

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0794

Reversed & Remanded

PROCEDURAL HISTORY: On August 5, 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 December 6, 2020. Claimant filed a timely request for hearing. On July 7, 2022, ALJ Scott conducted a hearing and issued Order No. 22-UI-197726, reversing the August 5, 2021 administrative decision by concluding that claimant was entitled to receive PUA benefits for the weeks including December 6, 2020 through May 1, 2021 (weeks 50-20 through 17-21). On July 15, 2022, the Department filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The Department submitted written arguments on July 15, 2022 and July 29, 2022. EAB did not consider the Department's July 15, 2022 written argument when reaching this decision because it did not include a statement declaring that it provided a copy of the argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). EAB considered the Department's July 29, 2022 argument when reaching this decision. Claimant submitted a written argument on August 11, 2022. EAB considered claimant's argument when reaching this decision.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence are Department records showing wages paid by Intelekia Law Group to claimant, and have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

FINDINGS OF FACT: (1) On or before the beginning of 2019, claimant, who was an attorney, helped form a law firm called Intelekia Law Group LLC and took a 1/3 ownership interest in the LLC.

(2) In 2019 and the first half of 2020, claimant performed work for Intelekia Law Group. Intelekia reported to the Department the wages it paid claimant and the hours claimant worked in 2019 and the first and second calendar quarters of 2020. Intelekia reported paying claimant \$7,500 in the third quarter of 2019, \$6,750 in the fourth quarter of 2019, \$7,500 in the first quarter of 2020, and \$7,500 in the second quarter of 2020. EAB Exhibit 1.

(3) On June 30, 2020, claimant sold his ownership interest in the LLC to the LLC itself and quit working for the law firm. Claimant quit because he did “almost exclusively litigation work and that all stopped with COVID when the courts shut down” and “with the lack of income coming in . . . it seemed like a good thing to leave and find something else to do.” Transcript at 19.

(4) On July 31, 2021, claimant filed an initial application for PUA benefits. Following federal guidance, which required PUA claims in which the initial application was filed after December 27, 2020 to be backdated no earlier than December 6, 2020, the Department assigned a first effective week to claimant’s PUA claim of December 6, 2020.

(5) Claimant claimed PUA benefits for the weeks including November 29, 2020 through February 6, 2021 (weeks 49-20 through 05-21), and the weeks including February 14, 2021 through May 1, 2021 (weeks 07-21 through 17-21).¹ These are the weeks at issue. The Department did not pay claimant for the weeks at issue.

(6) Shortly after claimant filed his initial application for PUA benefits, the Department reviewed its records of the wages claimant earned in the “base year” period preceding the December 6, 2020 first effective week of claimant’s PUA claim. The base year consisted of the third and fourth quarters of 2019 and the first and second quarters of 2020.

(7) During the third and fourth quarters of 2019 and the first and second quarters of 2020, Department records showed that claimant’s sole source of wages were the wages reported by Intelekia. Based on the Intelekia wages, the Department determined that claimant had earned sufficient wages in subject employment during his base year to qualify monetarily for regular unemployment insurance (regular UI) benefits. Because claimant was monetarily eligible for regular UI, the Department concluded he was not eligible to receive PUA benefits.

CONCLUSIONS AND REASONS: Order No. 22-UI-197726 is set aside, and this matter remanded for further proceedings consistent with this order.

Claimant did not receive PUA benefits for the weeks at issue and, therefore, claimant had the burden to prove that he should have been paid benefits for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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.

benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

Under the CARES Act Pub. L. 116-136, to be entitled to receive PUA benefits, an individual must be a “covered individual” as that term is defined by the Act. Pub. L. 116-136, § 2102(b). The Act defines a “covered individual” as an individual who (1) “is not eligible for regular compensation . . . under State or Federal law . . . including an individual who has exhausted all rights to regular unemployment . . . under State or Federal law” and (2) self-certifies that they are either “otherwise able to work and available to work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because” of one of eleven reasons related to the COVID-19 pandemic, or “is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment” and is rendered unemployed or unavailable to work because of one of the eleven listed reasons. Pub. L. 116-136, § 2102(a)(3)(A). One of the COVID-19 related reasons listed in Section 2102(a)(3)(A)(ii)(I) is that “the individual has to quit his or her job as a direct result of COVID-19.” § 2102(a)(3)(A)(ii)(I)(ii).

The order under review concluded that claimant was a “covered individual” eligible for PUA benefits for weeks 50-20 through 17-21. Order No. 22-UI-197726 at 3-4. The order reasoned that claimant’s wages from Intelekia were earned as a member of an LLC and therefore were not wages from subject employment and so did not have the effect of making claimant eligible for regular UI. Order No. 22-UI-197726 at 3. Because claimant was not eligible for regular UI, the order concluded, he met the first element required to be a covered individual eligible for PUA benefits. Order No. 22-UI-197726 at 3. The record as developed does not support this conclusion.

As a preliminary matter, the order under review did not address claimant’s eligibility for PUA benefits as to week 49-20, which the record shows claimant claimed. *See* Transcript at 6-7. However, because claimant filed his PUA initial application after December 27, 2020, claimant was barred from receiving PUA benefits for any week prior to week 50-20. *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), Change 4, (Jan. 8, 2021) at I-19 (“Initial PUA claims filed after [December 27, 2020] may be backdated no earlier than . . . December 6, 2020 for states with a Saturday week ending date[.]”). Therefore, claimant was not eligible to receive PUA benefits for week 49-20. In addition, the order under review incorrectly found that one of the weeks at issue was the week of February 7, 2021 through February 13, 2021 (week 06-21). Order No. 22-UI-197726 at 1. However, claimant did not claim week 06-21 and therefore it is not among the weeks at issue in this case.

As to claimant’s PUA eligibility for weeks 50-20 through 05-21 and weeks 07-21 through 17-21, to establish he was a covered individual entitled to benefits, claimant must first show that he was not eligible for regular UI. Per ORS 657.150(1), whether claimant was monetarily eligible for regular UI depends upon whether claimant earned a sufficient amount of wages in subject employment during his base year. Claimant’s base year was the first four of the last five completed calendar quarters preceding his benefit year. ORS 657.010(1). Claimant’s benefit year was the period of 52 consecutive weeks beginning with the first week claimant filed his initial claim, which (due to PUA backdating) the Department treated as December 6, 2020, making claimant’s base year the third and fourth quarters of 2019 and the first and second quarters of 2020. ORS 657.010(3). Thus, if claimant earned enough in subject employment during the third and fourth quarters of 2019 and the first and second quarters of 2020, he would be monetarily eligible for regular UI and not eligible for PUA.

Claimant's sole source of wages during his base year were the wages reported by Intelekia. Intelekia paid claimant \$7,500 in the third quarter of 2019, \$6,750 in the fourth quarter of 2019, \$7,500 in the first quarter of 2020, and \$7,500 in the second quarter of 2020. These wages are sufficient to meet the test for regular UI monetary eligibility,² so long as the wages were earned in subject employment. However, under ORS 657.044(1)(c), "'employment' does not include service performed for: . . . A limited liability company by a member[.]" Here, the record shows that when claimant performed the work for which Intelekia paid him, he held a 1/3 ownership interest in the law firm, which was a limited liability company. Therefore, more likely than not, the wages claimant earned from Intelekia were for services performed for a limited liability company by a member, and thus were wages earned for services performed that did not count as "employment" per ORS 657.044(1)(c).

Nevertheless, it is possible that Intelekia filed a written election with the Department such that the base year wages claimant received from Intelekia would be considered wages earned in subject employment. Under ORS 657.425(1), "[a]ny employing unit for which individuals perform services that are not employment subject to this chapter, may file with the Director of the Employment Department a written election that all such excluded services are employment for all the purposes of this chapter." Further, "[u]pon approval of the election by the director, the services are employment subject to this chapter effective the first day of the calendar quarter in which the election was filed, or a later date when so specified in the election." ORS 657.425(3). In addition, per OAR 471-031-0301(1), it is considered a written election when an employing unit "[r]eports on its quarterly payroll reports with the Employment Department information for services that are not considered subject employment under ORS Chapter 657" and when it "[p]ays all taxes owed to the Employment Department for that reporting period." Furthermore, a written election made under the procedure outlined above is considered approved "unless the Employment Department notifies the employing unit in writing that it is not approved[.]" OAR 471-031-0301(2).

It is likely that Intelekia reported to the Department the information for claimant's services in quarterly reports as referenced in OAR 471-031-0301(1)(a) since the record shows that Intelekia reported to the Department the wages it paid claimant and the hours claimant worked in 2019 and the first and second calendar quarters of 2020. However, it is unknown from the record whether Intelekia paid all taxes owed to the Department for the quarterly reporting periods. Therefore, remand is necessary for further development of the record.

On remand, the ALJ should ask questions to develop the record as to whether the election requirements of ORS 657.425 and OAR 471-031-0301(1) were met such that the wages claimant earned from Intelekia would count as wages earned for services performed in subject employment.

In his written argument, claimant asserted that even if Intelekia elected to have the services he performed be treated as subject employment and therefore the existence of the Intelekia base year wages operated to make him monetarily eligible for regular UI, he still would not count as eligible for regular UI benefits. Claimant's Argument at 1. Specifically, claimant argued that because his PUA initial claim

² See ORS 657.150(2)(a)(A) (As applicable here, an individual is monetarily eligible where they "[w]orked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year[.]").

was filed on July 31, 2021 but the weeks he claimed dated from before that date, he would not have been eligible to receive regular UI benefits given that his regular UI initial claim would be considered effective the week of July 31, 2021 and the weeks at issue would be weeks claimed prior to the first effective week. Claimant's Argument at 2-5; *see also* OAR 471-030-0040(3) ("An initial . . . claim must be filed prior to or during the first week or series of weeks for which benefits . . . [are] claimed[.]"). Claimant's theory of ineligibility, if accepted, would appear to enable any person otherwise eligible for regular UI to meet the first element of covered individual status simply by failing to file their regular UI initial claim in a prompt fashion before or during the week in which they are actually unemployed. This could complicate agency administration, which calls into question whether claimant's theory of regular UI ineligibility is consistent with how the concept is intended to be understood under the CARES Act.

Even so, on remand, the ALJ should inquire whether the Department would consider a regular UI initial claim filed by claimant to be effective the week of July 31, 2021 or if the Department would assign December 6, 2020 as the first effective week of such a regular UI claim. If the former, the Department should be offered an opportunity to respond to claimant's argument that assigning the week of July 31, 2021 as the first effective week of a regular UI claim would render claimant ineligible for regular UI benefits such that he would meet the first element of PUA eligibility.

Remand is also necessary because, even if the record were to support that claimant was not eligible for regular UI, it is not evident that claimant was unemployed during the weeks at issue because of a COVID-19 related circumstance recognized by the CARES Act. The record shows that claimant sold his interest in Intelekia Law Group and quit working for the firm on June 30, 2020. At hearing, claimant testified that he left the firm because he did "almost exclusively litigation work and that all stopped with COVID when the courts shut down" and "with the lack of income coming in . . . it seemed like a good thing to leave and find something else to do." Transcript at 19. The order under review concluded that claimant qualified under section 2102(a)(3)(A)(ii)(I)(ii) of the Act, reasoning that claimant had to quit his job as a direct result of COVID-19. Order No. 22-UI-197726 at 3-4. The record does not support that conclusion.

Federal guidance instructs that someone "has to quit" within the meaning of section 2102(a)(3)(A)(ii)(I)(ii) when ceasing employment is an involuntary decision compelled by the circumstances. U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), April 5, 2020 at I-7. For example, where an individual is diagnosed with COVID-19 and the illness caused health complications that render the individual objectively unable to perform their essential job functions, section 2102(a)(3)(A)(ii)(I)(ii) would be met. UIP 16-20 at I-6. Here, in contrast, the record fails to show that claimant's decision to quit working for Intelekia was compelled or involuntary in nature given that claimant testified that it merely "seemed liked a good thing to leave" because there was "a lack of income coming in." Transcript at 19.

Further, guidance states that whether something is a "direct result" of COVID-19 is governed by 20 C.F.R. 625.5(c).³ UIP 16-20 at I-7. Modified as called for by the CARES Act, that regulation provides that an individual's unemployment "is a direct result of the [COVID-19 public health emergency] where

³ Section 2102(h) of the CARES Act provides that regulations at 20 C.F.R. part 625 apply to the PUA program, unless otherwise provided or contrary to Section 2102. Applying the regulations is mandatory, except as otherwise provided by Section 2102 or in the event of a conflict between the statute and the regulations, because the plain language of Section 2102(h) provides that the regulations "shall apply[.]"

the unemployment is an immediate result of the [COVID-19 public health emergency] itself and not the result of a longer chain of events precipitated or exacerbated by the [pandemic].” 20 C.F.R. 625.5(c). Part 625.5(c)(3) also states more specifically that something is a “direct result” of COVID-19 where the unemployment resulted from “loss of revenues,” provided that, “prior to the [pandemic]” the employer or business “received at least a majority of its revenue or income from . . . an entity in the . . . area closed by the federal, state, or local government in immediate response to the [pandemic].”

Applying these standards, the record does not show that claimant’s unemployment was a direct result of COVID-19. Claimant testified that his litigation work stopped when the courts shut down, but claimant’s place of employment was a law firm, not the courts. Therefore, any state or local shut down order affecting the courts would only interfere with claimant’s law firm employment as the result of a longer chain of events precipitated by the pandemic, rather than as an immediate result. Moreover, while claimant testified to “a lack of income coming in,” which could implicate the more specific “loss of revenues” definition of “direct result” found at Part 625.5(c)(3), for that provision to apply, claimant’s law firm must have received a majority of its revenues from an entity that was closed in response to the pandemic. Transcript at 19. Here, the entities closed in response to the pandemic were the courts and no showing was made that Intelekia received any revenues from the courts. More likely than not, the firm’s revenues were generated from client fees and not payments from the courts. Therefore, the definition of “direct result” found at Part 625.5(c)(3) is not applicable in claimant’s circumstances.

It remains possible that claimant’s unemployment was because of a qualifying reason under the CARES Act. On remand, the ALJ should ask questions to develop more detail about the nature of claimant’s litigation work, which courts were closed and how those closures affected his work, and whether it was possible for claimant to continue to bring income in by conducting his business in court remotely, such as by teleconference. The ALJ should also make any additional inquiry necessary to assess whether claimant was rendered unemployed because of a COVID-19 reason recognized under the Act.

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 a covered individual eligible to receive PUA benefits, Order No. 22-UI-197726 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-197726 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 19, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-197726 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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