Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0002 4356 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Michele Lerner, a review examiner of the Department of Unemployment Assistance (DUA), that the services performed by her for the employing unit did not constitute employment, under G.L. c. 151A, § 2, and that she was not monetarily eligible for a claim for unemployment benefits, under G.L. c. 151A, §§ 24(a), 1(a) and 1(s). We review, pursuant to our authority under G.L. c. 151A, § 41. Although we reverse the review examiner's conclusion with regard to the G.L. c. 151A, § 2, issue, we affirm the conclusion that she is not monetarily eligible for a claim.

The claimant filed a claim for unemployment benefits with the DUA on April 20, 2012. On August 3, 2012, the DUA's Employer Liability Unit issued a determination finding that the services performed by the claimant for the employing unit did not constitute employment. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties and a representative from the Employer Liability Unit, the review examiner affirmed the agency's initial determination in a decision rendered on April 17, 2013.

The review examiner concluded that the claimant could not establish a valid unemployment claim, pursuant to G.L. c. 151A, §§ 24(a), 1(a), and (s), in part because the services performed by the claimant for the employing unit did not constitute employment, under G.L. c. 151A, § 2. As to whether the claimant was an employee or an independent contractor, the review examiner concluded that the employing unit had carried its burden to show that the claimant performed her services free from the direction and control of the employing unit, the services were outside of the employing unit's usual course of business and premises, and the claimant was independently established in a similar trade or business as the employing unit. 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 specifically regarding the amount of direction and control exerted over the claimant. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. After reviewing the consolidated findings of fact, the Board remanded the case a second time for additional evidence, this time for the review examiner to make specific findings regarding how much the claimant was paid by the employing unit. Only the claimant attended that hearing. The review examiner then issued a new set of consolidated findings of fact. Our decision is based upon our review of the entire record.

The issues before the Board are: (1) whether the review examiner's conclusion that the services performed by the claimant did not constitute employment is based on substantial and credible evidence and free from error of law, where the employing unit told the claimant how to obtain information it needed from the Registry of Motor Vehicles (RMV), the claimant only received access to the RMV records after the RMV obtained a letter from the employing unit as to why the claimant needed access to the records, and the claimant could no longer access the records when the employing unit told the RMV that the claimant should no longer have such access; and (2) whether the review examiner's conclusion that the claimant is not monetarily eligible for a claim is based on substantial and credible evidence and free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact, made following the November 4, 2013 hearing, are set forth below in their entirety:

1. The claimant has a JD degree.

2. The claimant worked for a publishing company from May 1, 2006 to September 11, 2009.

3. The claimant worked for a business related to real estate from June 5, 2009 to November 2, 2009, earning less than $200 a quarter.

4. The claimant established an independent writing business before becoming associated with the present employer.

5. The claimant had a benefit rate of $108 a week on her sequence 001 claim. She collected this benefit until she exhausted the claim and 2 Emergency Unemployment Compensation claims, during the week ending September 29, 2012.

6. The claimant did not certify her claim for the weeks ending July 31, 2010 through April 14, 2012.

7. The claimant reported no partial earnings during the weeks ending November 14, 2009 and December 8, 2012, the last weeks for which she certified her sequence 001 claim.

8. The alleged employer is a law firm. This law firm has one or more employees who provide services which are covered employment.

9. The alleged employer placed an advertisement on the web site "Craig's List" under the heading "Registry of Motor Vehicles – Independent contractor (Quincy)" stating the following:

   "Looking to hire an individual on a contract basis from the Quincy Area to go to the Registry of Motor Vehicles' main administrative office in Quincy (not a

RMV location) 2-3 three times a week to retrieve and assemble information on drivers involved in car accidents. This is an independent Contactor position. Will be paid approximately $150-$250 per week. Need to be available roughly 8-10 hours a week.

Must be proficient in Microsoft Excel and familiar with creating and editing a spreadsheet. Experience in this area is helpful but not a must.

Send email if interested. Thank you.

. Location: Quincy
. Compensation $150-$200 per week based on contract
. This is a contract job.
. Principals only. Recruiters please don't contact this job poster.
. Please, no phone calls about this job!
. Please do not contact job poster about other services, products or commercial interests."

10. The claimant was desperate for income and responded to the above described advertisement even though she did not want to work as an independent contractor. The claimant and the president of the law firm met in the offices of the law firm to discuss the advertised position. The claimant told the President that she was a writer and had experience with legal writing. She told him she was familiar with the legal field. She indicated that she would be interested in the data he was collecting for her own writing.

    She did not indicate that she had previous experience making lists of the type the alleged employer was looking for as she had not done this specific type of work before.

11. On November 8, 2011, the claimant and the President signed a document entitled "Independent Contractor Contract and Agreement" which stated in essence that:

    a. The law firm desired to obtain the services of the claimant to obtain and document names and addresses of persons involved in auto accidents from accident reports filed at the Registry of Motor Vehicles.

    b. The law firm was retaining the services of the claimant as an independent contractor and not as an employee.

    c. The claimant agreed to provide 2 lists of seventy five names and addresses of people involved in automobile accidents who were not at fault exclusively to the law firm, from accident reports she reviews at the Registry of Motor Vehicles. The claimant agrees to document these names by inserting and incorporating these names and addresses into a Microsoft Excel spreadsheet.

d. That each week the claimant would produce and deliver a minimum of two lists that contained at least 75 names and addresses. The claimant was free to produce and deliver as many lists of 75 names and addresses as she desired to the law firm each week.

e. For each list the claimant would be paid $55 on a weekly basis.

f. The claimant agreed not to disclose any of the information she received to anyone else or any other entity during the time she was providing this service exclusively to the law firm. The claimant also agreed to indemnify and hold harmless the law firm as a result of the claimant's violation of this clause.

g. That it was an open ended contract which could be canceled at any time by either party for any reason.

12. The alleged employer required the excel spreadsheets into which the data collected were to be entered have 5 columns, one for each of the following bits of data: first name; last name; address; zip code. The alleged employer also required that the data only be for potential plaintiffs.

13. The claimant had to speak to either the Director of Public Records or someone assigned by this Director to get authorization to access the required records. This is the person identified as the alleged employer's contact at the RMV.

14. Part of the job responsibility of the Director of Public Records was to approve or deny access to the RMV accident records. Before making this decision the Director required the person requesting access to the records to identify who they were; who they were collecting the information for; and what the information was to be used for. If they were then given authorization the person would have to sign in each time they came to collect information with their name and the time they were present.

15. The claimant went to the Registry of Motor Vehicles and spoke the Director of Public Records, Karen Purduyn regarding getting access to the records.

16. The claimant told the Director of Public Records that she wanted to collect names and addresses of accident victims for the alleged employer, a law office. The Director told the claimant that, as the alleged employer was a law office it could be allowed access to the records but that before such access would be granted the RMV would need a letter from the alleged employer verifying the purpose for gathering the information.

17. The claimant's access to the RMV records was conditioned upon receipt by the RMV of the letter from the alleged employer.

18. The claimant communicated the above requirement to the alleged employer. On or about October 20, 2011, the alleged employer faxed a letter to Ms. Purduyn at the RMV. It stated that the alleged employer was requesting permission for the claimant to review accident/police reports filed with the RMV for two purposes:

    a. First that the alleged employer and the claimant needed the information to conduct research and to document the claimant's findings in relation to a report she was writing that outlined "Gender, Age and Geographic Regions in Accidents Involving Personal Injury. ' [sic] and

    b. Second, to collect names and addresses of those involved in automobile accidents for advertising purposes.

19. The October 20, 2012 letter also stated that the claimant would not copy any reports and would simply review the reports and document only the names and addresses onto an Excel spreadsheet. License numbers would not be recorded. The letter went on to ask to be informed whether the claimant was approved and what days and hours she would be allowed to conduct this research each week.

20. After faxing the above letter, the alleged employer spoke to the Director of Public Records by telephone and was informed that the letter had been received and that the claimant would be granted access to the records. The alleged employer was told that there was one 2 hour block of time a week available and that the claimant would need to speak to the Director's Assistant Jeffery Kali to schedule herself for the block of time.

21. The RMV has procedures for scheduling access to the records due to the limited space available at the Quincy records office for the public to engage in reviewing such records.

22. The alleged employer told the claimant to speak to the Director's Assistant to get the 2 hour block of time. The claimant did so. After some time had passed the claimant contacted the alleged employer and informed him that additional time blocks were available. She asked if she should take them. He told her that if she would be able to gather more lists of names which would meet the alleged employer's needs she should do so. The claimant then scheduled herself for additional blocks of time.

23. The claimant was not actually able to use any of the information she collected for her own report.

24. The claimant took her own computer into the registry in order to record the information she was collecting.

25. The claimant only came to the alleged employer's offices once a week, in order to drop off the completed lists. She did not perform any work in the offices and the alleged employer did not provide any supplies or equipment to her.

26. The claimant would present an invoice to the alleged employer each week for the number of lists she had completed. These invoices included the name of her personal business – "Varacolors". At the claimant's request the law firm made out the check to her personally and not to "Varacolors".

27. The claimant and the law firm continued in this arrangement until the president sent her a letter on April 17, 2012 stating that, effective immediately, the firm no longer desired and canceled the claimant's services. The letter advised the claimant that she must stop the research at the department of motor vehicles. The letter also stated that all the claimant's invoices were satisfied in full and that no money was owed to the claimant to date.

28. The termination letter was copied to the contact at the Department of Motor Vehicles so that she would know that any additional time the claimant spent at the Registry was not to be attributed to the law firm.

29. The alleged employer wanted the Director of Public Records to know that the claimant was no longer performing services for it so that when they hired someone else to continue the project this new person would be able to use the time block that the claimant had been using to access records for the alleged employer. The alleged employer also did not want to risk being held responsible in any way for actions the claimant engaged in after they terminated their relationship.

30. After the alleged employer copied the letter discontinuing law firm's relationship with the claimant the claimant would have needed to go through the process of getting access to the records again if [sic] wanted or needed such access. This is because the initial access was granted, at least in part, because of the claimant's association with the employer a law firm.

31. Towards the end of the relationship the claimant and the law firm had conflicts regarding the employer's refusal to pay for lists that it felt did not meet the basic formatting criteria the law firm had instructed the claimant to use. There is a dispute between the alleged employer and the claimant as to whether the claimant has been paid in full.

32. The claimant filed her sequence 002 unemployment claim on April 20, 2012, which had a benefit year beginning date of April 15, 2012.

33. The alleged employer responded to a DUA request for information regarding the claimant's status with them and her wage information indicating that the claimant was an independent contractor and not an employee.

34. An investigation was conducted by the DUA status department and on August 3, 2012 a determination was issued that the relationship between the claimant and the law firm was not covered employment, because there was no employer/employee relationship.

35. The claimant filed her sequence 003 unemployment claim on August 13, 2012 which had a benefit year beginning date of April 15, 2012.

36. Both the sequence 002 and the sequence 003 claims were withdrawn as ineligible based on total wages.

37. The primary base period for the claim effective April 15, 2012 is April 1, 2011 to March 31, 2012.

38. The alternate base period for the claim effective April 15, 2012 is July 1, 2011 to April 14, 2012.

39. The claimant had no earnings during the 2nd quarter of 2011.

40. The claimant had no earnings during the 3rd quarter of 2011.

41. The clamant performed services during the 4th quarter of 2011 for which she invoiced the alleged employer $1,485.

42. The alleged employer paid the claimant $1,155 during the 4th quarter for services that the claimant performed provided and for which she had provided invoices.

43. The claimant performed services during the 1st quarter of 2012 for which she invoiced the alleged employer $2,440.

44. The alleged employer paid $1,860 during the 1st quarter of 2012 for services that the claimant performed and for which she provided invoices.

45. On April 6, 2012 the claimant presented the alleged employer with [sic] invoice for work performed the week ending March 24, 2012. The alleged employer gave her a check dated April 9, 2012 for $235. This check was returned for insufficient funds.

46. On April 13, 2012, the claimant presented the alleged employer with an invoice for work performed the week ending March 31, 2012. The employer presented the claimant with a check dated April 13, 2013 for $290. The check was not negotiable.

47. The claimant did not perform services for any other employing unit during the primary or alternate base period of the claim, effective April 15, 2012.

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 conclusions that the claimant's services were not employment and that she was not monetarily eligible for a claim are free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's consolidated findings of fact with the exception of the figures noted in Findings of Fact #42 and #44. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner initially concluded that the claimant's services did not constitute "Employment" as defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

> Service performed by an individual, . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—
>
> (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
>
> (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

By its terms, this statute presumes that an employment relationship exists, unless the employing unit carries its burden to show "that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit's burden to meet all three prongs of this "ABC" test. Should the employing unit fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

In the initial decision, the review examiner concluded that the employing unit had met its burden with respect to all three prongs of the "ABC" test. Since we disagree that the burden was met at least with respect to prong (a), we conclude that the claimant's services constituted employment.

We analyze prong (a) under common law principles of master-servant relationship, including whether the worker is free from supervision "not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work." Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). "The essence of the distinction under common law has always been the right to control the details of the performance," but "the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Athol Daily News, 439 Mass. at 177-178.

The review examiner's findings of fact suggest some independence from the employing unit's control. For example, the claimant used her own equipment and supplies to perform the services agreed upon by the parties. She also billed the employer at irregular intervals with invoices, a practice not common with a regular payroll employee.

However, we think that several findings of fact suggest a stronger degree of control by the employing unit over the claimant than the review examiner initially noted in her decision. As to the work itself, the employing unit required certain specific information to be presented in a specific way. The claimant was to use Microsoft Excel data, which was to be put into five columns, and only certain specified information was to be collected by the claimant. The claimant was not able to use this information for her own purposes; it all had to be turned in to the employing unit for its business reasons.

More significant, perhaps, are the findings of fact, which indicate that the only reason the claimant was able to access the information she obtained for the employing unit was because the employing unit made it possible through its contact at the RMV. The review examiner found that the claimant's access to the RMV's records was conditioned on the claimant obtaining a letter from the employing unit indicating what the information was to be used for. Indeed, when the employing unit severed its relationship with the claimant later in April, 2012, the claimant's access to the records was curtailed, since the employing unit specifically told its contact at the RMV to not allow the claimant to use the employing unit's block of time at the RMV anymore. The findings of fact make clear that the claimant was acting under the authority or auspices of the employing unit in order to get the information that the employing unit wanted. The findings further establish that the information had be collected entirely in accordance with the employer's specifications and recorded in a precise format as dictated by the employer.

It is true that the employing unit did not supervise the claimant directly at the RMV. However, based on the facts that the employing unit gave the claimant very specific direction in what information to obtain and from whom and that she could get time at the RMV only pursuant to a letter sent from the employing unit to its RMV contact, we conclude that the claimant was not "free from the control or direction of the employing enterprise." Therefore, the employing unit did not meet its burden with respect to prong (a) of the ABC test.

Since the test is conjunctive, and the employing unit failed to meet one of the three prongs, we need not go further with any analysis of prongs (b) and (c). The services performed by the claimant for the employing unit constituted employment, within the meaning of G.L. c. 151A, § 2, and the employing unit must make contributions to the unemployment compensation fund based on those services.

We now consider whether, based on the wages earned from the employing unit, the claimant could establish a valid unemployment claim. G.L. c. 151A, § 24, provides, in pertinent part, as follows:

> An individual, in order to be eligible for benefits under this chapter, shall—
>
> (a) Have been paid wages in the base period amounting to at least thirty times the weekly benefit rate; provided, however, that for the period beginning on January first, nineteen hundred and ninety-five the individual has been paid wages of at least two thousand dollars during said base period; provided, further, that said amount shall be increased annually proportionately, rounding to the nearest one hundred dollars, to any increases which have occurred during the prior calendar year in the minimum wage . . . .

G.L. c. 151A, § 1(a), defines base period, in relevant part, as follows:

> "Base period", the last four completed calendar quarters immediately preceding the first day of an individual's benefit year; provided, however that if an individual as a result of the above provision does not meet the requirement of clause (a) of section twenty-four, or has reason to believe that he would be eligible for an increase of ten percent or more in his total benefit credit as defined in subsection (a) of section thirty, if his base period was calculated using the last three completed calendar quarters and any weeks in which wages were paid to the individual during the incomplete calendar quarter in which the individual files a claim, . . . then the term "base period" shall mean the last three completed calendar quarters and any weeks in which wages were paid to the individual in the incomplete calendar quarter in which the individual files a claim for benefits; provided, further, that if a claimant received weekly compensation for temporary total disability under the provisions of chapter one hundred and fifty-two . . . for more than seven weeks within the base period, as heretofore defined, his base period shall be lengthened by the number of such weeks, but not to exceed fifty-two weeks, for which he received such payments; . . .

G.L. c. 151A, § 1(s)(A) defines wages, in relevant part, as follows:

> "Wages," every form of remuneration of an employee subject to this chapter for employment by an employer, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, lodging, payment in kind and all remuneration paid in any medium other than cash; . . .

To be monetarily eligible for a claim, under G.L. c. 151A, § 24(a), the claimant must have earned wages of at least $3,500.00 in the base period.[1] She must also have earned wages which amount to thirty times her weekly benefit rate. The review examiner found that the claimant filed a new claim for unemployment benefits on April 20, 2012, and the effective date of the claim is April 15, 2012. The primary base period of the claim is, therefore, the time period from April 1, 2011, through March 31, 2012. Her alternate base period, as provided for under G.L. c. 151A, § 1(a), is July 1, 2011, through April 14, 2012.

Based on the review examiner's findings of fact, as well as the payment records submitted by the claimant and entered into the record, we conclude that the claimant is not monetarily eligible for a claim, because she has not earned at least $3,500.00 in either her primary or alternate base period. When determining what wages may be considered for monetarily eligibility, we are concerned only with wages that were actually paid to the claimant, not necessarily those which she earned but were not paid. *See* Naples v. Comm'r of Department of Employment and Training, 412 Mass. 631, 634 (1992).

As to the primary base period, the claimant earned wages from the employer only in the fourth quarter of 2011 and the first quarter of 2012. The review examiner found that the claimant earned $1,155.00 in the fourth quarter of 2011. This amount is not supported by the payroll information submitted by the claimant, so, as noted above, we reject this amount. Based on the payroll receipts in the record (Remand Exhibit #8), we conclude that the claimant earned $825.00 in the fourth quarter of 2011. The breakdown is as follows:

Payment Date	Amount Paid	Check Number
11/3/2011	$55.00	6171
11/8/2011	$110.00	6186
11/29/2011	$330.00	6209
12/9/2011	$165.00	6232
12/19/2011	$165.00	6248

Total: $825.00

The review examiner found that in the first quarter of 2012, the employer paid the claimant $1,860.00. Again, this amount is not supported by the payroll information submitted by the claimant; so, as noted above, we reject this amount. Based on the payroll records, we conclude that the claimant earned $1,805.00 in the first quarter of 2012. The breakdown is as follows:

Payment Date	Amount Paid	Check Number
1/13/2012	$330.00	6286
1/25/2012	$220.00	6297
2/6/2012	$165.00	6325
2/7/2012	$165.00	6327

[1] G.L. c. 151A, § 24(a) states that a claimant must have earned $2,000.00 in the base period. However, this amount has been changed, as required under the statute, based on changes to the minimum wage. The minimum amount of wages needed for a valid unemployment claim is now $3,500.00. *See* http://www.mass.gov/lwd/unemployment-insur/basic-ui-information/understanding-eligibility-requirements.html (accessed May 16, 2014) (explaining requirements for eligibility for UI program).

2/21/2012	$330.00	6349
3/5/2012	$265.00	6379
3/15/2012	$165.00	6392
3/20/2012	$165.00	6415

Total: $1,805.00

Since the claimant earned only $2,630.00, she is not eligible for claim based on her primary base period wages.

As to the alternate base period, the claimant earned $825.00 in the fourth quarter of 2011, $1,805.00 in the first quarter of 2012, and $385.00 in the second quarter of 2012.[2] Therefore, she earned $3,015.00 in her alternate base period, and she is still not monetarily eligible for a claim under G.L. c. 151A, § 24(a). We note that the review examiner made findings of fact regarding two checks written to the claimant in April 2012, a time period which is covered by the alternate base period. However, the findings of fact indicate that the claimant never received or was actually paid the amounts noted in the checks. One check was returned due to insufficient funds and the other was non-negotiable. Thus, she was not paid those wages. *See* Naples, 412 Mass. at 634.

We, therefore, conclude as a matter of law that the review examiner's initial conclusion that the claimant's services did not constitute employment is based on an error of law, because the claimant was subject to the direction and control of the employing unit, but the claimant is not monetarily eligible for an unemployment claim.

[2] The review examiner did not make a finding about the April 2, 2012 payment record, which is a part of Remand Exhibit #8. That record, which is check number 6423, shows an amount paid of $385.00. While this amount is not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the remand hearing and placed in the record, and it is thus properly referred to in our decision today. *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 review examiner's decision is affirmed in part and reversed in part. We reverse the conclusion that the claimant's services were not employment, pursuant to G.L. c. 151A, § 2. The claimant was an employee, and the employing unit shall contribute to the unemployment compensation fund based on that employment. However, we affirm the conclusion that the claimant is not monetarily eligible for an unemployment claim, because she does not have sufficient wages in her base period upon which to base a claim. The claimant may contact the DUA and request another monetary determination if she obtains additional evidence that she was *paid* more wages in her base period than is currently reflected in the record.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 20, 2014

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh