

The claimant has worked for and is a partner in an LLC. He filed an unemployment claim when the business closed. Upon producing documentary evidence that the claimant's LLC employer elected to be treated as a corporation for federal tax purposes, the Board held that his wages qualified to establish monetary eligibility for the claim under G.L. c. 151A, § 24(a).

**Board of Review
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Issue ID: 0035 1210 01

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 unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant stopped performing services when the employer temporarily closed on March 21, 2020. He filed a claim for unemployment benefits with the DUA, which was initially approved, but subsequently denied in a determination issued on April 14, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determination on different grounds, denying benefits in a decision rendered on July 25, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had insufficient base period wages upon which to establish a claim for benefits and, thus, he was disqualified under G.L. c. 151A, §§ 1(h) and 24(a). 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 obtain additional evidence that he was paid wages by an employer, a Limited Liability Company (LLC), which elected to be treated as an s-corporation for federal tax purposes. Both parties 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 issue before the Board is whether the review examiner's decision, which concluded that the claimant's wages could not be used to establish an unemployment claim because his employer LLC operates as a partnership, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as the supervisor of operational managers for the employer, a health and fitness center, for approximately 5 years until March 21, 2020, when the business closed due to COVID-19.
2. The claimant worked 50 hours a week.
3. The claimant was paid an annual salary of approximately \$115,000.00.
4. The claimant owns the business with the managing partner and a silent partner. The claimant and the managing partner each own 38% of the business and the silent partner owns the remaining 24%.
5. The corporation was organized on March 28, 2014.
6. In 2015, the corporation filed an Entity Classification Election Form 8832 with the Internal Revenue Service. On page 2 of the Form, the corporation reported it was a domestic eligible entity electing to be classified as an association taxable as a corporation.
7. In 2015, the corporation filed an Election by Small Business Form 2553 with the Internal Revenue Service requesting to be treated as an S corporation for federal tax purposes.
8. On March 16, 2015, the Internal Revenue Service notified the corporation that it will be treated as an S corporation effective March 28, 2014.
9. The business is a Limited Liability Company that has been treated as a S corporation for federal tax purposes since the effective date of March 28, 2014.
10. The three owners file the business' taxes with their personal tax returns via a K-1 schedule.
11. The claimant filed an initial claim for benefits effective March 22, 2020. The base period of the claim extends from January 1, 2019 through December 31, 2019. The alternate base period extends from April 1, 2019 through March 21, 2020.
12. The claimant's W-2 for the year 2019 reflects the claimant's gross wages as \$114,180.00 and his reported W-2 wages as \$101,882.24.
13. The claimant's paycheck for the period of March 1, 2020 through March 15, 2020 was for the total gross amount of \$4,747.50. His total year end gross earnings at that time was \$28,545.00.
14. On April 14, 2020, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 6(d) of the Law.

15. The claimant's paycheck for the period of September 13, 2020 through September 19, 2020 was for the total gross amount of \$1,923.00. His total year end gross earnings at that time were \$61,392.25.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. 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, we disagree with the review examiner's legal conclusion that the claimant's base period earnings may not be treated as qualifying wages.

In order to be eligible for unemployment benefits, the claimant must have earned wages amounting to at least thirty times his weekly benefit rate and at least \$5,100.00 in his base period. G.L. c. 151A, § 24(a).¹ Wages are defined under G.L. c. 151A, § 1(s), which provides, in relevant part, as follows:

(A) "Wages", every form of remuneration of an employee subject to this chapter for employment by an employer

The employer in this case is a partnership registered as an LLC in Massachusetts², and the claimant is a partner. *See* Consolidated Finding # 4. Where the claimant is part owner of the business entity that he works for, we take a close look at the employer's tax classification. It matters whether the employer elected to be treated as a partnership or a corporation while the claimant was drawing his salary.³ As explained by the Massachusetts Appeals Court:

Corporations, unlike partnerships, are treated as separate legal entities for the purposes of the unemployment compensation statute. Spaneas v. Travelers Indem. Co., 423 Mass. 352, 354 (1996) ("A corporation is an independent legal entity, separate and distinct from its shareholders, officers, and employees.") Therefore, a corporate shareholder may be an employee and qualify for unemployment benefits provided other conditions are met.

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount changes periodically, as required under the statute, based on changes to the minimum wage. The minimum amount of wages needed for a valid unemployment claim at the time the claimant filed his 2020 claim was \$5,100.00.

² Because the unemployment benefits at issue are subject to the Federal Unemployment Tax Act, 26 U.S.C. § 3301, et seq., we are bound by U.S. Department of the Treasury regulations. An employer's tax classification is dictated by federal tax law, not how the employer is recognized as an entity under state law. 26 C.F.R. § 301.7701-1(a)(1). The employer's LLC status is a state-law designation, and it is not material for purposes of our analysis. *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 26-08 (Sept. 8, 2008), p. 1. "When the states created LLCs, the IRS did not create a new tax classification, but instead applied the three tax entity classifications it had always used for business taxpayers: corporation, partnership, or sole proprietor. . . ." *Id.* at p. 1–2.

³ "A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership." 26 C.F.R. § 301.7701-2(a).

Herder v. Dir. of Division of Unemployment Assistance, 82 Mass. App. Ct. 701, 704 (2012) (further citations omitted).

If the claimant's employing entity remained classified as a partnership, his earnings would not qualify as "wages" for purposes of monetary eligibility under G.L. c. 151A, §§ 1(s)(A), and 24(a). However, if the partnership elected to be treated as a corporation for federal tax purposes, then we would recognize the wages as remuneration to an employee. We remanded for documentary evidence to substantiate the claimant's assertion that the employer had elected to be treated as a corporation rather than as a partnership for federal tax purposes.

Pursuant to 26 C.F.R. § 301.7701-3(c)(1)(v)(C), the U.S. Treasury Department treats an entity, which elects to be treated as an S-corporation and meets all other requirements of a small business corporation, as having made the election to be treated as a corporation under 26 C.F.R. § 301.7701-3. At the remand hearing, the claimant produced copies of several documents, including Internal Revenue Service (IRS) Forms 2553 and 8832, which the employer filed in 2015, as well as a letter from the IRS, dated March 16, 2015, confirming that the employer's election to be treated as an S-corporation for federal tax purposes was accepted. *See Consolidated Findings ## 6–8.*

The record also shows that, during his base period, the claimant was paid wages in an amount greater than thirty times his weekly benefit rate and which exceeded \$5,100. *See Consolidated Findings ## 11–13.*⁴

We, therefore, conclude as a matter of law that during the base period of this claim, because the claimant earned wages from an entity that is treated as a corporation for federal tax purposes, his earnings were wages as defined under G.L. c. 151A, § 1(s)(A). We further conclude that the claimant's base period earnings from the employer were sufficient to constitute qualifying wages under G.L. c. 151A, § 24(a).

⁴ These findings show that the wages paid to the claimant during his base period exceed thirty times the maximum weekly benefit amount of \$823.00 for the weeks at issue in this claim (30 x \$823.00 = \$24,690).

The review examiner's decision is reversed. The claimant is entitled to receive benefits under his 2020-01 claim, effective the week beginning March 22, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 4, 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
(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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