



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-120571-OP (June 22, 2012) - Board imposed an interest penalty on an overpayment to a claimant, a Tennessee resident, who knowingly engaged in a scheme to make it appear as though the claimant performed work in Massachusetts so that he could collect the higher Massachusetts benefit rate.

### 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 unemployment benefits and compel repayment of \$2,816.00 in benefits received by the claimant for which he was not eligible. We review, pursuant to our authority under G.L. c. 151A, § 41, affirm the conclusion that the claimant is ineligible for benefits and responsible to repay the overpayment, but reverse the finding that the overpayment was due to error without fraudulent intent and impose interest on the overpayment.

The claimant filed a combined wage claim for unemployment benefits with the Massachusetts DUA on June 22, 2010, which was initially approved. But on January 5, 2011, the agency issued a redetermination concluding that the claimant was monetarily ineligible for benefits in Massachusetts because he had no employment or wages from Massachusetts, and that he had been overpaid \$2,816.00. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant and a representative from the DUA Benefit Integrity Unit, the review examiner affirmed the redetermination and overpayment in a decision rendered on August 31, 2011. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was monetarily ineligible to receive unemployment benefits in Massachusetts because the \$68.00 he reportedly had earned from [Employer] were not Massachusetts wages, since [Employer] was not based in

Massachusetts; and, thus, he was disqualified under G.L. c. 151A, §§ 24(a), 1(a), and 1(s). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence regarding communications and documents exchanged between the claimant and [Employer], and whether their communications addressed the claimant's potential eligibility for unemployment benefits in Massachusetts. Only the claimant attended the remand hearing, which was convened in December, 2011 and January, 2012. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, and contemplates novel issues of law and fact.

The issue on appeal is whether an overpayment resulting from "wages" paid to a claimant who: (1) paid a substantial sum (\$500.00) to an entity; and (2) received a substantially lesser amount back from that entity (\$68.00 for "working" eight hours one day), knowing that for his \$500 payment he would receive the ability to obtain a much higher weekly unemployment insurance benefit rate in Massachusetts than he would have received in any of the states where he had actually worked in his base period, was due to error without fraudulent intent, or whether a claimant who participates in such a scheme has engaged in fraud.

#### Findings of Fact

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

1. The claimant works in the construction field frequently working in several states in any given year.
2. On 06/22/10 the claimant filed a combined wage claim for Massachusetts benefits and began receiving unemployment benefits from Massachusetts at a weekly benefit rate of \$629.00 plus a \$75.00 weekly child dependency allowance.
3. The claimant lives in Tennessee.
4. The claimant filed his claim in Massachusetts based on his relationship with a company [Employer].
5. The claimant agreed to pay [Employer] \$500.00 and the company would then send the claimant a packet of documentation including a W-4 form, a I-9 form, a uniform order form, business cards, and a timesheet. The claimant was told by the company to market the company by wearing the uniform and passing out business cards. The company also sent the claimant a check for \$68.00 representing eight hours of work at a rate of \$8.50 per hour. The claimant was told that he could earn \$25.00 for every person he recruited but no commission money was ever paid by the company.

6. The claimant understood that this company created lists of people in the construction field to market to potential employers and that the claimant's name would be added to that list for future employment opportunities. Similar companies existed in other states so the claimant did not find the marketing requests of this company to be unusual.
7. This company represented to the claimant that it was a Massachusetts company with a business address at [Massachusetts address]. In fact that address is the location of a United Parcel Service (UPS) store that has a mail drop option for its customers. The company [Employer] did not have any offices, operate any facilities, or offer any services in Massachusetts.
8. The company [Employer] has a business address which is the home of the company President located in [Town], Connecticut.
9. The Massachusetts Department of Revenue expressed concerns to the Massachusetts DUA UIPID Fraud Unit regarding this company [Employer] and an investigation ensued.
10. The company President was interviewed at her home in Connecticut as part of an investigation by the Massachusetts DUA UIPID Fraud Unit. The President admitted that workers were told that they need not come to Massachusetts to work for this company. The claimant was never directed by this company to perform services in Massachusetts. The claimant performed no work in Massachusetts.
11. The claimant submitted time sheets and was paid the \$68.00 for one day of work which he performed on 02/19/10, with other commission money promised if the claimant signed up new investors [sic] in the employer's company.
12. The claimant, in his dealings with the employer, was assured that this was a Massachusetts company and that the claimant could properly file a claim for unemployment benefits in Massachusetts. The claimant was eager to file in Massachusetts because it paid a higher unemployment rate than most other states. The claimant was told by this employer that this job provided him with a "legal loophole" to file in Massachusetts while he earned commissions.
13. The claimant believed that the information this employer provided him was true and he was surprised to later learn that this employer was not a Massachusetts company as [it] had claimed.

14. On 01/05/11 the claimant was mailed a "Notice of Redetermination and Overpayment". This Notice informed the claimant that he is monetarily ineligible to receive benefits on his Massachusetts unemployment benefits claim filed on 06/22/10 because he had no employment and wages in Massachusetts and does not qualify to establish an eligible combined wage claim pursuant to the Code of Federal Regulations at Title 20 CFR Chapter V Part 616.
15. The 01/05/11 Notice informed the claimant that he had received benefits to which he was not entitled to receive in the amount of \$2,816.00 for the 4 weeks ending 07/03/10 through 07/24/10 and that he is responsible for returning that amount to the unemployment fund.
16. The 01/05/11 Notice stated that the overpayment was due to an error without fraudulent intent and thus there is no interest charged on the unpaid balance.
17. On 01/12/11 the claimant requested a hearing on the redetermination and overpayment issues.
18. The claimant first learned of this employer company [Employer] from other workers in the construction field who had signed up to work for the company. [X] (the husband of the Owner of [Employer]) works in the construction field and the claimant spoke with him and this led to the claimant calling the Owner of [Employer] ([Y]) who told the claimant how to join the company.
19. The claimant first learned of [Employer] in the winter of 2009.
20. The claimant did receive printed information from [Employer]. The claimant received an Employment Application, Consumer Authorization Form, Form I-9 Employment Eligibility Verification, W-4 tax form, timesheets, Face Book company location map, and Face Book company information sheet, and other IRS information.
21. The claimant received this information via e-mail.
22. The claimant was sent this information in January of 2009.
23. The Owner/President of [Employer] [Y] sent the claimant information regarding [Employer].
24. The claimant does not recall any information being sent to him by this employer referencing eligibility for unemployment benefits in Massachusetts.

25. Prior to the claimant opening his claim for unemployment benefits on 06/22/10 no one including the person who told him about [Employer] told the claimant that his work for [Employer] could render him eligible for unemployment benefits in Massachusetts.
26. In reviewing the information in finding of fact #5 from the original hearing decision the claimant agrees with the information provided in finding of fact # 5. There was nothing in this information that specifically noted eligibility for unemployment benefits in Massachusetts.
27. The job with [Employer] never ended after obtaining the one day of wages. The claimant continued to hand out the business cards hoping to obtain the \$25.00 for enlisting other workers and hoping that his affiliation with the company could lead to being contacted for construction work. When questions were raised in Massachusetts about the company, the claimant called [X] and [Y] and they assured the claimant that there was nothing shady about the company. More recent calls to the company number went unanswered.
28. The claimant also contacted, by telephone, the Interstate Claim Department of the unemployment benefits office in Nashville, Tennessee on three occasions questioning them about [Employer] and they assured the claimant that the company had no issues that they were aware of and they indicated to the claimant that if he worked for them for an hour, he could file an unemployment claim in Massachusetts.
29. The claimant believed that it was appropriate to pay [Employer] \$500.00 because he thought he would be getting several uniforms and this would go to the administrative costs. The claimant also equated these costs with paying union dues. You pay money to get work to make more money. The claimant hoped to earn bonus money for each person he brought to the company but more importantly he hoped that this would lead to job referrals and steady work in the construction field.
30. When the \$25.00 per referral bonus money was not paid and no construction job referrals were given to the claimant, he did not seek to recover his \$500.00 payment because he believed there was nothing he could do to be reimbursed for this money.
31. The claimant had filed an interstate claim before in 2008 again in Massachusetts. In 2008 the claimant lived in Tennessee, worked in Illinois but he came to Massachusetts to file an interstate claim because the benefit rate in Massachusetts was higher than other states and at the time it was common knowledge in the construction field that workers working in several states could file in Massachusetts to obtain the highest benefit rate. The claimant filed a total of two claims in Massachusetts for this reason.

32. In 2008, the claimant understood that only a handful of states participated in the multi-state program and Massachusetts was one of the states that offered the highest benefit rates.
33. The claimant never actually performed work in Massachusetts during the base period of these claims.
34. At the time the claimant filed his claim for benefits on 06/22/10 the claimant had benefit year employment in Tennessee, Illinois, and the [Employer] employment [sic].
35. The claimant contacted Tennessee for Form I-B-1 transfer of wages to Massachusetts. The claimant wanted to file a claim in Massachusetts because Massachusetts had the highest unemployment benefit rate of all the states where the claimant could file a claim. The claimant wanted to file in the state that could offer the highest weekly return. The claimant did not want to file in Tennessee because the weekly benefit rate is hundreds of dollars less per week than Massachusetts would pay.
36. The claimant filed an internet multi-state claim in Massachusetts.
37. The claimant knew that Massachusetts paid a higher benefit rate than other states because of when he filed back in 2008. The claimant knew because in the construction trade this is common knowledge and also you can look up on line under Inter-state Claims and it will post what the benefit rates are for each of the states.
38. To the claimant's memory, in Tennessee the claimant's rate was \$275.00, in Pennsylvania it would be \$550.00, and in Massachusetts it would be even more \$629.00 (or \$704.00 with \$75.00 child dependency allowance added).

#### Ruling of the Board

The Board adopts the 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 also discussed below.

In order to be eligible for unemployment benefits in Massachusetts, a claimant must have earned wages from Massachusetts. The specific requirements are set forth in G.L. c. 151A. The review examiner initially concluded that the claimant was ineligible for benefits in Massachusetts because the \$68.00 he was paid by [Employer] were not established to be Massachusetts wages subject to G.L. c. 151A, and that he was overpaid \$2,816.00. We affirm this portion of the review examiner's decision.

Our analysis on remand considers G.L. c. 151A, §§ 69(a) and 71. G.L. c. 151A, § 69(a) provides, in relevant part, as follows:

The [DUA] may recover by a civil action any amounts paid to an individual through error . . .

G.L. c. 151A, § 71 provides, in relevant part, as follows:

The commissioner may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith . . .; or (3) benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; . . .

The review examiner also initially concluded that the claimant's overpayment resulted from an error without fraudulent intent. We remanded the case to take additional evidence of communications and documents exchanged between the claimant and [Employer], as well as whether the claimant knew employment in Massachusetts qualified him for higher benefits here than in the other states where he had worked during his base period. After remand, we believe that the evidence in the record, taken as a whole, compels the conclusion that the claimant obtained benefits to which he was not entitled not through innocent error but as a result of fraud.

The review examiner found that the claimant is a construction worker who lives in Tennessee and frequently works in several states during any given year. During the benefit year at issue, the claimant had worked in Tennessee and Illinois, in addition to his so-called "work" with [Employer]. He had previously filed an interstate claim in 2008, coming to Massachusetts to file a claim despite not having worked here. The claimant knew Massachusetts paid higher weekly benefit rates than other states based on his 2008 claim and because it is "common knowledge" in the construction field. For the period at issue here, the claimant received \$704 per week from Massachusetts – a \$629 weekly benefit rate with a \$75 dependency allowance. As of July 2011, the maximum weekly benefit rates in Tennessee and Illinois were \$325 and \$531, respectively.

The review examiner found that the claimant learned of [Employer] from other construction workers in the winter of 2009. [Employer] purported to be a Massachusetts company that created lists of construction workers to market to potential employers, looking for agents to distribute its business cards at construction sites.

The claimant paid [Employer] \$500.00. [Employer] sent him a so-called "Employee Agreement," a so-called "Employment Application," a W-4 form, an I-9 Employment Eligibility Verification form, and a Weekly Time Sheet, *see* Remand Exhibit 11;<sup>1</sup> as well as a "uniform" and business cards to distribute. In exchange for his \$500.00, the claimant was paid \$68.00 – \$8.50 per hour for eight hours, during which he allegedly distributed the [Employer] business cards – and [Employer] indicated it would pay a \$25 commission for each new prospective

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<sup>1</sup> We note that the claimant signed and dated all of these documents, including his time sheet, on the same day – Saturday, February 13, 2010 – calling into question whether he actually distributed cards at construction sites on the Saturday at issue.

“employee” who called as a result of the claimant’s efforts. Although none of the [Employer] documents explicitly stated that earning Massachusetts wages could qualify the claimant for higher weekly benefits here in Massachusetts, the claimant admittedly already knew that it would. Moreover, the review examiner found that the claimant had been assured by [Employer] that, as a consequence of his entering into the above-described financial arrangement with them, he would be able to file a claim for unemployment benefits in Massachusetts.

Subsequent governmental investigation into [Employer] revealed the entity’s only connection to Massachusetts to be via a mail drop box in [Town], MA; and that the entity was actually run out of its “president’s” home in [Town], Connecticut. The [Employer] president admitted that she told its “workers” they need not actually come to Massachusetts to perform work.

The review examiner’s initial decision concluded that the claimant and DUA were both “victims” of [Employer’s] false contentions that it operated a legitimate business in Massachusetts. The decision also implied that it was only the facts that the owners of [Employer] resided in Connecticut and that the entity had no presence in Massachusetts beyond a leased mailbox that caused the claimant’s “work” to not be Massachusetts employment. While we agree that this “work” was not cognizable employment, we think that the reason it was not has nothing to do with the owners’ place of residence, but rather derives from the very nature of the transaction itself between [Employer] and the claimant.

The premise behind this transaction was simple: the claimant would pay \$500 to [Employer], in exchange for which he would receive a \$68 “wage” as well as a record of employment in Massachusetts that would enable him to recoup his \$500 investment many times over. The return on the claimant’s investment would derive from the much higher weekly benefit rate that his fictitious record of Massachusetts employment would enable him to obtain. The claimant’s weekly benefit rate of \$704 in Massachusetts was more than double the \$325 he would have been paid by his home state of Tennessee, and almost 50% greater than the \$531 he would have received in Illinois. As a result of these differentials, the claimant recovered his \$500 investment in the [Employer] scheme in just a little over two weeks of Massachusetts’ higher unemployment benefits. After that point, all the additional benefits he received beyond what he would have received in states where he had actually worked were, in a very real sense, pure profit.

On these facts, we believe that the conclusion is inescapable that the claimant’s \$500 payment in exchange for \$68 in Massachusetts “wages” that he knew would qualify him for a much higher weekly benefit rate than in any states in which he actually worked was *per se* fraud – a *quid pro quo* through which both the claimant and [Employer] benefitted, prior to the discovery of this fraud by government agents.

A determination of fraud requires a finding of intent, that such determinations are the role of the finder of fact, and that there is no such finding from the review examiner in this case. *See, generally, School Committee of Brockton v. MCAD* 423 Mass. 7 (1996). However, it is also true that, in a proper case, intent may be inferred from the actor’s conduct. *Starks v. Director, Division of Employment Security*, 391 Mass. 640 (1984). In our view, this is just such a case.



Indeed, the inference of fraudulent intent is so great as to compel that conclusion, notwithstanding the review examiner's perception in his initial decision that the claimant's conduct amounted to no more than innocent error. School Committee of Brockton, 423 Mass. at 15.

Regarding the claimant's alleged attempts to obtain assurance that [Employer] was a legitimate enterprise, while the review examiner credited the claimant's belief that the information provided to him by [Employer] was true, we find this belief to be unreasonable as a matter of law – particularly in view of the finding that this was described to him as a “legal loophole.” As the review examiner found, the claimant was “eager” to file in Massachusetts because it paid a higher unemployment rate than other states. He also eagerly participated in a scheme that would appear respectable to cover for his malfeasance and capitalize on this state's very generous benefits.

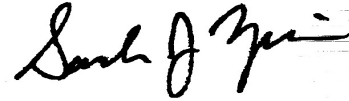
We are also unconvinced by the claimant's professed belief that it was “appropriate” to pay [Employer] \$500 because he thought it would cover administrative costs and was analogous to paying union dues. We find this belief also to be unreasonable as a matter of law. The claimant submitted nothing suggesting [Employer] was in any way involved in the formation of or association with any legitimate labor union or association. Nothing in the claimant's documents suggests his interaction with [Employer] involved a promise of anything more than one day of temporary “work.”

We, therefore, conclude as a matter of law that the claimant was overpaid \$2,816.00, and that he received these benefits fraudulently.

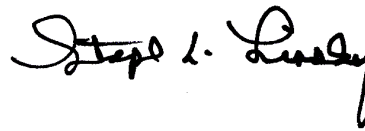
The portion of the review examiner's decision concluding that the claimant is ineligible for benefits in Massachusetts and was overpaid is affirmed. The portion of the review examiner's decision concluding the overpayment was due to error without fraudulent intent is reversed. The claimant participated in and abetted fraudulent receipt of benefits from Massachusetts. The claimant is denied benefits for the week ending June 26, 2010 and for subsequent weeks, until such time as he meets the requirements of G.L. c. 151A. The claimant is required to repay \$2,816.00 for the four weeks ending July 3 through July 24, 2010, plus interest.

In conclusion, any attempt to manipulate or skirt interstate unemployment laws and regulations by setting up or participating in a similar scheme, especially where the participant is aware that he or she may be eligible for a windfall of unearned higher benefits in Massachusetts, will receive strict scrutiny and may fairly be viewed as fraudulent.

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - June 22, 2012**



Sandor J. Zapolin  
Member



Stephen M. Linsky, Esq.  
Member

Chairman John A. King, Esq. 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 – July 23, 2012**