

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1046

Order No. 22-UI-203895 Affirmed ~ Ineligible for Pandemic Unemployment Assistance
Order No. 22-UI-203918 Affirmed ~ Overpayment, No Penalties

PROCEDURAL HISTORY: On November 8, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not eligible to receive PUA benefits effective March 22, 2020. On November 15, 2021, the Department served noticed of an administrative decision, based in part on the November 8, 2021 administrative decision, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$7,995 in PUA benefits, \$10,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits, and \$1,800 in Lost Wages Assistance (LWA) benefits that claimant was required to repay to the Department, as well as a \$2,729.25 monetary penalty. Claimant filed a timely request for hearing on both administrative decisions. On February 8, 2022, ALJ Frank conducted a hearing on the November 8, 2021 administrative decision, and on February 16, 2022 issued Order No. 22-UI-186649, affirming the November 8, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for the weeks including March 22, 2020 through September 4, 2021 (weeks 13-20 through 35-21). On March 4, 2022, claimant filed an application for review of Order No. 22-UI-186649 with the Employment Appeals Board (EAB). On May 9, 2022, EAB issued EAB Decision 2022-EAB-0293, remanding the matter for further development of the record to determine whether claimant was eligible for PUA benefits during the weeks at issue.

On September 26, 2022, ALJ Frank conducted a combined hearing on the November 8, 2021 and November 15, 2021 administrative decisions. On September 29, 2022, ALJ Frank issued Order No. 22-UI-203895, re-affirming the November 8, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for weeks 13-20 through 35-21. On September 30, 2022, ALJ Frank issued Order No. 22-UI-203918, modifying the November 15, 2021 administrative decision by concluding that claimant was liable for the overpayment assessed in that administrative decision, but that claimant did not make a willful misrepresentation and therefore was not subject to a monetary penalty. On October 13, 2022, claimant filed applications for review of Orders No. 22-UI-203895 and 22-UI-203918 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-203895 and 22-UI-203918. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-1047 and 2022-EAB-1046).

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.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), Order No. 22-UI-203918, concluding that claimant was liable for the overpayment assessed in the November 8, 2021 administrative decision, but that claimant did not make a willful misrepresentation and therefore was not subject to a monetary penalty, is **adopted**. The remainder of this decision addresses claimant's eligibility for PUA benefits.

FINDINGS OF FACT: (1) On October 6, 2020, claimant filed an initial claim for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks including March 22, 2020 through September 4, 2021 (weeks 13-20 through 35-21). These are the weeks at issue. On or prior to December 21, 2020, the Department paid claimant benefits for the weeks including March 22, 2020 through December 19, 2020 (weeks 13-20 through 51-20). The Department did not pay claimant benefits for the weeks including December 20, 2020 through September 4, 2021 (weeks 52-20 through 35-21). Claimant was not eligible for regular unemployment insurance (regular UI) benefits during any of the weeks at issue.

(2) Prior to the weeks at issue, claimant earned money by performing landscaping and similar services. From August 10, 2019 until March 24, 2020, claimant performed two to three hours of yard work for a client every Thursday, earning \$75 each time. On October 18, 2019, claimant was paid \$45 for having cleaned another client's gutters. Claimant made no investments towards turning his yard work activities into a business. Claimant submitted documentation of these services to the Department in order to support his PUA claim.

(3) On his October 6, 2020 initial claim, claimant stated that he stopped performing the above services after March 24, 2020 because he was "advised to stay home so [he could] stay healthy so [he] was not able to go to [his] clients," and had to "self quarantine" due to the governor's stay-at-home order. Exhibit 1 at 24.

(4) In January 2021, the Department sent letters and emails to PUA claimants notifying them that they would be required to provide documentation to substantiate their claimed self-employment activities.

(5) On September 22, 2021, claimant provided the Department with documentary proof of work he had performed doing landscaping and similar services. This documentation consisted of a cash receipt dated October 18, 2019 in the amount of \$45 for "cleaning gutters," and a notarized affidavit from one of claimant's clients, dated September 22, 2021, stating that claimant worked for her every Thursday from August 10, 2019 until March 24, 2020 and was paid \$75 weekly. Exhibit 1 at 29, 30. Claimant did not provide further documentary proof.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits for the weeks at issue.

Under the CARES Act, 15 U.S.C. Chapter 116, to be eligible to receive PUA benefits, an individual must be a “covered individual” as that term is defined by the Act. 15 U.S.C. § 9021. 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, including 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 they meet any additional criteria established by the Secretary of Labor. 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ff), (kk).

Further, an individual may also meet the definition of a “covered individual” if they are “self-employed . . . or otherwise would not qualify for regular unemployment or extended benefits . . . or pandemic emergency unemployment compensation . . . and meets the requirements” set forth under 15 U.S.C. § 9021(a)(3)(A)(ii)(I) of the Act. 15 U.S.C. § 9021(a)(3)(A)(ii)(II). One of the eleven COVID-19 impact reasons listed in § 2102(a)(3)(A)(ii)(I) 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). Pursuant to federal guidance, “the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 2 (July 21, 2020) at 2. § 9021(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.”

Moreover, § 9021(a)(3)(A)(iii) of the CARES Act, as amended by § 241(a) of the Continued Assistance Act (“CAA”), requires individuals to submit documentation to substantiate their employment or self-employment within a specified period of time in order to meet the definition of a “covered individual.” As explained by federal guidance, the provision requires that “individuals who have an existing PUA claim as of December 27, 2020” and “who receive PUA on or after December 27, 2020, must provide documentation within 90 days of the application date or the date the individual is instructed to provide such documentation by the state agency (whichever date is later).” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at I-10. Acceptable proof of self-employment includes, but is not limited to, “state or Federal employer identification numbers, business licenses, tax returns, business receipts, and signed affidavits from persons verifying the individual’s self-employment.” UIPL 16-20, Change 4 at I-10. If an individual fails to submit such documentation within the required timeframe, under Section 241(b)(2) of the CAA, the individual is not considered ineligible for PUA benefits received before December 27, 2020 but is otherwise not eligible for PUA and “the state may . . . establish an overpayment for those weeks of unemployment ending on or after December 27, 2020[.]” UIPL 16-20, Change 4 at I-11.

Substantiation. Where the initial claim for PUA benefits was filed on or prior to December 27, 2020, the documentary substantiation requirements imposed by the CAA only apply to benefits that claimant claimed, or was paid, on or after December 27, 2020. The record shows that claimant's initial claim was filed, and benefits for weeks 13-20 through 51-20 were paid, prior to December 27, 2020. Therefore, pursuant to the CAA, claimant was not required to substantiate his self-employment with documentation for those weeks.

Further, the record shows that claimant did, in fact, provide documentary proof of self-employment: a receipt from a client whose gutters he cleaned in 2019, and an affidavit from another client who attested to claimant's having provided weekly yard work for her through March 24, 2020. Exhibit 1 at 29–30. This documentation is of the type indicated by the US Department of Labor's guidance: business receipts and signed affidavits from persons verifying the individual's self-employment. Claimant provided this documentation to the Department on September 22, 2021.

At hearing, the Department's witness testified that the Department sent out notifications via mail and email in January 2021 advising PUA claimants that they were required to submit this documentation. September 26, 2022 Transcript at 15. However, the Department's witness did not specify that such a notice had been specifically sent to claimant at that time. As such, this testimony is speculative, and does not demonstrate that claimant was actually instructed to submit documentation at that time. Similarly, the Department's witness testified that claimant was sent a PUA "entitlement letter" on February 10, 2021. September 26, 2022 Transcript at 16. No further evidence was submitted regarding this "entitlement letter" or what it stated. While the Department's witness implied this letter advised claimant of the substantiation requirement, she did not actually say so. September 26, 2022 Transcript at 16. Thus, as the precise date the Department notified claimant of his obligation to substantiate is not evident, the Department failed to prove that claimant's provision of substantiating documentation on September 22, 2021 was not within 90 days of when the Department instructed claimant to provide it. Therefore, the record does not show that claimant failed to submit the documentation within the timeframe required by § 241(a) of the CAA.

Self-employment. The record shows that claimant engaged in activities for remuneration which could, in some contexts, qualify as "self-employment." However, the record does not show by a preponderance of the evidence that claimant's work performing landscaping and similar services qualified as "self-employment" for purposes of the PUA program. In particular, 20 C.F.R. 625.2(o) defines "self-employment" as "services performed as a self-employed individual," and 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." Thus, for claimant to have been considered "self-employed," he must have been a "self-employed individual" under 20 C.F.R. 625.2(n). While the record shows that claimant derived a weekly income of \$75 per week performing work for one of his clients in 2019 and 2020, and while it also shows that he performed some other work for other clients, it does *not* show by a preponderance of the evidence that claimant primarily relied on this work for his income. Moreover, at hearing, claimant explicitly disclaimed having a business or investing in one. September 26, 2022 Transcript at 14. Thus, claimant was not performing services under the auspices of his own business and was not a "self-employed individual" within the meaning of 20 C.F.R. 625.2(n). For these reasons, claimant was not "self-employed" for purposes of the PUA program.

Unemployed due to COVID-19. Even if claimant met the definition of “self-employed,” above, the record does not show, by a preponderance of the evidence, that claimant was unemployed or unavailable to work for one of the COVID-19 related reasons specified under 15 U.S.C. § 9021(a)(3)(A), such that claimant would be considered a “covered individual” under the Act. In particular, under 15 U.S.C. § 9021 (a)(3)(A)(ii)(I)(kk) and guidance issued thereunder, self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency may be considered covered individuals. Claimant did not show that he experienced a significant diminution of services due to the COVID-19 pandemic. At hearing, claimant stated that “homeowners. . . didn’t want any contact during the stay at home order.” September 26, 2022 Transcript at 10. However, it was presumably possible for claimant to continue performing his work without directly contacting a client by, for instance, accepting contactless payment by cash, check, or electronic transfer. Further, the affidavit that claimant’s client signed gave no indication that she personally told claimant that his services were no longer desired. Instead, she stated that, “The last day he worked was 3/24/20 due to the governor Kate Brown’s orders to stay home due to covid-19 and he has not returned back to work for me for this reason.” Exhibit 1 at 30. Thus, it appears that claimant’s drop in income was due to his own choice to stay home, and not a diminution of services.

Furthermore, it remains unclear why claimant made this choice. Claimant’s work consisted of yardwork and similar work that was performed outdoors: circumstances in which one could be reasonably certain of avoiding contracting COVID-19 if standard precautions were followed. The governor’s order referenced by the client did not place limitations on solo outdoor work where it was possible to maintain social distancing.¹ Likewise, while claimant indicated on his initial application that he was “advised to stay home,” he did not indicate that he was advised by a health care provider to self-quarantine due to concerns related to COVID–19. Thus, claimant was not a covered individual under 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ff) or any other provision of 15 U.S.C. § 9021 (a)(3)(A)(ii).

For the above reasons, claimant was not eligible for PUA benefits for the weeks at issue.

DECISION: Orders No. 22-UI-203895 and 22-UI-203918 are affirmed.

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

DATE of Service: December 27, 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.

¹ *See generally* Executive Order No. 20-12, March 23, 2020.

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email OED_Overpayment_unit@employ.oregon.gov . You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver applications. To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “State UI Overpayment Waiver”. To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “Federal Program Overpayment Waiver”.**

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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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