that her lost hours and subsequent laid off were due to the COVID-19 public health emergency, is supported by substantial and credible evidence and is free from errors of law.

Findings of Fact

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) effective April 19, 2020.
2. At all relevant times, the claimant was a resident of Massachusetts.
3. The claimant had been employed as a packer at a hobby store in [City], MA from March 1, 2020 through April 24, 2020, although she was paid through the week ending June 13, 2020.

4. The claimant's hours started to be reduced after her first week, from 24 hours her first week down to 16 hours the next few weeks. Her hours were further reduced to 10.5 hours for the week of March 29 through April 4, 2020 and 11.5 hours for the week April 12-18, 2020. The claimant was never given a reason for the reduction in her hours.
5. The claimant was laid off on April 24, 2020. She was not given a reason for the layoff.
6. The claimant has not been called back to work.

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 she is a covered individual within the meaning of the CARES Act. Among the eligibility criteria under § 2102(a)(3)(A)(ii)(I)(kk), is that an employee whose hours have been reduced or who was laid off as a direct result of the COVID-19 public health emergency.² 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.³

The findings show that the claimant was employed as a packer at a hobby store from March 1, 2020, until April 24, 2020. *See* Finding of Fact # 3. The claimant experienced a gradual reduction in her hours beginning on March 29, 2020, until she was laid off on April 24, 2020. *See* Findings of Fact ## 4 and 5. She was informed of the layoff when she arrived at the store for her shift and her supervisor told her and two others that the store was closing.⁴

As the review examiner notes in her decision, the claimant believed that her reduction in hours and eventual layoff were due to the COVID-19 public health emergency, but her supervisor never explicitly told her this. *See* Findings ## 4 and 5. The claimant continued to receive weekly paychecks until the week ending June 10, 2020. *See* Finding # 3. Exhibits 26 and 27 are

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

² *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20, Change 5 (Feb. 25, 2021), (4)(a).

³ *See* UIP 16-20, Change 1 (Apr. 27, 2020), Question 7, p. I-3.

⁴ 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).

the final two paychecks the claimant received, and they show in the earnings statement that the claimant was paid for “Covid Sick-EE.”⁵ The review examiner also notes in her decision that the claimant attempted multiple times to secure documentation from her employer stating that the reduction in hours and eventual layoff were due to a slowdown in business caused by the COVID-19 public health emergency, but he refused to provide this information. Because the claimant did not have documentary evidence to show that the work she lost was related to COVID-19, the review examiner concluded that she was unable to show that she was affected by a COVID-19 listed reason under the CARES Act. We disagree.

“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). We believe that the review examiner’s assessment is unreasonable in relation to the evidence presented.

While not able to provide documentary evidence that the effects of the COVID-19 public health emergency are what caused her reduction in work, the claimant provided sworn testimony that is uncontroverted by evidence in the record. The review examiner accepted this testimony as credible and referenced it without challenge in the decision. Although evidence stating the reason for the claimant’s loss of work would have been helpful, corroborating evidence, this evidence does not exist because the person in control of this information, the claimant’s former supervisor, refused to provide it. “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* Judicial Control of Administrative Action, L. L. Jaffe 598, 608 (1965). In this case, her testimony was the best available evidence. Because it was neither contradicted nor improbable, it must be considered.

It is important to note that, under the CARES Act, Congress merely requires that an individual self-certify that she is unemployed for an approved COVID-19 reason, not that she prove it with documentary evidence. The Massachusetts Supreme Judicial Court’s definition of substantial evidence, quoted above, also does not require documentary proof. *See* Lycurgus, 391 Mass. at 627–628. In the case before us, when we look at the record as a whole, we believe that the claimant has satisfied the substantial evidence test with both documentary evidence showing her reduction in hours and eventual layoff and uncontroverted sworn testimony that the loss of work was due to the effects of the COVID-19 public health emergency.

⁵ Exhibits 26 and 27 are also part of the unchallenged record.

We, therefore, conclude as a matter of law that the claimant has met her burden to show that she was out of work for the listed COVID-19 reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(kk).

The review examiner's decision is reversed. She is entitled to PUA benefits during the period March 29, 2020, and for subsequent weeks, if otherwise eligible, subject to a reduction of benefits in any week that she earned more than her weekly benefit amount plus earnings disregard.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 17, 2023



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.

RG/rh