

The employer elected to be classified as an S-corporation for federal tax purposes. Therefore, the claimant's base period wages may be used to establish monetary eligibility for benefits even though he is the sole owner of the employer LLC.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0056 8427 16

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 31, 2020. 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 benefits in a decision rendered on July 20, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not have sufficient qualifying base period wages to establish a claim, and, thus, he was disqualified under G.L. c. 151A, § 1(h). 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 about the employer's federal tax status. The claimant 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 base period wages from the instant employer could not be used to establish an unemployment claim because he was the sole proprietor of the employer's LLC, 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 filed an initial claim for unemployment benefits with an effective date of October 31, 2021. The base period of the claim extends from October 1, 2019, through September 30, 2020.

2. The claimant works full time as the Manager for the employer, an ice cream shop which is seasonal. The season runs from April through September each year.
3. During the year 2019, the claimant was paid \$50,700.00 from the employer.
4. The claimant receives a W-2 from the employer and files his earned wages via his personal income taxes.
5. The claimant is the sole owner of the business.
6. The business is a Domestic Limited Liability Company (LLC) that has elected to file its federal taxes as an S-Corporation since January 1, 2009.
7. The business filed its 2020 federal taxes as an S-Corporation via Form 1120-S.
8. During the base period of the claim, the claimant was considered an employee of the business.
9. On October 31, 2020, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 6(d) of the Law.

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 reject the review examiner's legal conclusion that the claimant could not use his base period wages from the employer to establish his monetary eligibility for benefits.

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 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

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 2020-01 claim was \$5,100.00.

The employer in this case is an LLC registered in Massachusetts², and the claimant is the sole owner. Consolidated Findings ## 5 and 6. Where a claimant is the sole owner of his employer, we must look at the employer's federal tax classification to determine whether the claimant's base period wages constitute qualifying remuneration. As the Massachusetts Appeals Court has explained:

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.

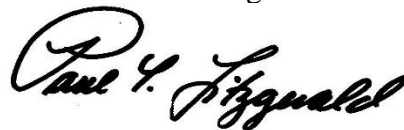
Herder v. Dir. of Division of Unemployment Assistance, 82 Mass. App. Ct. 701, 704 (2012) (further citations omitted).

If the employer were classified as a sole proprietorship for federal tax purposes, the claimant's earnings would not qualify as "wages" for the purposes of establishing monetary eligibility for benefits under G.L. c. 151A, §§ 1(s)(A) and 24(a). However, if the employer elected to be classified as a corporation for federal tax purposes, it is considered a legally distinct entity from its shareholders and officers, and, therefore, any wages paid to a shareholder or officer may qualify as remuneration to an employee of the corporation.

Following remand, the review examiner found that the employer has elected to be treated as an S-corporation for federal tax purposes since 2009. Consolidated Findings ## 6 and 7. Because the employer has elected to be treated as a corporation for federal tax purposes, the claimant's wages constitute remuneration for the purposes of establishing his monetary eligibility for benefits.

We, therefore, conclude as a matter of law that, during the base period of this claim, the claimant's earnings constituted qualifying wages under G.L. c. 151A, §§ 1(s)(A) and 24(a).

The review examiner's decision is reversed. The claimant is entitled to receive benefits effective the week beginning October 1, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 2022

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 an employer's classification 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.



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

LSW/rh