

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0318**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On February 4, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits effective February 2, 2020. On March 4, 2021, claimant filed a late request for hearing. On March 31, 2021, ALJ Scott conducted a hearing, at which claimant's request for hearing was treated as timely,<sup>1</sup> and on April 2, 2021 issued Order No. 21-UI-164063, affirming the February 4, 2021 administrative decision and concluding that claimant was not entitled to receive PUA benefits for the weeks of February 2, 2020 through March 20, 2021 (weeks 6-20 through 11-21). On April 22, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as the information contained in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

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<sup>1</sup> At hearing, the ALJ noted that it was unclear whether claimant's hearing request was timely, due to a note left by a Department representative on claimant's hearing request form indicating that claimant may have filed a hearing request before March 4, 2021. Audio Record at 1:23 to 2:38. The ALJ advised she planned to conduct the hearing as though claimant's request for hearing had been timely filed, absent any objections. Audio Record at 1:42. The Department representative did not object. Audio Record at 2:08.

**FINDINGS OF FACT:** (1) Beginning in 2019, claimant worked sporadically as a self-employed cannabis trimmer for recreational cannabis farms. Claimant received income for this work that was included in his 1099 tax forms.

(2) On February 4, 2020, claimant performed and completed a one-day trim job. Claimant was scheduled to perform another trim job beginning February 10, 2020, but that job was cancelled. Claimant was told that the February 10, 2020 trim job was cancelled because another trimmer hired to work on the February 10, 2020 trim job had been exposed to COVID-19 because that trimmer had worked on a previous trim job with someone who had contracted COVID-19. The farm did not want to go forward with the job without testing all the trimmers for COVID-19, so they cancelled the job.

(3) Claimant performed trim jobs on October 11, 2020 through October 19, 2020, October 29, 2020 through October 31, 2020, and November 6, 2020 through November 19, 2020. Each of these jobs concluded naturally when the trim work was completed and did not end for reasons related to COVID-19.

(4) On December 6, 2020, claimant filed an initial claim for PUA benefits. When claimant filed his initial claim, the Department determined that claimant was not eligible for regular unemployment insurance benefits, extended benefits, or pandemic emergency unemployment compensation benefits.

(5) Claimant claimed PUA benefits for the weeks from February 2, 2020 through March 20, 2021 (weeks 6-20 through 11-21).<sup>2</sup> Those are the weeks at issue. The Department did not pay claimant PUA benefits for any of the weeks at issue.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-164063 is set aside and this matter remanded for another hearing and order.

Under the CARES Act, Pub. L. 116-136, to be eligible to receive PUA benefits, an individual must be a “covered individual” as that term is defined by the Act. Pub. L. 116-136, § 2102(a). In pertinent part, the Act defines a “covered individual” as an individual who “is not eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 2107” and provides a self-certification under § 2102(a)(3)(A)(ii)(I) of the Act that the individual “is otherwise able to work and available for work within the meaning of applicable State law,” but is rendered unemployed, partially unemployed, or unable or unavailable to work because of one or more of 11 listed reasons that relate to the COVID-19 pandemic. Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I).

Under § 2102(a)(3)(A)(ii)(II) of the Act, an individual may also meet the definition of a “covered individual” if they self-certify that they are self-employed and meet the requirements of § 2102(a)(3)(A)(ii)(I). The requirements of that subclause, as mentioned above, are that the individual is otherwise able to work and available for work within the meaning of applicable State law but is rendered unemployed, partially unemployed, or unable or unavailable to work because of a reason related to the COVID-19 pandemic set forth in § 2102(a)(3)(A)(ii)(I). Those reasons include, in relevant part, that “the

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<sup>2</sup> Claimants are allowed to claim PUA benefits retroactive to the week beginning February 2, 2020. Transcript at 5.

individual meets any additional criteria established by the Secretary [of Labor] for unemployment assistance under this section.” Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(kk).

The Secretary of Labor has established additional criteria. Pursuant to a U.S. Department of Labor Unemployment Insurance Program Letter, “[t]he Secretary [of Labor] has determined that, in addition to individuals who qualify for benefits under the other criteria described [in § 2102(a)(3)(A)(ii)(I)(aa)–(jj) of the Act], **an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities.** For example, a driver for a ridesharing service who receives an IRS Form 1099 from the ride sharing service may not be eligible for PUA benefits under the other criteria outlined above, because such an individual does not have a ‘place of employment,’ and thus cannot claim that he or she is unable to work because his or her place of employment has closed. However, **under the additional eligibility criterion established by the Secretary here**, the driver may still qualify for PUA benefits if he or she has been forced to suspend operations as a direct result of the COVID-19 public health emergency, such as if an emergency state or municipal order restricting movement makes continued operations unsustainable.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) (UIPL 16-20), at I-6 (emphasis added).

Here, the order under review acknowledged that claimant was self-employed and did not qualify for regular unemployment insurance benefits, extended benefits, or pandemic emergency unemployment compensation benefits. Order No. 21-UI-164063 at 3. However, the order concluded that claimant was not eligible for PUA benefits because he did not establish that he was unemployed or unable to work because of one of the reasons set forth in § 2102(a)(3)(A)(ii)(I) of the Act. Order No. 21-UI-164063 at 3. The record as developed is insufficient to support the order’s conclusion that claimant was not eligible for PUA benefits.

It is unknown from the record whether, during the weeks at issue, claimant was unemployed because the COVID-19 public health emergency severely limited his ability to continue performing his customary work activities, and thereby forced him to suspend such activities, per § 2102(a)(3)(A)(ii)(I)(kk) and the eligibility criteria under that subclause set forth in the Program letter cited above. On remand, the ALJ should ask questions to develop whether, during the weeks at issue, the COVID-19 public health emergency severely limited claimant’s ability to continue performing his cannabis trimming work activities such that he was forced to suspend those activities. To whatever extent the record on remand indicates that during the weeks at issue claimant did not perform cannabis trimming work activities, the record should be developed to determine whether that was due to the COVID-19 public health emergency as opposed to the result of some other reason, such as simply not having any trim jobs scheduled to occur. This inquiry must produce evidence sufficient to assess, on a week-by-week basis, whether the COVID-19 public health emergency forced claimant to suspend his cannabis trimming work activities during the period at issue.

The record also suggests that claimant may have been forced to suspend his cannabis trimming work activities during the week of February 9, 2020 through February 15, 2020. At hearing, claimant testified that his trim job scheduled for February 10, 2020 was cancelled because another trimmer had worked with someone on a prior job who had contracted COVID-19. Transcript at 23. The order under review

concluded that claimant's testimony was implausible because "there were no reported cases of C[OVID]-19 in Oregon at that time and there was no testing available." Order No. 21-UI-164063 at 3. However, the record as developed does not support that conclusion. On remand, the record should be developed to determine whether the trimmer who was allegedly exposed to COVID-19 and caused claimant's February 10, 2020 trim job to be cancelled had worked with the person who contracted COVID-19 on a prior job in different state, such as California, where confirmed COVID-19 cases may have occurred before February 10, 2020.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was eligible for PUA benefits during each of the weeks at issue, Order No. 21-UI-164063 is reversed, and this matter is remanded for further development of the record.

**DECISION:** Order No. 21-UI-164063 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. Hettle;  
A. Steger-Bentz, not participating.

**DATE of Service:** May 28, 2021

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-164063 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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