



Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR-261159**

APPELLANT: (claimant)

RESPONDENT: (employer)

[REDACTED]

International Paper Company
39 Broad Street
Westfield, MA 01085

Office #05

On September 10, 1999, in Boston, Massachusetts, the Board reviewed the written record, and a recording of the testimony presented at the hearing held by the Deputy Director's representative on June 22, 1999.

On August 4, 1999, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of Section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). Both parties were invited to present written argument stating their reasons for agreeing or disagreeing with the Deputy Director's decision. Only the claimant responded within the time period allowed.

The Board has now reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

Although the claimant's representative argued that the payment received by the claimant should be looked upon as a lump sum payment made in installments, the regulations found under 430 CMR 4.41(3) states the term "remuneration" shall include payment of termination, severance or dismissal pay, or payment in lieu of dismissal notice made to an employee in periodic payments in connection with a plant closing even if the employee has the option of electing to receive the payment in a lump sum. The regulation gives clarification that periodic payments are remuneration. In addition the definition for "lump sum" according to Webster's Dictionary is a gross, or total, sum paid at one time.

Under the provisions of Section 1(r)(3) and throughout the regulations found under 430 CMR 4.40 and 4.41 lump sum is referred to as "a lump sum" again giving the indication of one payment. In addition to the issue of the payment is the claimant's date of separation. Both the employer and the claimant agreed that his separation occurred on 3/27/98. The evidence established any employee separated between March 30, 1998 and December 30, 1998 would meet the prescribed time limits to be included in the plant closing. Under 430 CMR 4.38 the definition for Plant closing is the permanent cessation or reduction of business at a facility or facilities, where such facilities are located at a single site of employment as defined by 20 CFR 639.3(I), of at least 50 employees which

results or will result as determined by the Commissioner in the permanent separation of at least 50% of the employees of the facility within a period of six months prior to the date of certification or within such other period as the commissioner shall prescribe, provided, that such period falls within the six month period prior to the date of certification. The six month period prior to the certification date of 9/30/98 is 3/30/98, and since the claimant was separated on 3/27/98 he is not an affected employee. The evidence as presented failed to establish the claimant is entitled to benefits in accordance with the provisions of Section 1(r)(3) of the Law.

In view of the facts, the claimant is subject to disqualification and is denied benefits.

The redetermination under the provisions of Section 71 was necessary.

Benefits are denied for the week ending 9/26/98 through the week ending 10/24/98.

The claimant is overpaid for the week ending 9/26/98 in the amount of \$229.00, week ending 10/3/98 in the amount of \$260.00, week ending 10/10/98 in the amount of \$260.00, week ending 10/17/98 in the amount of \$247.00, and week ending 10/24/98 in the amount \$154.00. The total overpayment for the week ending 9/26/98 through the week ending 10/24/98 is \$1150.00.

N.B. The payment for the week ending 7/18/98 is a partial payment of \$153.44 and the computer should be updated to reflect the change in partial earnings.

Section 1(r)(3), 71(1), and 74 of Chapter 151A of the General Laws and 430 CMR 4.38 and 4.41(2)(3) are pertinent and provide as follows:

Section 1. The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise: -

- (r) "Unemployed" and "Unemployment", an individual shall be deemed to be unemployed and in unemployment if either in "partial unemployment" or in "total unemployment" as defined in this subsection.
- (3) For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, "remuneration" shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine.

For the purpose of this clause, "plant closing" shall mean a permanent cessation or reduction of business at a facility of at least fifty employees which results or will result as determined by the commissioner in the permanent separation of at least fifty percent of the employees of a facility or facilities.

Section 71. The commissioner may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith; or . . .

Section 74. This chapter shall be known and may be cited as the Employment and Training Law, and shall be construed liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family.

430 CMR 4.38:

Definitions

Plant Closing: the permanent cessation or reduction of business at a facility or facilities, where such facilities are located at a single site of employment as defined by 20 CFR 639.3(i), of at last 50 employees which results or will result as determined by the Commissioner in the permanent separation of at least 50% of the employees of the facility or facilities within a period of six months prior to the date of certification or within such other period as the commissioner shall prescribe, provided, that such period falls within the six month period prior to the date of certification.

430 CMR 4.41:

Exceptions to Receipt of Remuneration

- (2) The term "remuneration" shall not include payment of termination, severance or dismissal pay, or payment in lieu of dismissal notice made to an employee in a lump sum in connection with a plant closing.
- (3) The term "remuneration" shall include payment of termination, severance or dismissal pay, or payment in lieu of dismissal notice made to an employee in periodic payments in connection with a plant closing even if the employee has the option of electing to receive the payment in a lump sum.

The Deputy Director's representative held a hearing on June 22, 1999. Both parties appeared. Whereupon, the Deputy Director's representative made her findings of fact as follows:

1. The claimant was employed as a process specialist, and he was employed from 5/28/86 until his lay off on 3/27/98.
2. The claimant was a member of Local 197.
3. The claimant worked in the Westfield location in the trimming department for the instant employer.
4. On 3/2/98 a Plant Closing Questionnaire was filled out by the human resources leader and the following information was supplied:

* What was the largest total number of employees (full and part-time) at the facility during the past six months?
Answer: 173

* Has the above-listed facility been permanently closed?

Answer: No

If "Yes", when did it close?

Answer: Permanent partial closure expected on one line
Of progression 3rd Quarter, 1998

* If the above-listed facility has not been permanently closed do you anticipate its closing in the near future?

Answer: No

If "Yes", what is the actual or anticipated closing date?

Answer: See No.2, above

* If the above-listed facility is not to be closed, will it undergo a series of layoffs?

Answer: Yes

If "Yes", list actual or anticipated date(s) of these layoffs

And number(s) of employees affected. Do not include
Employees transferred to another company facility.

<u>Actual or Anticipated Dates of Layoffs</u>	<u>Number of Employees Affected</u>
3/15/98	10
5/30/98	50
9/30/98	28

* Has the above-listed facility laid off employees within the past six months?

Answer: No

* What is the total number of employees (full and part-time) to be permanently separated from their jobs as a result of the facility's closing, of layoffs?

Answer: 88

* Are employees given separation pay at the time of layoff?

Answer: Hourly - No

Salaried - Yes receive semi-monthly paychecks

For hourly employees, see Effects Bargaining package

Salary employees will be given 2 weeks of pay for every
Year and partial year of service.

* Is the separation pay being paid out in one lump sum?

Answer: Hourly - Yes 3 installments

Salary employees will be given 2 weeks of pay
for every year and partial year of service.

Hourly employees will receive one payment 6 weeks
after termination date, another payment 12 weeks after
termination and, if eligible, a final payment 6 months
after termination. Salaried employees may opt to have
their severance paid continuously. Payments will be
made on the 15th and last day of the month.

* Are employees required to sign a release of claim form to receive their severance?

Answer: No

5. Based on a union agreement the claimant was entitled to a severance payment as a result of his separation. The payment was equal to three per cent of his lifetime earnings with the company.

- 6. Based on the union agreement the claimant was to receive two percent of his total earnings for the last full period of unbroken employment. One-half of the severance pay due to be paid after the employee has been laid off six weeks. The second half of the severance pay due will be paid after the Employee has been laid off twelve weeks. Because the claimant had five years or more service with the employer according to the agreement he was entitled to an additional one percent of his total earnings for the last full period of unbroken employment, and that payment was to be made six months after being laid off.
- 7. On 5/7/98 the claimant received \$3256.34. On 6/18/98 the claimant received \$3256.35. On 9/24/98 the claimant received \$3256.34.
- 8. On the claim filed 4/20/99 [sic] the instant employer reported the following wages:

1/1/97	4/1/97	7/1/97	10/1/97
to	to	to	to
3/31/97	6/30/97	9/30/97	12/31/97
\$9671.70	\$7424.22	\$7527.02	\$7647.28
- 9. Based on the wages reported by the instant employer the claimant's average weekly wage is \$620.58.
- 10. Based on information supplied by the employing unit in a memo from the determinations department dated 3/27/98, the Westfield facility was found to meet the definition of a plant closing and the certification date of the plant closing was determined to be 9/30/98. According to the memo any employee separated between March 30, 1998 and December 30, 1998 falls within the time prescribed by the regulations for plant closing under Section 1(r) (3) of the Law.
- 11. On 5/13/99 the claimant was mailed a Notice Of Redetermination And Overpayment disqualifying him under the provisions of Section 1(r)(3) for the week ending 5/7/98 through the week ending 5/30/98, week ending 6/20/98 through the week ending 7/11/98, week ending 9/26/98 through the week ending 10/17/98. Since the claimant had already received payment for the weeks of disqualification he was determined overpaid in the total amount of \$3056.00.

After reviewing the record, the Board adopts the findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes as follows:

It is uncontroverted that the claimant did receive severance payment as a result of his separation from work. The claimant was entitled to receive two percent of his total earnings for the last full period of unbroken employment. The employer paid to the claimant one half of this initial sum after he had been laid off for a period of six weeks; the employer paid the other half the claimant after he had been laid off for a period of twelve weeks. The employer also paid to the claimant an additional one percent of his total earnings for the last full period of unbroken employment after he had been laid off for a period of six months.

The critical issue before the Board is whether the severance payment made to the claimant was "in a lump sum in connection with a plant closing" as set forth under the provisions of Section 1(r)(3) of the Law, and 430 CMR 4.41(2).

The Board concludes that the separation payment was made in a lump sum. First, when the employer completed the Plant Closing Questionnaire, it specified that the separation pay was being paid to hourly employees, as was the claimant, in one lump sum but in three installments. Secondly, the statute refers to a "lump sum" payment, not a "one time lump sum" payment. Thirdly, the payment made to the claimant cannot be viewed in the context of "periodic payments" as referenced in 430 CMR 4.41(3). According to the Merriam Webster dictionary, "periodic" refers to something "occurring or recurring at regular intervals." The claimant did not receive the separation pay in periodic payments comparable to the manner in which he was paid his regular pay. Thus, he did receive the separation pay in a "lump sum" which is the first criteria

The Determinations Department, on March 27, 1998, did issue a memo in which it was found that the Westfield facility where the claimant was employed did meet the definition of a "plant closing." According to this memo, the certification date of the plant closing was established as September 30, 1998. Additionally, any employee separated from work between March 30, 1998, and December 30, 1998, was deemed to have fallen within the time frame prescribed by the regulations for "plant closing" under Section 1(r)(3) of the Law.

Section 1(r)(3) of the Law indicates, in part, that "remuneration" shall not include severance payment "made to the employee in a lump sum in connection with a plant closing." The statute does not specify that in order for an individual to be entitled to unemployment benefits his layoff must occur during the certification period. Although 430 CMR 4.38, does incorporate into its plant closing definition a six month certification period, such regulation also affords the commissioner a certain degree of leeway in modifying the certification period. The Board concludes that to deny benefits to the claimant on the basis his layoff occurred one business day before the certification period commenced would be against the legislative intent and counter to the provisions of Section 74 of the Law.

The separation pay made to the claimant is non disqualifying remuneration as it was made in a lump sum in connection with a plant closing within the meaning of Section 1(r)(3) of the Law. Accordingly, a redetermination under the provisions of Section 71(1) of the law, is not required.

The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending September 26, 1998, through the week ending October 24, 1998. The claimant has received benefits in the amount of \$1150 to which he was properly entitled.

N.B. Please reference Docket #'s BR-261157 and BR-261158 for other weeks at issue arising from the claimant's receipt of separation pay.

Thomas E. Gorman

Thomas E. Gorman
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING - OCT 01 1999

Kevin P. Foley

Kevin P. Foley
Member

APPELLANT I.D. [REDACTED]
RESPONDENT I.D. [REDACTED]

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

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LAST DAY - NOV 01 1999