

0017 7491 67 (June 14, 2016) – The employer’s obligation to provide the claimant with notice of how to file an unemployment claim did not begin at the time the claimant’s hours were reduced, but began when the claimant separated to accept a job with another employer.

Board of Review
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Issue ID: 0017 7491 67

BOARD OF REVIEW DECISION

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 a pre-date of the effective date of the claimant’s unemployment claim from September 27, 2015 to June 28, 2015. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA in early October of 2015, and the claim was determined to be effective September 27, 2015. The claimant requested that his claim be pre-dated to late June of 2015, but this request was denied in a determination issued by the DUA on February 17, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency’s initial determination and denied the pre-date request in a decision rendered on March 12, 2016.

The pre-date request was denied after the review examiner determined that the claimant did not have good cause for failing to file his claim earlier and, thus, he was not eligible to have an earlier effective date of his claim, under G.L. c. 151A, §§ 23(b), 24(c), and 430 CMR 4.01(3) and 4.01(4). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we accepted the claimant’s application for review and remanded the case to the review examiner to make subsidiary findings of fact from the record as to whether the claimant’s employer failed to timely give him notice of how to file an unemployment claim, as required by G.L. c. 151A, § 62A(g). The review examiner has issued her consolidated findings of fact and returned the case to the Board. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion that the claimant is not entitled to a pre-date is supported by substantial and credible evidence and is free from error of law, where there is insufficient evidence in the record to show that the claimant’s employer timely provided him with written information about how and where to file a claim for unemployment benefits after he was separated from that employer.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits on 10-2-15, with an effective date of 9-27-15.
2. The claimant had filed previous claims for unemployment benefits in 2011 and 2012.
3. The claimant worked as a bus driver for the instant employer. He drove a regular route until the school year ended at the end of June and then continued working with this employer on a reduced daily schedule. The claimant left the instant employer on 7-11-15 to accept employment with a second employer on 7-20-15.
4. The employer did not give the claimant information in June or July of 2015 regarding how and where to file a claim.
5. The employer mailed a pamphlet to the claimant at the time the employer became aware of his separation in August 2015 entitled "How to file for unemployment Insurance Benefits".
6. The claimant did not file for unemployment benefits at the time he separated from the instant employer.
7. The claimant began working for the 2nd employer.
8. The claimant did not file for unemployment benefits at the time the benefit information was mailed to him by the instant employer.
9. In October of 2015 the claimant learned through his place of employment that he may have been eligible for unemployment benefits during the summer months.
10. On his claim for benefits filed on 10-2-15, the claimant requested that his claim be predated to June of 2015.
11. On 2-17-16 the claimant's request was denied "because you had accepted another job" and the effective date of his claim was established as 9-27-15 in accordance with Section 23(b) of the law and 430 CMR 4.01.
12. The claimant appealed the predate denial.

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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, since the employer has not established that it complied with the requirements of G.L. c. 151A, § 62A(g), we conclude, contrary to the review examiner, that the claimant is entitled to a pre-date.

G.L. c. 151A, § 62A(g), provides, in pertinent part, as follows:

Each employer shall issue to every separated employee, as soon as practicable, but not to exceed 30 days from the last day said employee performed compensable work, written information furnished or approved by said division which shall contain . . . instructions on how to file a claim for unemployment compensation . . . Delivery is made when an employer provides such information to an employee in person or by mail to the employee's last known address. The waiting period under section 23 for an employee who did not receive the information required by this paragraph and who failed to file timely for benefits, shall be the Sunday of the initial week such employee would have been eligible to receive unemployment compensation. Each employer shall have the burden of demonstrating compliance with the provisions required herein.

The review examiner found that, at the end of the school year in late June of 2015, the claimant stopped driving his regular route. He then continued to work for his prior employer, but on a reduced schedule. In October of 2015, the claimant filed for unemployment benefits, after learning that he may have been eligible for benefits during the summer.

The review examiner further found that the employer provided the claimant with written notice instructing him on how to file a claim for benefits in August of 2015. *See* Finding of Fact # 5. The question thus becomes whether the employer provided this notice in a timely fashion. The above-cited statute mandates that the employer "shall issue" the notice to "every separated employee, as soon as practicable, but not to exceed 30 days from the last day said employee performed compensable work."

In this case, since the claimant continued to perform compensable work for his prior employer after the school year ended, the employer's obligation to provide the claimant with notice of how to file his claim for unemployment did not begin at the time the claimant's hours were reduced. However, when he left his job with this employer to go to a different job with another employer, he was separated for purposes of G.L. c. 151A, § 62A(g). He stopped performing services for the employer on July 11, 2015. *See* Finding of Fact # 3. Thus, the employer had, at most, thirty days from July 11, 2015 to issue the claimant information about filing his unemployment claim.

As noted above, the employer issued this information to the claimant in August of 2015. *See* Finding of Fact # 5 and Exhibit # 4, p. 1. It is not clear from the record when in August of 2015 the employer gave the information to the claimant, and the employer did not attend the hearing to clarify its initial statement to the agency that it gave the claimant the information. Under G.L. c.

151A, § 62A(g), “[e]ach employer shall have the burden of demonstrating compliance with the provisions required herein.” In this case, since the employer did not show that it complied with the statutory provisions within thirty days of July 11, 2015, we conclude that there is not substantial and credible evidence in the record to conclude that the claimant was issued the required information in time. Therefore, he is entitled to have his claim pre-dated. There is no need to also show any form of good cause for not filing the claim earlier. This is because the statute uses mandatory language (“[t]he waiting period . . . for an employee who did not receive the information required . . . shall be the Sunday of the initial week such employee would have been eligible . . .”). The fact that the claimant had previously filed unemployment claims is not a consideration listed in the above-cited statute. The good cause analysis used by the review examiner was not necessary or applicable.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny the pre-date was based on an error of law, because there is insufficient evidence in the record to show that, pursuant to the provisions of G.L. c. 151A, § 62A(g), the employer provided information about filing an unemployment claim within thirty days of his separation.

The review examiner's decision is reversed. The claimant is entitled to a pre-date on his 2015 claim. The effective date of the claim shall be July 19, 2015.¹

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 14, 2016



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**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.

SF/rh

¹ The effective date of the claim shall be July 19, 2015, because we cannot conclude that the claimant “would have been eligible to receive unemployment compensation” during the week beginning July 12, 2015. The claimant chose to stop working on July 11, and nothing in the record indicates that his former employer did not have work available that week. It was his choice not to work during the week of July 12, 2015. We note that the claimant did begin working for the new employer on July 20, 2015; however, there is insufficient evidence in the record to conclude that he would have had sufficient earnings such that he would not have been in unemployment that week. Following the pre-date of this claim, the DUA may inquire into his partial earnings to see whether he earned over his benefit rate beginning the week of July 19, 2015.