0015 1081 68 (Aug. 26, 2016) – On-call, part-time, municipal snowplow driver's services were not exempt under G.L. c. 151A, § 6A(5), because he was routinely called in to handle the demands of heavy snowfall.

Board of Review
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Issue ID: 0015 1081 68
Claimant ID: 1087592

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award the claimant benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his primary employment with another employer on December 3, 2014. He filed a claim for benefits with the DUA, which was approved on February 6, 2015. During 2014, the claimant had also worked part-time for the instant employer as an on-call snowplow driver. The instant employer, an interested party, appealed the determination to the hearings department. Only the employer attended the hearing. In a decision rendered on March 20, 2015, the review examiner affirmed the agency's determination to award benefits, concluding that the instant employer was a subsidiary part time employer, that the claimant was accepting all work offered by the employer, and that the claimant was in partial unemployment, under G.L. c. 151A, §§ 29(b) and 1(r). The Board accepted the employer's application for review and provided the parties with an opportunity to submit written reasons for agreeing or disagreeing with the review examiner's decision. Only the employer responded.

On January 27, 2016, the Board issued a decision affirming the review examiner's conclusion that the claimant was in partial unemployment. However, the Board disqualified the base period wages earned from the employer from the calculation of the claimant's weekly benefit amount, on the ground that those wages were exempt, pursuant to G.L. c. 151A, § 6A(5). Because the parties had not received notice and an opportunity to present evidence pertaining to G.L. c. 151A, § 6A(5), the Board subsequently rescinded its decision and remanded the case for further evidence as to whether the claimant's services were exempt under this statutory provision. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issues on appeal are: (1) whether the claimant's services as an on-call snowplow driver were exempt, pursuant to G.L. c. 151A, § 6A(5); and (2) whether the review examiner's conclusion that the claimant is in partial unemployment is supported by substantial evidence and free from error of law.

Findings of Fact

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

1. The employer is a municipality in the Commonwealth of Massachusetts.

2. The claimant was hired to work on call for the employer from December 21, 2014.

3. The claimant initiated a new claim for unemployment benefits on December 16, 2014 with an effective date of December 14, 2014.

4. The claimant separated from the employer in September 2015.

5. The employer contacts persons for snowplowing services via a 3 level contact list. The employer contacts employees in the next level of the list when the employer cannot meet the demands of a snowstorm with employees from the preceding level of the list.

6. Employees at every level of the list are paid an hourly wage by the employer.

7. The first level of the list consists of regular fulltime employees of the employer.

8. The second level of the list consists of on call employees of the employer.

9. The third level of the list consists of on call subcontractors of the employer.

10. During his employment with the employer, the claimant was on the second level of the list.

11. As of September 2015 when the claimant separated from the employer, the claimant is no longer on the list of persons whom the employer contacts to perform snowplowing services.

12. During the claimant's employment, the claimant's schedule varied. The employer called and offered work to the claimant as work became available.

13. During the base period of the claim, the claimant worked for another employer while working contemporaneously for the instant employer.

14. The Agency records indicate that during the base period of the claim, the claimant earned more money from his job with the other employer than when he worked for the instant employer.

15. During the week ending December 27, 2014, the employer did not offer any work to the claimant.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject the portion of Consolidated Finding # 2 that states the claimant was employed by the town "from December 21, 2014." It is evident from Consolidated Finding # 13 that the claimant was working for the employer prior to this date, during his base period.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant's services for the employer were not exempt, and we further conclude that the claimant was entitled to partial unemployment benefits while working for the employer during the benefit year.

Municipal on-call snowplowing services

In its appeal to the Board, the employer asked us to consider whether the claimant's services were exempt under G.L. c. 151A, § 6A. This statutory provision states, in relevant part, as follows:

> The term "employment" shall not include service performed by an individual in the employ of the commonwealth or any of its instrumentalities or any political subdivision thereof . . . if such individual performed such services as . . . (5) an employee serving on a temporary basis in case of fire, storm, ***snow***, earthquake, flood, or similar emergency . . . . (Emphasis added.)

G.L. c. 151A, § 6A(5), was enacted in 1977 following a change in federal law. *See* 29 U.S.C. § 3309(b)(3)(D), which similarly exempts from unemployment tax and benefits service performed in the employ of a government entity, if such service is performed "as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency . . . ."[2] The U.S. Department of Labor (DOL) released an official commentary on the 1976 Federal Unemployment Tax Act (FUTA) Amendments to aid the states in understanding the changes.[3] It states:

> The exclusion . . . applies only to those individuals who are hired or impressed into service to assist in emergencies and includes such temporary tasks as fire-

[1] The DUA's electronic record keeping system, UI Online, shows that the claimant's base period was September 1, 2013 to August 31, 2014, and that the employer reported paying wages to the claimant during the 4th quarter of 2013 and the 1st quarter of 2014.

[2] This subsection was incorporated into the Federal Unemployment Tax Act (FUTA) as part of the Unemployment Compensation Amendments of 1976, Public Law 94-566 ("the 1976 Amendments").

[3] *See* Draft language and Commentary to Implement the Unemployment Compensation Amendments of 1976 – P.L. 94-566, available at http://www.workforcesecurity.doleta.gov/dmstree/pl/pl_94-566.pdf.

> fighting, removal of storm debris, restoration of public facilities, snow removal and road clearance, etc. The exclusion does not apply to permanent employees whose usual responsibilities include emergency situations.

Id. at p. 26. The commentary adds, "It does not apply to *regular* employees whose usual responsibilities include such emergency situations." Id. at p. 27 (emphasis added.)

The DOL further clarified the intent of this emergency services exemption in 2008, when the DOL considered a proposed Illinois statutory provision that would have excluded services performed by volunteer, on-call firefighters. In a March 6, 2008 letter to the Illinois Department of Employment Security, the DOL advised that Illinois' proposed exclusion would create an issue of conformance with mandatory FUTA provisions.[4] The DOL stated that the paid on-call firefighters were not "employee[s] serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency," within the meaning of the exception under 29 U.S.C. § 3309(b)(3), because these firefighters "do not perform services only during such emergencies; instead they are permanent employees who serve on an intermittent, on-call basis." It referred to Internal Revenue Code's Social Security and Medicare tax exemption for workers "serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency."[5] And, it quoted Internal Revenue Service (IRS) guidance, which states in relevant part:

> This [26 U.S.C. § 3121(b)(6)(C)] exception applies only for temporary workers hired in response to an *unforeseen emergency*. It does not apply to firefighters who work on a recurring, routine or regular basis, even if their work involves situations that may be considered emergencies, including responding to fires. (Emphasis added.)[6]

Without the benefit of this DOL guidance, our prior Board decisions considered whether a claimant's services fell under G.L. c. 151A, § 6A(5), based upon the nature of the employment relationship. *Compare, e.g.,* Board of Review Decision BR-109140-A (Jan. 26, 2010) (since part-time, on-call Emergency Medical Technician (EMT) was paid to be on-call, regardless of whether he was needed to perform services, his services were not exempt) with Board of Review Decision 0011 1365 11 (Nov. 17, 2015) (services of an on-call EMT, who was paid only when she answered a call, were exempt).[7] For this reason, we remanded the present appeal to explore in more detail the nature of the employment relationship between the claimant and the employer.

After remand, the consolidated findings show that the claimant was paid on an hourly basis and only when he was called upon to provide snowplowing services. The employer maintained three lists, pulling first from a list of regular, full-time employees, pulling second from a list of on-call employees who drove the employer's equipment (including the claimant), and when necessary, pulling from a third list of subcontractors who used their own equipment.[8] Following the

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[4] *See* 20 C.F.R. § 604.6.
[5] *See* 26 U.S.C. § 3121(b)(6)(C).
[6] Available at http://www.irs.gov/govt/fslg/article/0,,id=111350,00.html.
[7] Board of Review Decisions BR-109140-A and 0011 1365 11 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.
[8] The employer testified that employees on the first and second lists drove the employer's snowplowing equipment; the subcontractors on the third list used their own vehicles. While not explicitly incorporated into the review

analysis in our prior decisions, the present case would seem to present the same circumstances as the EMT services in Board of Review Decision 0011 1365 11. However, we now believe such an outcome would run counter to the federal guidance cited above.

We take this opportunity to revise our interpretation of G.L. c. 151A, § 6A(5). Snowfall in New England is not an unforeseen emergency. As a general rule, a municipality's need for snowplowing services is anticipated. Snow removal budgets are planned and personnel lined up months in advance.[9] Individuals such as the claimant are regularly called in to supplement the employer's full-time staff when snowfall is heavy or falls over an extended period of time. Thus, the claimant's on-call services were recurring and routine.[10] Since the claimant is a regular, on-call employee, whose usual responsibilities for the employer include snow removal, we conclude that they did not constitute exempt emergency services within the meaning of G.L. c. 151A, § 6A(5).[11]

Partial unemployment

Next, we consider whether the claimant is entitled to benefits, pursuant to G.L. c. 151A, §§ 29 and 1(r). G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

> "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

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 . . . .

Since the claimant's eligibility for benefits is based upon his separation from full-time employment, he is eligible for partial unemployment benefits for any weeks that he has less than full-time employment. Since nothing in the record indicates that the claimant was turning down offers of work during his benefit year, he was in total unemployment during those weeks that he

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examiner's findings, this testimony is part of the unchallenged evidence introduced at the 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).

[9] The employer offered undisputed testimony that on-call snowplow drivers sign up to be on the employer's list in September.

[10] In his DUA fact-finding questionnaire, the claimant stated that he worked 62 hours in 2014. This is also part of the unchallenged evidence in the record.

[11] Were the services at issue performed only during a record blizzard, we might reach a different result.

did not have any work and he was in partial unemployment during those weeks that he worked part-time for the employer.

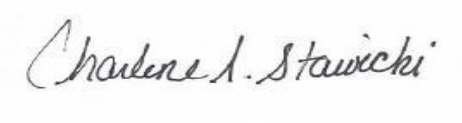
We, therefore, conclude as a matter of law that the claimant's services for the employer are not exempt, under G.L. c. 151A, § 6A(5). We further conclude that the claimant was in unemployment, within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending December 27, 2014, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

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