

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0710

Affirmed
Request for Adjustment of Claim Determination Denied
Invalid Claim

PROCEDURAL HISTORY: On August 8, 2013, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report concluding that claimant did not qualify for unemployment insurance benefits. On August 21, 2013, the Department served notice of a decision denying claimant's request for adjustment of the Department's claim determination. Claimant filed timely requests for hearing on both decisions. The Office of Administrative Hearings (OAH) scheduled a hearing on the wage potential benefit report for October 14, 2013 at 8:15 a.m. OAH scheduled a hearing on the denial of claimant's request for adjustment for October 14, 2013 at 9:30 a.m. OAH mailed notice of the 8:15 a.m. hearing on the wage and potential benefit report to claimant and the Department. OAH mailed notice of the 9:30 a.m. hearing on the denial of claimant's request for adjustment to claimant, the Department, and Herb Pharm, the business entity for which claimant performed services during his base year. On October 14, 2013 at 8:15 a.m., ALJ Bear conducted the hearing on the wage and potential benefit report, at which claimant and the Department appeared. On October 14, 2013 at 9:30 a.m., ALJ Bear conducted a hearing on the denial of claimant's request for adjustment, at which claimant, the Department and Herb Pharm appeared. On November 12, 2013, ALJ Bear issued Hearing Decision 13-UI-04317, reversing the denial of claimant's request for adjustment. On November 14, 2013, ALJ Bear issued Hearing Decision 13-UI-04454, reversing the wage and potential benefit report based on Hearing Decision 13-UI-04317. On November 27, 2013, the employer filed applications for review with the Employment Appeals Board (EAB). On January 9, 2014, EAB issued Appeals Board Decisions 2013-EAB-2374 and 2013-EAB-2374, reversing Hearing Decisions 13-UI-04317 and 13-UI-04454, and remanding the matters to OAH for a new hearing. On March 31, 2014, ALJ R. Davis conducted a consolidated hearing, and on April 9, 2014 issued Hearing Decisions 14-UI-14686 and 14-UI-14687, affirming the Department's wage and potential benefit report, and its decision

denying claimant's request for adjustment. On April 29, 2014, claimant filed applications for review of Hearing Decisions 14-UI-14686 and 14-UI-14687 with EAB.

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) On August 6, 2013, claimant filed an initial claim for benefits. The base year for that claim is April 1, 2012 through March 31, 2013.

(2) During his base year, claimant performed services for Herb Pharm, a limited liability company (LLC), as its national sales manager. Claimant owned Class C, D-1 and D-2 common units in Herb Pharm, which entitled him to economic rights, including allocations of profits and losses. Herb Pharm allocated profits to claimant during his base year.

(3) Claimant's ownership of C, D-1 and D-2 Common Units also entitled him to voting rights as specified in Herb Pharm's operating agreement. Herb Pharm's operating agreement stated that it would be managed by managers, its board of directors, and that no member had any power or authority to bind the LLC unless the member was a director or officer acting expressly within the scope of his or her authority under the operating agreement, or the board of directors had expressly authorized the member to act as an agent of the LLC in accordance with the agreement. The operating agreement stated that other members would take no part in the management of the LLC's business or transact any business for the LLC. Claimant was not a director or officer of Herb Pharm.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's wage and potential benefit report reflects all the wages and hours claimant worked in subject employment during his base year, and deny claimant's request for adjustment.

ORS 657.044(1)(c) provides that subject employment does not include service performed for a limited liability company by a member, as defined in ORS 63.001. "Member" means a person or persons with both an ownership interest in a limited liability company and all the rights and obligations of a member specified under ORS 63. ORS 63.001(21). In this case, it is undisputed that claimant had an ownership interest in Herb Pharm. In written argument, as at hearing, claimant asserts that he did have all the rights and obligations of a member under ORS 63 because he was not allowed to vote on any management decisions. Claimant had the burden to prove that he did not have all the rights and obligations of a member specified under ORS 63. *See accord, Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Herb Pharm's operating agreement stated that it would be managed by managers, its board of directors, and that members who were not directors or officers would take no part in the management of the LLC's business. More likely than not, Herb Pharm was a "manager-managed limited liability company," defined under ORS 63.001(2) as an LLC that is designated as a manager-managed LLC in the LLC's articles of organization, or whose articles of organization otherwise expressly provide that the LLC will be managed by a manager or managers. With respect to manager-managed limited liability companies, ORS 63.130 provides, in relevant part:

(2) In a manager-managed limited liability company, unless otherwise provided in the articles of organization or any operating agreement:

* * *

(b) Except as otherwise provided in subsections (3) and (4) of this section, any matter relating to the business of the limited liability company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers;

* * *

(3) Unless otherwise provided in the articles of organization or any operating agreement, the following matters of a member-managed or a manager-managed limited liability company require the consent of all of the members:

(a) The amendment of the operating agreement or the articles of organization under ORS 63.444;

(b) The compromise, as among the members, of an obligation to make a contribution under ORS 63.180 (4) or to return money or other property paid or distributed in violation of any provision of this chapter; and

(c) The consent to dissolve the limited liability company under ORS 63.621 (3).

(4) Unless otherwise provided in the articles of organization or any operating agreement, the following matters of a member-managed or a manager-managed limited liability company require the consent of a majority of the members:

(a) The making of interim distributions under ORS 63.200, including the redemption of an interest;

(b) The admission of a new member;

(c) The use of the limited liability company's property to redeem an interest subject to a charging order;

(d) The sale, lease, exchange, mortgage, pledge or other transfer or disposition of all, or substantially all, of the limited liability company's property, with or without goodwill;

(e) The merger of the limited liability company with any other entity;

(f) The conversion of the limited liability company into any other type of entity;

(g) The incurring of indebtedness by the limited liability company other than in the ordinary course of the business of the limited liability company;

(h) A transaction involving an actual or a potential conflict of interest between a member or a manager and the limited liability company;

(i) A change in the nature of the limited liability company's business; and

(j) Any other matter specified in the articles of organization or any operating agreement as requiring member approval if no number or percentage of members is otherwise stated.

At hearing, claimant did not assert or show that he was denied voting rights to which owners of Herb Pharm Class C, D-1 and D-2 common units were entitled under Herb Pharm's articles of organization or operating agreement, or to which he otherwise was entitled to under ORS 63.130. Absent such a showing, claimant failed to establish that the service he performed for Herb Pharm was in subject employment, and not as an LLC "member," as defined under ORS 63.001(21). We therefore agree with the ALJ that the Department's wage and potential benefit report reflects all the wages and hours claimant worked in subject employment during his base year, and deny claimant's request for adjustment.

DECISION: Hearing Decisions 14-UI-14686 and 14-UI-14687 are affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: June 2, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.