

**Board of Review
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Issue ID: 0024 6724 18

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employing unit appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the services performed by a deck hand constituted employment, pursuant to G.L. c. 151A, § 2, and that the employing unit is subject to the provisions of Chapter 151A, pursuant to G.L. c. 151A, § 8(a). We affirm.

On January 31, 2018, the agency initially determined that the services performed by the deck hand constituted employment. The employing unit appealed, and a DUA representative and the employing unit attended the hearing. In a decision rendered on April 26, 2018, the review examiner affirmed the agency determinations. The Board accepts the employing unit's application for review.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employing unit's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record.

We also conclude that the review examiner's ultimate conclusion that the services were employment is free from error of law. In order for the employing unit to show that the services were not employment, it must carry its burden to show that it meets each prong of the statutory ABC test, which is laid out in G.L. c. 151A, § 2. The test is conjunctive, so if the employing unit fails to meet any portion of the three-pronged analysis, the services will be considered employment.

In making the conclusion that the employing unit has failed to carry its burden, we do so under G.L. c. 151A, § 2(b). Specifically, prong (b) of the test requires the employing unit to show that the services at issue were performed either outside of the usual course of business for which the service is performed or is performed outside all of the places of business of the enterprise for which the service is performed. Here, the employing unit's business is commercial fishing. The claimant performed services as a deck hand on the employing unit's vessel. The services included fishing and packaging fish. Such services are certainly within the usual course of a fishing business. Additionally, the claimant performed these services at the employing unit's place of business, namely, the vessel. The vessel is owned by the employing unit and is the

location where all of the commercial fishing activities are based. Therefore, the employing unit has not met its burden under G.L. c. 151A, § 2(b).¹

The review examiner's decision is affirmed. The services performed constitute employment under G.L. c. 151A, § 2. Pursuant to G.L. c. 151A, § 8(a), the employing unit is subject to the provisions of Chapter 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 1, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano, 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 Viewing the case as a whole, we also note that the employing unit has probably not met its burden with respect to prongs (a) and (c) of the ABC test either. See *Silva v. Dir. of Div. of Employment Security*, 398 Mass. 609 (1986). However, the review examiner's findings of fact leave out some details with respect to those aspects of the statutory test. Because the test is conjunctive, and because we conclude that the employing unit has certainly not met its burden under prong (b), we need not remand the case to the review examiner for further consideration of the other prongs of the ABC test.