

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0192

Affirmed
Request for Adjustment of Claim Determination Is Denied

PROCEDURAL HISTORY: On December 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant’s request for an adjustment of claim determination. Claimant filed a timely request for hearing. On February 3, 2016, ALJ Murdock conducted a hearing at which the employer failed to appear, and on February 8, 2016 issued Hearing Decision 16-UI-52566, affirming the Department’s decision. On February 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB)

Claimant submitted two written arguments to EAB, the first presenting a legal argument in opposition to Hearing Decision 16-UI-53566 and the second responding to an argument titled “Rebuttal to Appeal” that was purportedly sent to EAB on behalf of the employer. EAB considered claimant’s first written argument when reaching this decision. EAB did not consider claimant’s second argument since it did not receive, and has no record of having had received a “Rebuttal to Appeal” or any other document from or on behalf of the employer. As such, claimant’s second argument is not relevant to any issues before EAB. Moreover, the second argument was filed four days after the due date for written argument expired, without claimant having requested or received an extension of the deadline. *See* OAR 471-041-0080(1) (October 29, 2006).

FINDINGS OF FACT: (1) Beginning sometime around approximately 2003, claimant began working in a liquor store in which, at some point, her mother came to have an ownership interest. Over time, claimant performed duties in the liquor store similar to those of an assistant manager. Claimant’s mother performed duties in the liquor store similar to those of a general manager.

(2) Sometime before or after 2003, claimant’s mother organized the operation of the liquor store in which claimant worked as an Oregon limited liability company (LLC) called Two Wild Spirits, LLC. Sometime after, claimant became a member of that LLC with a ten percent ownership interest. Claimant’s mother was the only other member of the LLC and retained a ninety percent ownership interest.

(3) Sometime after 2003, claimant went to a bank to secure a loan. After reviewing some documents that claimant brought in, bank personnel told her there were issues in granting the loan because claimant was a member of the LLC and had an ownership interest in it. Claimant and her mother later discussed claimant's membership in the LLC. Afterward, claimant did not attempt to withdraw from membership in the LLC.

(4) On October 26, 2013, claimant and her mother signed a registration form identifying themselves as the sole members of Two Wild Spirits LLC and submitted that form to the Department. Exhibit 2 at 1. The form stated that the LLC anticipated hiring two employees by December 1, 2013 for which it would withhold unemployment insurance payroll taxes. *Id.* By approximately 2013, claimant was receiving approximately \$5,000 per month from the LLC for her services.

(5) In the fourth quarter of 2013 through the third quarter of 2014, the LLC did not report to the Department that it paid any wages to claimant, although she received \$5,000 per month from it. The LLC did not withhold unemployment insurance taxes from its monthly payments to claimant.

(6) On approximately January 13, 2015, claimant's mother informed claimant she was no longer allowed to perform duties for the LLC and would no longer receive \$5,000 per month from the LLC.

(7) On February 9, 2015, claimant filed an initial claim for unemployment insurance benefits. Claimant's base year for purposes of determining her eligibility for benefits was established as the year from October 1, 2013 through September 30, 2014 (the fourth quarter of 2013 through the third quarter of 2014). Sometime shortly after, claimant told a representative from the Department that she had been paid by the LLC as an independent contractor. Exhibit 1 at 1. Upon review, the Department determined claimant was not eligible to receive unemployment benefits because she had been an LLC member during the fourth quarter of 2013 through the third quarter of 2014 and any payments she received from the LLC were not wages subject to unemployment taxes.

CONCLUSIONS AND REASONS: Claimant's request for a readjustment of the Department's claim determination is denied.

The facts in this case are not in dispute. The issue as framed in claimant's written arguments is whether, regardless of the type of services claimant provided to the LLC, she is or is not excluded under ORS 657.044(1)(b) from having the LLC's payments to her added to her base year wages for purposes of determining the unemployment insurance benefits to which she is entitled because those services were provided to an LLC of which she was a member. Claimant's February 19, 2016 Written Argument. ORS 656.044(1)(b) specifically states that "employment" for purposes of calculating benefit eligibility under ORS chapter 657 "does not include services performed for: **** [a] limited liability company by a member." In Hearing Decision 16-UI-25266, the ALJ concluded that "the law is unambiguous on this point" and that the remuneration claimant received for the services she performed for the LLC was not subject to ORS chapter 657. Hearing Decision 16-UI-25266 at 2.

Claimant argued at hearing and in written argument that, viewed in the context of the entire statutory scheme set out in ORS chapter 657, ORS 657.044(1)(b) is ambiguous. To establish this ambiguity, claimant relied on purported inconsistencies between ORS 657.040 (independent contractor exclusion)

and ORS 657.044(1)(b) (LLC member exclusion). Claimant also relied on the case *Necanicum, Inc. v. Employment Department*, 345 Or 138, 190 P3d 368 (2008) for the proposition that in light of the alleged ambiguity, the exclusion of ORS 657.044 should apply only where LLC members are performing services to the LLC that are members' duties, rather than when they serving the LLC as "traditional" employees. Claimant also relied on *Gross v. Employment Department*, 237 Or App 671, 240 P3d 1130 (2010) for the proposition that ORS 657.044(1)(b) should not be applied to exclude LLC members when such an exclusion would be inconsistent with the apparent intent of ORS chapter 657 to provide broad unemployment insurance coverage to unemployed individuals.

In *Necanicum*, the Supreme Court focused on the language of ORS 657.030 as it existed in 2008, when it stated that directors of a corporation might under appropriate circumstances be considered employees of the corporation for purposes of unemployment insurance coverage despite the apparent across-the-board exclusion set out at ORS 657.044(1)(a). In its analysis, the Court emphasized that ORS 657.030(1) was the introductory statute defining "employment" and was followed by several statutes setting out services that were specifically excluded from the definition of "employment." *Necanicum*, 345 Or at 142. The Court observed that ORS 657.030(1) stated "[a]s used in the chapter, *unless the context requires otherwise*, and subject to [various statutory exclusions] or any other section which excludes services from the term "employment," "employment" means service for an employer *** performed for remuneration [.]" *Id.* The Court reasoned that, by using the phrase "unless the context requires otherwise" the legislature recognized and intended to allow modifications by adjudicative or administrative bodies to the relevant statutory terms it had set forth defining covered employment, as needed, to carry out its overall intentions underlying Chapter 657. *Id.* at 143. Based on this permissive language, the court interpreted the exclusion of ORS 657.044(1)(a) not to apply to corporate directors when they provided services to the corporation in the capacity of an ordinary employee, as opposed to those services provided in their directorial capacity. *Id.* at 143-145.

However, *Necanicum* no longer supports claimant's position in light of the enactment of House Bill 2347, which revised the language of ORS 657.130 and became effective on May 19, 2011. House Bill 2347 amended ORS 657.030(1) to remove the language "unless the context requires otherwise," and to replace it with "[a]s used in this chapter, **except as provided in** ORS 657.035, 657.040, and **657.043 to 657.094**, employment means service for an employer *****" (emphasis in the original to denote legislative changes). By this 2011 statutory revision, the legislature removed the permissive language on which the Court in *Necanicum* relied for its authority to modify under appropriate circumstances the operation of ORS 657.044(1)(a) according to its literal terms. The continued viability of *Gross* is also limited since it, as well, relied heavily on the reasoning that by using the language of the predecessor version of ORS 657.030(1), the legislature anticipated that courts might diverge from the statutory text excepting certain services from the definition of covered employment if an adjudicative body, administrative agency or other appropriate entity determined that result would better implement the overall purposes of Chapter 657. *Gross*, 237 Or App at 681-683.

The language of the statutory provisions currently in effect defining the services that do and do not constitute employment for purposes of ORS Chapter 657 does not anticipate or invite judicial or adjudicative modifications. In 2011, by inserting in ORS 657.030(1) new language that specifically identified the exclusion set out in ORS 657.044(1)(b) for services provided to an LLC by an LLC member, it can only be inferred that the legislature said what it meant, and it intended that exclusion to remain in force regardless of arguments that application according to its literal terms might not, under

certain circumstances, further the legislative purposes of ORS Chapter 657. Given the plain meanings of the current version of these statutes, and the specific acknowledgement in the 2011 legislative revisions that ORS 657.044 excluded certain services from constituting employment, we disagree with claimant and conclude that the applicable statutes are not ambiguous, and do not allow for a contextual exceptions to their general applicability.

We also do not accept claimant's argument that ORS 657.040, 657.044 and 670.600(5) are sufficiently in conflict that we must go beyond their textual meanings. First, ORS 670.600(5) does not raise a conflict with either of the two other statutes since it merely states that when a person provides services to another through an LLC that is not determinative of whether the person provided the services as an independent contractor. It says nothing from which the reverse can be inferred; it is limited in scope and only addresses how to affirmatively determine if a person is an independent contractor. Second, ORS 657.040 and 657.044 are not in such conflict that ORS 657.044 must be interpreted in a way that varies from the meaning of its plain text. ORS 657.040 states that "[s]ervices provided by an individual for remuneration are deemed to be employment unless *** the individual is an independent contractor ***." Although this provision uses broad language that appears to divide the universe of "services" between those provided by an independent contractor, which are not employment within the meaning of ORS Chapter 657, and all other services, which are subject employment, this interpretation disregards the overall organization of the statutory scheme defining and excluding services from constituting "employment." It does not mean, as claimant asserts, that ORS 657.044(1)(b)'s exclusion for services provided to an LLC by an LLC member should be considered "subservient" to ORS 657.040 and not excluded from "employment" unless the member provided those services to the LLC as an independent contractor. Based on the organization of Chapter 657 and the specific language of ORS 657.030, which introduces the statutes defining and excluding certain services from "employment," both ORS 657.040 and 657.044 are subservient to *it*. To accept claimant's broad-ranging interpretation of ORS 657.040 would logically require us to interpret the specific exclusions from employment for certain services that the legislature set out at ORS 657.043, 657.045, 657.047, 657.048, 657.050, 657.053, 657.056, 657.060, 657.065, 657.067, 657.072, 657.078, 657.080, 657.085, 657.087, 657.090, 657.091, 657.092, 657.093 and 657.094 as surplusage inapplicable unless the particular types of services described were also provided by an independent contractor. Such a reading is inconsistent with the plain text of the statutes. Moreover, to any extent ORS 657.040 and ORS 657.044 might be read as conflicting, the conflict is resolved by the canon of statutory construction which states "when a general and particular [statutory] provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." ORS 174.020(2). Here, the legislature's specific intent was to exclude services provided to an LLC by a LLC member from constituting "employment" and that specific intent must control when settling the purported "conflict."

Claimant's apparent position on review is that the services claimant provided to the LLC of which she was a member should be considered employment regardless of the plain and literal meaning of the language in ORS 657.044(1)(b). However, the legislature enacted the statute that it did using the language that it did and we must conclude that the legislature acted with deliberate purpose in doing so. EAB may not interpret the statute in a manner that is contrary to its plain meaning or undermines the legislature's authority to enact laws with respect to the unemployment insurance program. Claimant's request for a readjustment of the Department's claim determination is denied.

DECISION: Hearing Decision 16-UI-52566 is affirmed.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: April 1, 2016

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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