



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

BR-107379-A (July 14, 2009) -- Denied partial benefits to driver who, under the terms of his employment contract, could never work full-time hours. He was guaranteed a minimum 17.5 hours per week and was on-call up to a maximum of 30 hours per week

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to award benefits for the week ending March 8, 2008. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Benefits were granted after the review examiner determined that the claimant was in partial unemployment, under G.L. c. 151A, §§ 29(b) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to make subsidiary findings from the record. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the subsequent consolidated findings.

After the claimant filed a claim for unemployment benefits, the agency issued a determination on April 29, 2008, which found him to be monetarily eligible for benefits due to the employer's inability to furnish full-time hours of work. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the employer, the review examiner affirmed the agency's initial determination to allow the claimant to collect benefits in a decision rendered on June 23, 2008.

The issue on appeal is whether the claimant is in partial unemployment in any week in which he works fewer than full-time hours.

Findings of Fact

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

1. The claimant initiated a new claim for benefits on January 22, 2008.
2. Shortly thereafter, it was determined that the claimant was monetarily eligible to receive weekly benefits in the amount of \$445.00 and that his weekly earnings exclusionary equaled \$148.33.
3. The claimant works for the instant employer as a part-time courier. The claimant was hired as a permanent part-time employee on October 16, 1994.
4. The claimant's schedule varies depending on business.
5. Since October 16, 1994, the employer has guaranteed the claimant a minimum of 17.5 hours per week.
6. After working the guaranteed 17.5 hours, the claimant is allowed to work up to a maximum of 30 hours per week.
7. The claimant performs work on Martha's Vineyard.
8. The claimant works a set schedule on Wednesdays, Thursdays and Fridays, during the off season. The claimant works from 12 noon - 2 pm through 6:30 pm on Wednesday, and from 9 am - 10 am through 6:30 pm on Thursday and Friday.
9. The claimant's hours generally peak during the summer season. The claimant may work 30 hours or more during the summer season because he works on Martha's Vineyard.
10. The claimant earns \$21.33 per hour.
11. During the week ending March 8, 2008, the claimant worked 24.4 hours, all the hours made available to him by the instant employer. The claimant earned gross wages of \$520.45.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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....

Not every employee who works less than full-time hours is eligible for partial unemployment. See Town of Mattapoisett vs. Director of the Div. of Employment Security, 392 Mass. 546, 548 (1984). The review examiner found that the claimant was hired as a permanent part-time employee in 1994. He was guaranteed a minimum 17.5 hours per week on a set schedule, and he was allowed to work up to a maximum of thirty hours per week, if the work was available. Since his hours were capped, he could never work for this employer on a full-time weekly schedule. Thus, he was ineligible for partial unemployment benefits based solely upon his earnings from this employer for as long as he was provided the minimum 17.5 hours of work per week.

We, therefore, conclude as a matter of law that the claimant was not in partial unemployment, within the meaning of G.L. c. 151A, §§ 29(b) and 1(r)(1).

The DUA review examiner's decision is reversed. The claimant is denied benefits for the week ending March 8, 2008 and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 14, 2009



John A. King, Esq.
Chairman



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – August 13, 2009