

**The services performed by the captain of a fishing vessel constituted employment, pursuant to G.L. c. 151A, § 2(b), because the services were within the usual course of the employer’s fishing business and the services occurred on the employer’s fishing vessel itself. The services were not exempt under G.L. c. 151A, § 4A(f).**

**Board of Review  
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**Issue ID: 0031 4060 69**

### 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 captain of a commercial fishing vessel constituted employment pursuant to G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On June 10, 2019, the agency initially determined that the services performed by the captain constituted employment. The employing unit appealed, and a DUA representative and the employing unit attended the hearing. In a decision rendered on November 2, 2019, the review examiner affirmed the agency determination. The employing unit timely appealed to the Board, and the Board accepts the employing unit’s application for review.<sup>1</sup>

The issue before the Board is whether the review examiner’s decision that the services performed by the captain of a commercial fishing vessel constituted employment pursuant to G.L. c. 151A, § 2, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

The review examiner’s findings of fact are set forth below in their entirety:<sup>2</sup>

1. The employer is a corporation, which owns two fishing vessels, one is a four-crew vessel and the other is a three-crew vessel. The corporation is physical [sic] located in [City A] Massachusetts.
2. The claimant had worked as a captain of at least one other fishing vessels [sic] prior to October 2018. This vessel reported the claimant’s wages to DUA.

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<sup>1</sup> The employing unit appealed the November 2, 2019, decision on November 10, 2019, which was timely. However, the appeal was not forwarded to the Board of Review until March 10, 2020. We have accepted the appeal as timely and reviewed the matter.

<sup>2</sup> The mis-numbering of the findings of fact is taken directly from Part II of the review examiner’s decision.

3. The claimant heard through word of mouth that the employer's captain had died and that the employer therefore needed a new captain for one of its fishing vessels. The claimant went to see the owner of the fishing company and offered his services as a ship captain.
1. On October 9, 2019, the employer gave the claimant a crew agreement to sign which stated in part:
  - a. That he understood that by working on the vessel he was an independent contractor responsible for all State, Federal, Unemployment, Social Security, Medicare, business and personal taxes.
  - b. That he was notified by the vessel owner that the vessel was a drug and alcohol-free vessel and of the penalties for violating this expectation.
  - c. That he agreed not to violate any federal, state, fisheries or USCG laws, regulations.
  - d. That he agreed not to violation [sic] any rules defined by the vessel owner.
  - e. That harassment, sexual harassment, intimidation, and inappropriate touching of an observed assigned to the vessel was prohibited and the penalties for violating this expectation [sic].
  - f. That the he would familiarize himself with all safety equipment onboard the vessel.
  - g. That he would participated [sic] in the required US Coast Guard and Vessel safety drills conducted by a certified safety instructor or vessel owner.
  - h. That he would list any broken, missing or defective safety equipment and in a separate space to list any broken, missing or defective safety equipment.
  - i. That he had been instructed by the vessel owner and that after his examination, instruction, familiarization and training on how to use all required safety and mechanical devises, he inspected them and found them to be in good working condition and that he had listed any that were not in the place provided and brought them to the attention of the vessel owner prior to leaving port.
  - j. That he agreed and accepted responsibility for the vessel and that he would not violated [sic] any laws while in control.
2. On October 9, 2018, the claimant signed the above described crew agreement.
3. On October 9, 2018, the claimant signed a W-9 Request for Taxpayer Identification Number and Certification classifying him as an individual /sole proprietor or single member LLC.
4. The claimant's job was to captain the crew of the employer's fishing vessel. One of the claimant's job tasks was to hire a crew for each vessel trip. The crew attached to the vessel only for the length of the trip. The crew has no legal connection to the claimant beyond his authority as captain of the employer's vessel.

5. The employer required that all crewmembers sign the crew agreement before they left port.
6. The employer's vessel fished in federal waters.
7. The employer compensated the crew with 45% of the catch, after expenses for the trip were deducted. The claimant, as captain, was responsible for determining what share each crewmember, including himself, received.
8. The employer did not submit 2018 quarterly wage reports or otherwise report wages for any workers for that quarter, including wages the claimant.
9. The last day that the claimant performed services for the employer was December 11, 2018.
10. Between October 1, 2018 and December 31, 2018, the employer paid the claimant \$29,475.23. This sum was reported to the IRS as miscellaneous income through a 1099 form.
11. On or about January 2, 2019, the claimant informed the employer that he was unable to take the vessel out because he did not have sufficient crew to run the vessel.
12. Between December 11, 2018 and March 24, 2019, the claimant worked for another fishing vessel. This vessel reported wages for the claimant to DUA for the 2nd, 3rd and 4th quarter of 2019.
13. On March 24, 2019, the claimant filed his 2019-01 claim for unemployment benefits, effective the same date.
14. On June 10, 2019, DUA issued a determination that under Massachusetts Chapter 151A Section 2, the services provided by the claimant to the employer were covered employment.

### 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, except for two findings. In the second Finding of Fact # 1, the review examiner found that the crew agreement was given to the claimant on October 9, 2019. However, the record supports a finding that the year should be 2018. *See* Exhibit 21. In addition, we reject Finding of Fact # 12, because it is unsupported by substantial and credible evidence in the record. The record does not contain any information as to what wages were reported by an employer in 2019, and the record does not contain any specific employment dates for the claimant's work with a different employing unit. Although

Exhibits 2 and 10 show that the claimant had employment in the second, third, and fourth quarters of 2018 with another employer, the review examiner's findings of fact do not state this. Therefore, we have not considered it when rendering a decision in this matter. These errors do not affect the outcome of the case.

As our decision, we conclude that the review examiner's determination that the services at issue were employment is free from error of law. 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. Coverall North America, Inc. v. Comm'r of Div. of Unemployment Assistance, 447 Mass. 852, 857 (2006).

In concluding 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, a captain on the employer's fishing vessel, performed services including supervising the crew, maintaining certain safety standards, and determining how to compensate the crew of the vessel. While performing these duties, the captain also participated in the fishing activities of the vessel. Such services are certainly within the usual course of the employing unit's commercial fishing business. Additionally, the claimant performed the 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 the commercial fishing activities are based. Therefore, the employing unit has not met its burden under G.L. c. 151A, § 2(b), and the services at issue constitute employment for purposes of Chapter 151A.<sup>3</sup>

In its appeal to the Board, the employing unit argues that fishermen (and captains of commercial fishing vessels) are not covered by the Massachusetts unemployment law, Chapter 151A. However, this argument is not supported by Massachusetts law or federal law. Under G.L. c. 151A, § 4A, employment includes services performed by an individual:

(f) On or in connection with American vessels . . . under a contract of service which is entered into within the United States or during the performance of which the vessel . . . touches at a port in the United States including service performed on or in connection with such vessel . . . outside the United States, and including service performed on or in connection with the operation of an American vessel

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<sup>3</sup> Although the captain had some freedom in how he supervised his crew, he was hired by the employing unit's owner and was the employing unit's representative on the vessel. Because we can decide the case under prong (b), a remand is not necessary to obtain more information regarding the direction and control test under G.L. c. 151A, § 2(a). However, we note that at least one case decided by the Supreme Judicial Court suggests that a captain of a fishing vessel can be considered the agent of the employing unit, and, therefore, services performed in that capacity could be considered employment. See Silva v. Dir. of Div. of Employment Security, 398 Mass. 609 (1986).

operating on the navigable waters within or within and without the United States, . . . and such operations are ordinarily and regularly supervised, managed, directed and controlled from an operating office managed by an employing unit in this commonwealth; provided however that the term “employment” shall not include service performed on a vessel of ten net tons or less engaged in catching, taking or harvesting of fish. . . .

Under this section of law, the services performed on a vessel are employment, unless the services are “performed on a vessel of ten net tons or less.” The language tracks very closely with the definitions laid out by the United States government for purposes of determining which employing units must contribute taxes under the Federal Unemployment Tax Act. *See* 26 U.S.C. § 3306(c)(17). Here, because the vessel at issue is an American vessel of more than ten net tons, actively engaged in the catching, taking, and harvesting of fish, with a home port in Massachusetts,<sup>4</sup> the services are not exempt under G.L. c. 151A, § 4A(f).

The review examiner’s decision is affirmed. The services performed constitute employment under G.L. c. 151A, § 2, and the employing unit must report the captain’s wages pursuant to the provisions of Chapter 151A.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 26, 2020**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](http://www.mass.gov/courts/court-info/courthouses)

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<sup>4</sup> *See* Exhibits 11–15. The gross tonnage and home hailing port information, while not explicitly incorporated into the review examiner’s findings, 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).

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