

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0486**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On February 19, 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. Claimant filed a timely request for hearing. On June 4, 2021, ALJ Janzen conducted a hearing, and on June 8, 2021 issued Order No. 21-UI-168262, affirming the February 19, 2021 administrative decision and concluding that claimant was not eligible to receive PUA benefits from July 12, 2020 through May 29, 2021 (weeks 29-20 through 21-21). On June 14, 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.

**FINDINGS OF FACT:** (1) In approximately July 2020, claimant began performing lawn maintenance odd jobs. On July 25, 2020, claimant's partner contracted COVID-19 and claimant provided care for her for about a week from July 25, 2020 through August 1, 2020.

(2) In October 2020, claimant worked at a Cracker Barrel restaurant for several weeks. At some point in late October 2020, the dining area of the restaurant was restricted due to the COVID-19 pandemic. Shortly thereafter, Cracker Barrel started offering claimant fewer work hours. Because of the reduced hours, claimant quit working for Cracker Barrel on November 3, 2020.

(3) On or about November 3, 2020, claimant began working at a McMenemy's restaurant. Claimant worked at McMenemy's for about a week and received only about 15 hours of work that week. Claimant quit working at McMenemy's on November 10, 2020 because he was not getting enough hours.

(4) In early November 2020, claimant registered a business name with the Oregon Secretary of State's office for use in connection with the lawn maintenance services he performed. Claimant did not pay any business taxes on the income he received from the lawn maintenance services he performed.

(5) On November 9, 2020, claimant filed an initial claim for PUA benefits. Although claimant had earned some wages in subject employment from Cracker Barrel and McMenemy's, the Department determined that he was not eligible for regular unemployment insurance benefits, extended benefits, or pandemic emergency unemployment compensation benefits.

(6) Claimant claimed PUA benefits for the weeks from July 12, 2020 through August 22, 2020 (weeks 29-20 through 34-20), August 30, 2020 through February 13, 2021 (weeks 36-20 through 06-21), and February 21, 2021 through May 29, 2021 (weeks 08-21 through 21-21).<sup>1</sup> These 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-167579 is set aside and this matter is remanded for further development of the record.

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. § 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 that the individual "is otherwise able to work and available for work within the meaning of applicable State law," but is rendered unemployed or unavailable to work because of one or more of 11 listed reasons that relate to the COVID-19 pandemic.<sup>2</sup> § 2102(a)(3)(A).

Those reasons include, in relevant part, that "the individual is providing care for a . . . member of the individual's household who has been diagnosed with COVID-19." § 2102(a)(3)(A)(ii)(I)(cc). Another reason is that "the individual meets any additional criteria established by the Secretary [of Labor] for unemployment assistance under this section." § 2102(a)(3)(A)(ii)(I)(kk). Relevant additional criteria established by the Secretary of Labor includes "self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency, even absent a suspension of services"; and "[a]n individual is an employee and their hours have been reduced or the individual was laid off as a direct result of the COVID-19 health emergency."

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<sup>1</sup> EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>2</sup> In addition, section 2102(a)(3)(A)(iii) of the CARES Act, as amended by Section 241(a) of the Continued Assistance Act, imposes an additional requirement for an individual to meet the definition of a "covered individual." Within a specified period of time after the initial PUA claim filing or after being directed to do so by the Department, the individual must "provide[] documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment[.]" U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (Jan. 8, 2021) at IV-7.

U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 2 (July 21, 2020) at 2; U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 5 (Feb. 25, 2021) at 8.

An individual may also meet the definition of a “covered individual” if they self-certify that they are self-employed, seeking part-time employment, lack sufficient work history, or otherwise would not qualify for regular unemployment, extended benefits, or pandemic emergency unemployment compensation, so long as they otherwise satisfy the requirements set forth under section 2102(a)(3)(A)(ii)(I) of the Act. § 2102(a)(3)(A)(ii)(II). Section 2102(h) of the Act provides that regulations at 20 C.F.R. Part 625 apply to the PUA program, unless otherwise stated or contrary to the Act. 20 C.F.R. 625.2(o) defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. 625.2(n) defines “self-employed individual” as “an individual whose primary reliance for income is on the performance of services in the individual’s own business, or on the individual’s own farm.”

The order under review concluded that claimant was not entitled to receive PUA benefits. Order No. 21-UI-168262 at 3-4. The record supports this conclusion in most respects.

For example, the record does not support eligibility for PUA on a theory that claimant was self-employed and experiencing a significant diminution in services because claimant failed to establish that he was self-employed or, even if his lawn maintenance services constituted self-employment, that he experienced a significant reduction in services due to the COVID-19 pandemic. With respect to whether claimant’s lawn maintenance activities constituted self-employment, claimant did not show that he was primarily reliant on the lawn maintenance services for income. Claimant also did not show that the lawn maintenance services were services in claimant’s “own business.” Although claimant registered a business name with the Oregon Secretary of State’s office in November 2020, he did not pay any business tax on income from his lawn maintenance activities, there is no evidence he directed his lawn maintenance activities according to a prepared business plan, and he did not form a business entity, such as an LLC, to carry out the activities. Moreover, claimant did not show that his lawn maintenance activities experienced a significant reduction in services due to the COVID-19 pandemic because claimant was unable at hearing to identify when exactly the COVID-19 pandemic caused any lawn maintenance jobs to be canceled or the names of any clients who canceled such jobs. Transcript at 26.

Similarly, the record does not support eligibility for PUA on a theory that claimant was unable to or unavailable for work because he was providing care for a member of his household who had been diagnosed with COVID-19. The record supports that claimant’s partner was diagnosed with COVID-19 and he cared for her for about a week from July 25, 2020 through August 1, 2020. However, claimant did not show that he had any scheduled self-employment that caring for his partner caused him to miss or cancel during the period of July 25, 2020 through August 1, 2020, and so did not show that caring for his partner rendered him unemployed or unavailable for work.

Although the record supports the conclusion of the order under review as to the bases for PUA eligibility discussed above, the order under review also concluded that claimant was not entitled to receive PUA benefits for the weeks he worked at Cracker Barrel. Order No. 21-UI-168262 at 4. The record as developed does not support this conclusion.

During the weeks that claimant worked at Cracker Barrel, claimant was an employee, and his hours may have been reduced as a direct result of the COVID-19 health emergency. For this reason, more inquiry is required to determine whether claimant meets the additional criteria, authorized under § 2102(a)(3)(A)(ii)(I)(kk), that he was an employee and had his hours reduced as a direct result of the COVID-19 health emergency while working at Cracker Barrel. To this end, the record should be developed as to what weeks claimant worked at Cracker Barrel; the baseline number of hours offered to claimant upon beginning employment at Cracker Barrel; how much claimant's hours were reduced over the time claimant worked there; and why the hours were reduced. Note that this inquiry is not required as to claimant's work at McMenemy's. The record is sufficient to conclude that the hours offered to claimant at McMenemy's was 15 per week and claimant quit working there after a short period of time without the 15 hour per week baseline decreasing due to the COVID-19 health emergency.

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 the weeks he worked at Cracker Barrel, Order No. 21-UI-168262 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-168262 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: July 21, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-168262 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 desisyon.

## 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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