

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0003

Affirmed
Request for Hearing Allowed
Ineligible for Pandemic Unemployment Assistance
Weeks 27-20 through 32-20 and 36-20 through 25-21

PROCEDURAL HISTORY: On April 22, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to PUA benefits effective August 23, 2020. On May 12, 2021, the April 22, 2021 administrative decision became final without claimant having filed a request for hearing. On June 10, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on August 17, 2021 issued Order No. 21-UI-172701, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by August 31, 2021. On August 24, 2021, claimant filed a timely response to the appellant questionnaire. On November 9, 2021, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 21-UI-172701 was vacated and that a hearing would be scheduled to determine whether claimant's late request for hearing would be allowed and, if so, the merits of the April 22, 2021 administrative decision. On November 23, 2021, ALJ Roberts conducted a hearing that was continued on December 1, 2021. Both hearings were interpreted in Vietnamese. On December 9, 2021, ALJ Roberts issued Order No. 21-UI-181458, concluding that claimant had filed a timely request for hearing on the April 22, 2021 administrative decision, and affirming the April 22, 2021 administrative decision. On December 24, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In reaching this decision, EAB has excluded from the record certain testimony offered by the Department during the December 1, 2021 hearing. That testimony was based upon unsworn communications the Department's witness had with claimant and claimant's prior employer between the November 23, 2021 and December 1, 2021 hearings. The admission of that unsworn testimony under the circumstances of this case was improper inasmuch it touched on issues material to this case and was improperly relied upon in the order under review to assess claimant's credibility.

Based on a de novo review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that that claimant had filed a timely request for hearing on the April 22, 2021 administrative decision is **adopted**. The remainder of this decision addresses claimant's eligibility for PUA benefits.

FINDINGS OF FACT: (1) Between January 2, 2020 and February 29, 2020, claimant was employed by a nail salon (the employer) as a manicurist/pedicurist.

(2) On or before March 1, 2020, the employer laid claimant off from work because claimant worked based on commission, and at the time the employer did not have "a [lot] of pedicure[] and manicure[]" business. November 23, 2021 Transcript at 18. Shortly thereafter, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits and stated on his claim that he had been laid off from work. The Department determined that claimant was not eligible for regular unemployment insurance, extended benefits, or pandemic emergency unemployment compensation (PEUC).

(3) On March 8, 2020, the Governor of Oregon issued Executive Order No. 20-03, declaring a state of emergency to ensure that the state was prepared with the resources necessary to respond to the COVID-19 pandemic. On March 23, 2020, the Governor of Oregon issued Executive Order No. 20-12, which, among other directives, mandated the closure of all nail salons in the State of Oregon.¹

(4) On October 25, 2020, claimant filed an initial claim for PUA benefits. Claimant did not mention his employment with the employer by name in his initial PUA claim; rather, he indicated that he was employed "generally" by nail salons, and that his last employment had ended on January 2, 2020 as the result of "a closure due to COVID." December 1, 2021 Transcript at 9.

(5) On November 4, 2020, claimant filed another initial claim for PUA benefits. On it, claimant specifically mentioned the employer by name, stated that he had worked for the employer from January 1, 2020 to February 29, 2020, and that he had been unable to reach his place of employment due to COVID-19 beginning March 1, 2020, because he had been advised by a healthcare provider to self-quarantine.

(6) Claimant claimed PUA benefits for the weeks including June 28, 2020 through August 8, 2020 (weeks 27-20 through 32-20) and August 30, 2020 through June 26, 2021 (weeks 36-20 through 25-21). These are the weeks at issue. The Department paid claimant PUA benefits for weeks 36-20 through 01-21, and did not pay claimant benefits for any of the other weeks at issue.

CONCLUSIONS AND REASONS: Claimant was not entitled to receive PUA benefits for the weeks including June 28, 2020 through August 8, 2020 (weeks 27-20 through 32-20) and August 30, 2020 through June 26, 2021 (weeks 36-20 through 25-21).

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

¹ These Executive Orders are available as of the date of this decision at <https://www.oregon.gov/gov/admin/pages/executive-orders.aspx>.

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. Pub. L. 116-136 § 2102(a)(3)(A). Those reasons include, in relevant part, that “the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency.” Pub. L. 116-136 § 2102(a)(3)(A)(ii)(I)(ee). Additional reasons include that “the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;” or that “the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency.” Pub. L. 116-136 § 2102(a)(3)(A)(ii)(I)(ff), (jj). Pursuant to federal guidance, PUA eligibility beyond the express language in §2102(a)(3)(A)(ii)(I)(jj) has been expanded to include situations where “[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.” U.S. Dep’t of Labor (USDOL), Unemployment Insurance Program Letter No. 16-20, Change 5 (Feb. 25, 2021) at 8.

Claimant did not establish that he was a “covered individual” under the PUA program during the weeks at issue. While claimant met the first element of eligibility—he was not eligible for regular unemployment insurance, extended benefits, or PEUC benefits during the weeks at issue—the record shows that claimant was not a “covered individual” because he was not unemployed or unavailable to work for any of the reasons enumerated under section 2102 of the CARES Act or guidance issued by the United States Department of Labor (USDOL).

For example, the record does not support eligibility for PUA on a theory that, during the weeks at issue, claimant was an employee and was laid off as a direct result of the COVID-19 public health emergency.² Here, the preponderance of the evidence shows that claimant was laid off due to a reduction in customers seeking either manicures and/or pedicures. However, the preponderance of the evidence fails to show that the reduction in customers at the time it occurred was the direct result of the COVID-19 public health emergency. Rather, the record shows that claimant’s lay off occurred on or before March 1, 2020, which was prior to the issuance of the March 8, 2021 and March 23, 2021 Executive Orders which declared a state of emergency and mandated the closure of nail salons, respectively. The timing reflected by this evidence suggests, more likely than not, that claimant’s lay off was the result of a reduction in customers not caused by the pandemic, and that the layoff therefore had no direct tie to the COVID-19 public health emergency. Furthermore, the record shows that claimant was inconsistent on his respective PUA claims when he first stated that his prior nail salon employment ended on January 2, 2020 due to a COVID-19 business closure, but subsequently stated in a second PUA claim that he worked for the employer’s nail salon between January 1, 2020 and February 29, 2020. The inconsistent record evidence on this point, coupled with the lack of any other record evidence showing when the employer closed their business, suggests that, more likely than not, the employer’s business remained open after claimant’s lay off on or before March 1, 2020, and until the March 23, 2020 mandated closure. As such, this evidence points to the conclusion that, more likely than not, the employer laid off

² Although the record reflects some conflicting evidence regarding whether claimant was laid off by the employer or voluntarily quit his job, under the circumstances of this case claimant’s first-hand testimony that he was laid off is entitled to greater weight than the Department’s hearsay evidence suggesting he quit.

claimant due to a lack of customers that occurred prior to any direct effects of the COVID-19 public health emergency, and prior to any mandated closure.

The record also fails to support eligibility for PUA under §(a)(3)(A)(ii)(I)(ff) of the Act because the record does not show by a preponderance of the evidence that claimant was unable to reach the place of employment due to health care provider having advised him to self-quarantine due to concerns related to COVID-19. In this regard, USDOL has instructed that this scenario usually occurs when “[a]n individual ... has been advised by a qualified medical professional that [they] may be infected with the coronavirus and that [they] therefore should self-quarantine.” USDOL, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) at I-5. Here, claimant indicated on his November 4, 2020 PUA claimant that he was unable to reach his place of employment after March 1, 2020 because a healthcare provider had advised him to self-quarantine and testified that this advice was provided, “[a]t the Emergency” December 1, 2021 Transcript at 19. However, claimant was unable to provide any further details regarding this healthcare provider advice, including when it was provided, nor did he indicate that he was told that he may have been infected with COVID-19. December 1, 2021 Transcript at 18-19. Furthermore, the preponderance of the evidence shows that claimant was laid off by the employer on or before March 1, 2020 due to a reduction in customers unrelated to the COVID-19 public health emergency, and that it was this reason, and not medical advice to self-quarantine, that claimant was unable to reach his place of employment.

Finally, the record does not support eligibility for PUA under §(a)(3)(A)(ii)(I)(ee) of the Act because the record does not show that claimant was unable to reach his place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency. In this regard, the USDOL has instructed that this scenario usually occurs when “[a]n individual ... is unable to reach [their] place of employment because doing so would require the violation of a state or municipal order restricting travel that was instituted to combat the spread of COVID-19.” USDOL, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) at I-5. Claimant is not eligible under this provision because the record fails to show that there was any state or municipal order restricting travel that prevented claimant from reaching his place of employment on or before March 1, 2020.

For these reasons, claimant was not a “covered individual” for purposes of Section 2102(a)(3) of the CARES Act, and therefore was not eligible to receive PUA benefits for weeks 27-20 through 32-20 and weeks 36-20 through 25-21.

DECISION: Order No. 21-UI-181458 is affirmed.

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

DATE of Service: February 4, 2022

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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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

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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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