

**As the claimant's employer, a Limited Liability Company, elected to be treated as an S-corporation for federal tax purposes, her base period wages could be used to establish monetary eligibility for benefits even though she is the sole owner of the LLC.**

**Board of Review  
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**Issue ID: 0072 0584 80**

### 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. Benefits were denied on the ground that the claimant did not have sufficient qualifying base period wages to establish a claim, and, thus, she was disqualified pursuant to G.L. c. 151A, §§ 1(h), (i), and (k).

The claimant had filed a claim for unemployment benefits, effective August 8, 2021, which was denied in a determination issued by the agency on March 8, 2022. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on November 2, 2022. The claimant sought review by the Board, which dismissed the appeal due to lack of jurisdiction, as the claimant had filed her appeal beyond the statutory appeal period under G.L. c. 151A, § 40. Subsequently, the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 16, 2023, the District Court ordered the Board to review the claimant's appeal on the merits. Consistent with this order, we reviewed the original record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal. On July 6, 2023, we remanded the case to the review examiner to consider additional documentation submitted with the claimant's District Court complaint. The claimant attended the remand hearing with counsel. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's wages did not render her monetarily eligible for an unemployment claim because she was a partner of the employer Limited Liability Company (LLC), is supported by substantial and credible evidence and is free from error of law.

After reviewing the record after remand, including the recorded testimony and evidence from the remand hearing, and the consolidated findings of fact, we reverse the review examiner's decision.

### Findings of Fact

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

1. On May 6, 2011, the present employing unit registered with the Massachusetts Secretary of State as a Limited Liability Corporation [sic] (LLC). The only filing registration options were LLC or Corporation.
2. The claimant is the sole stockholder [sic] in the present employing unit.
3. The present employing unit, filed an election with the IRS, requesting that the employing unit be treated as an S-corporation. The request was granted, effective January 1, 2014.
4. On June 30, 2018, the employing unit was involuntarily dissolved by Court Order or by the SOC.
5. The claimant received an Internal Revenue Service (IRS) W-2 from [Busines], for 2019, indicating that she received \$3,524.76 in Medicare wages and tips and \$3,383.77 in wages, tips, and other compensation.
6. The claimant received an IRS W-2 form from the present employing unit, for 2019, indicating that she received \$51,999.96 in both Medicare wages and tips and Wages, Tips, and other compensation.
7. Effective January 1, 2020, the employing unit was determined to be subject to the unemployment insurance system, based on pay roll - all others.
8. The claimant received an IRS W-2 form from the present employing unit, for 2020, indicating that she received \$41,442.22 in both "Medicare wages and tips" and "wages, tips, and other compensation."
9. Effective January 21, 2020, the employing unit was revived with the Massachusetts Secretary of State.
10. The claimant, as the sole owner of the employing unit, elected to pay herself wages and receive an IRS W-2. As such, her wages are included in the total wages upon which the employing unit paid unemployment taxes.
11. The employing unit uses IRS Form 1120-S to report its income and deductions. The employing unit's 2021 Form 1120-S indicated \$18,000 in compensation for officers and \$38,308 in ordinary business income.
12. The employing unit issues the claimant an IRS K-1 schedule which states her share of the earnings, losses, and dividends from the employing unit. She uses this form to report this income when filing her personal income taxes.
13. On March 25, 2020, the claimant filed her 2020-01 claim for unemployment benefits. She expected to be eligible to receive unemployment benefits based on her W-2 wages, not her K-1 schedule income. The claimant was found to

be monetarily ineligible and directed to file a claim under the Pandemic Unemployment Assistance (PUA) program which she did.

14. The claimant collected benefits, under the PUA program, for a period. She was later directed to reapply for UI benefits.
15. On August 10, 2021, the claimant filed her 2021-01 claim for unemployment benefits. The claim was effective August 8, 2021.
16. On August 11, 2021, the claimant was determined to be monetarily eligible to receive benefits, with a benefit rate of \$745, an earnings disregard of \$248.33, and a maximum benefit amount of \$18,906. This was based on the following reported wages, from the present employer:
  - a. 3rd quarter 2020 \$ 7,788.42
  - b. 4th quarter 2020 \$26,730.76
  - c. 1st quarter 2021 \$12,000.00
  - d. 2nd quarter 2021 \$ 6,000.00
17. On March 8, 2022, DUA issued Notice of Disqualification 0072 0584 80-01, stating that under Mass General Law Chapter 151A, Section 6(d), the claimant's base period wages were exempt.
18. On March 8, 2022, DUA issued a monetary determination effective August 8, 2021, indicating that the claimant's wages from the present employing unit were unusable. The determination further indicated that the claimant had no other wages upon which to base the claim. She was, therefore, monetarily ineligible to receive UI benefits, as of August 8, 2021.
19. On March 10, 2022, the claimant appealed Notice of Disqualification 0072 0584 80- 01. She did not attempt to reopen her PUA claim as she was not advised by anyone at DUA to do so.

### 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. After such review, the Board adopts the review examiner's consolidated findings of fact, except to note as follows. The reference in Consolidated Finding # 1 to the employer as a Limited Liability Corporation is incorrect, as the business entity is registered as a Limited Liability *Company*. Similarly, it is inaccurate to describe the claimant as a shareholder in Consolidated Finding # 2, as the LLC is not a corporation. Her proprietary interest in the LLC is more accurately described as an owner. In adopting the remaining findings, we deem 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 is monetarily ineligible for benefits.

In order to be eligible for unemployment benefits, the claimant must have earned wages amounting to at least thirty times her weekly benefit rate and at least \$5,400 in her base period. G.L. c. 151A, § 24(a).<sup>1</sup> 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 an LLC registered in Massachusetts<sup>2</sup>, and the claimant is the sole owner. Consolidated Findings ## 1 and 2. Where a claimant is the sole owner of her 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 2014. Consolidated Finding # 3. 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 her monetary eligibility for benefits.

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<sup>1</sup> 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 that the claimant filed her 2020-01 claim was \$5,400.00.

<sup>2</sup> 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.

Moreover, inasmuch as she earned gross wages during her base period in excess of \$5,400 and 30 times her weekly benefit rate, which the DUA originally set as \$745 a week, she is monetarily eligible for her 2021-01 claim. *See* Consolidated Finding # 16.

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 for the week beginning August 8, 2021, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.  
Member

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 31, 2023**



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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](http://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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