

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0010

Order No. 23-UI-242985 Modified ~ Late Request for Hearing Allowed, Eligible for PUA
Order No. 23-UI-242989 Modified ~ Late Request for Hearing Allowed,
No Overpayment or Penalties Assessed

PROCEDURAL HISTORY: On February 24, 2022, 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 February 2, 2020. On March 16, 2022, the February 24, 2022 PUA determination became final without claimant having filed a request for hearing. Also on March 16, 2022, the Department served notice of an administrative decision, based in part on the February 24, 2022 PUA determination, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$26,765 in combined PUA, Federal Pandemic Unemployment Compensation (FPUC), and Lost Wages Assistance (LWA) benefits that claimant was required to repay to the Department, as well as a \$3,744.75 monetary penalty. On April 5, 2022, the March 16, 2022 overpayment decision became final without claimant having filed a request for hearing. On July 11, 2022, claimant filed late requests for hearing on the February 24, 2022 PUA determination and the March 16, 2022 overpayment decision.

On November 30, 2023, ALJ Ramey conducted a consolidated hearing on both administrative decisions. On December 8, 2023, ALJ Ramey issued Order No. 23-UI-242985, allowing claimant's late request for hearing on the February 24, 2022 PUA determination and affirming that decision on the merits by concluding that claimant was not eligible to receive PUA benefits for the weeks of March 15, 2020 through December 12, 2020 (weeks 12-20 through 50-20), December 20, 2020 through February 6, 2021 (weeks 52-20 through 05-21), February 21, 2021 through April 3, 2021 (weeks 08-21 through 13-21), and April 11, 2021 through April 17, 2021 (week 15-21). Also on December 8, 2023, ALJ Ramey issued Order No. 23-UI-242989, allowing claimant's late request for hearing on the March 16, 2022 overpayment decision and modifying that decision on the merits by concluding that claimant was

overpaid \$26,765 in combined PUA, FPUC, and LWA benefits that he was required to repay to the Department, but that claimant did not make a willful misrepresentation of fact and therefore was not liable for a monetary penalty. On December 21, 2023, claimant filed an application for review of Order No. 23-UI-242985 with the Employment Appeals Board (EAB). On December 26, 2023, claimant filed an application for review of Order No. 23-UI-242989 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-242985 and 2023-UI-242989. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0010 and 2024-EAB-0031).

WRITTEN ARGUMENT: EAB considered claimant’s written arguments, filed on December 28, 2023 and January 19, 2024, when reaching this decision.

Based on a *de novo* review of the entire consolidated record in this case, and pursuant to ORS 657.275(2), the portions of each of the orders under review concluding that claimant had good cause for filing the late requests for hearing are **adopted**. Additionally, the portion of Order No. 23-UI-242989 concluding that claimant did not make a willful misrepresentation to obtain benefits is **adopted**. The remainder of this decision addresses claimant’s eligibility for PUA and liability for overpayment of benefits.

FINDINGS OF FACT: (1) On May 13, 2020, claimant filed an initial claim for PUA benefits. The Department determined that claimant’s weekly benefit amount was \$205. Claimant claimed benefits for the weeks of March 15, 2020 through February 6, 2021 (weeks 12-20 through 05-21) and February 21, 2021 through June 5, 2021 (weeks 08-21 through 22-21). These are the weeks at issue. The Department paid claimant a total of \$28,565 in combined PUA, FPUC, and LWA benefits over the course of all of the weeks at issue except for the weeks of December 13, 2020, through December 19, 2020 (week 51-20) and April 4, 2021, through April 10, 2021 (week 14-21). The Department did not pay claimant benefits for weeks 51-20 and 14-21.¹

(2) Since approximately 2005, claimant has made his living exclusively as a professional gambler. Prior to the onset of the COVID-19 pandemic, claimant competed in gambling tournaments and competitions, typically at casinos, card rooms, and other similar establishments. Claimant typically gambled his own money, although friends and associates sometimes “invested” in claimant, fronting him money in return for a share of his potential winnings. Transcript at 73. Claimant spent between ten and 50 hours gambling per week. Claimant earned approximately \$7,000 in gambling winnings in early 2020, prior to the beginning of the pandemic.

(3) In or around mid-March 2020, casinos and other venues at which claimant would gamble were closed due to the pandemic. As a result, claimant was not able to participate in the gambling competitions from which he had derived his income. Claimant was eventually able to begin to participate in online gambling as a substitute for in-person competitions, although his ability to do so was somewhat delayed due to having to “get established . . . with certain accounts, and [needing] a

¹ EAB has taken notice of these facts, which are 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 facts will remain in the record.

proper device to play on[.]” Transcript at 63. However, due to factors such as “higher competition, worse games, and less game availability on the internet,” claimant made “much less” money gambling online than he did at in-person tournaments. Transcript at 63.

(4) After the beginning of the pandemic, claimant moved from Oregon back to his family’s home in Massachusetts due to the financial hardship of having lost most of his income.

(5) On or around December 15, 2021, after having already paid claimant benefits for the majority of the weeks at issue, the Department sought documentation from claimant to substantiate the income he had been receiving as a professional gambler prior to the pandemic. Claimant did not receive the correspondence requesting this information because it was sent to his previous address in Oregon. As a result, claimant did not timely respond to the Department’s information request, and the Department subsequently issued the February 24, 2022 PUA determination, concluding that claimant was not eligible to receive PUA benefits for the weeks at issue.

(6) On or around June 8, 2022, claimant learned of the February 24, 2022 PUA determination and preceding information request. After retaining counsel to assist with the matter, claimant provided the Department with documentation to substantiate his claim, consisting of an affidavit regarding his career as a professional gambler and his 2020 tax return.

(7) In part based on the February 24, 2022 PUA determination, the Department issued the March 16, 2022 overpayment decision, which concluded that claimant was not eligible for benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was eligible for PUA benefits for the weeks at issue, and is therefore not liable for an overpayment of benefits that he is required to repay to the Department.

PUA Eligibility. To be eligible for PUA benefits, an individual must be a “covered individual” as that term is defined by the CARES Act, as amended. 15 U.S.C. § 9021(b). In pertinent part, a “covered individual” is an individual who (1) “is not eligible for regular compensation or extended benefits . . . or pandemic emergency unemployment compensation” 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 because of one of the eleven listed reasons. 15 U.S.C. § 9021(a)(3)(A)(i)-(ii).

One of the eleven enumerated COVID-19 related reasons is that “the individual meets any additional criteria established by the [United States] Secretary [of Labor] for unemployment assistance under this section.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). A circumstance approved via the Secretary’s item (kk) authority is for “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. Regulations at 20 C.F.R. part 625, which pertain to the Disaster Unemployment Assistance program, apply to the PUA program, unless otherwise provided or contrary to the Act. 15 U.S.C. § 9021(h). 20 C.F.R. Section 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." Under 15 U.S.C. § 9021(a)(3)(B)(i), the definition of a "covered individual" excludes "an individual who has the ability to telework with pay."

Furthermore, UIPL No. 16-20, Change 4 (January 8, 2021), 5, provides:

Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), are required to provide documentation substantiating employment or self-employment, or the planned commencement of employment or self-employment, within 90 days of application or when directed to submit the documentation by the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause under state [Unemployment Compensation] law.

Prior to the onset of the COVID-19 pandemic, claimant relied solely on income he derived from his activities as a professional gambler. This income consisted of his winnings from gambling competitions at casinos, card clubs, and similar venues. These venues temporarily closed in March 2020 due to the pandemic, depriving claimant of his only source of income. While claimant was eventually able to start participating in online gambling, he experienced a significant decline in his income compared to what he had earned prior to the closure of the in-person gambling venues. Order No. 23-UI-242985 concluded that claimant was not a "covered individual" under the CARES Act because claimant did not have "customers or clients that received a service or derived a benefit from claimant's gambling activities at the time of the reported COVID-19 impact period"; and because he did not show that the pandemic prevented him from "establishing [the] accounts or obtaining the necessary devices" to facilitate online gambling. Order No. 23-UI-242985 at 6. The record does not support these conclusions.

First, it should be noted that because the Department paid claimant benefits for a large majority of the weeks at issue, the Department primarily bears the burden of proof to show that claimant should not have been paid benefits for those weeks.² The Department has not met its burden here. Regarding the first of the conclusions discussed above, the applicable federal guidance is silent as to whether professional gambling activities are considered "self-employment" for purposes of the PUA program. However, even if claimant did not have "customers or clients" in a traditional sense, it is error to conclude that claimant was not providing a service, or that no other parties derived benefits, from his participation in gambling competitions.

Any venue which regularly hosts such competitions presumably does so specifically because those competitions *do* result in income for the venue. For example, hosting such a competition may bring spectators into the venue, who may spend money on cover charges or concessions. Therefore, claimant's role as a professional gambler is akin to an entertainer, like a professional athlete or performing artist. While the applicable federal guidance also appears silent as to whether the work of entertainers in general is considered "self-employment," logic would dictate that the PUA program was not intended to broadly exclude this large category of individuals.

² *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove 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).

Additionally, at hearing, the Department’s witness testified that, had claimant submitted documentation to substantiate his claim by the deadline originally set forth in December 2021, the witness would have found claimant eligible for PUA benefits for the weeks at issue based on claimant’s work as a professional gambler. Transcript at 45–46. While the Department’s testimony here is not conclusive evidence that claimant was a “covered individual” for the weeks at issue, it lends persuasive support to the conclusion that he was.

Next, in regard to the second conclusion cited above—regarding online gambling—the record does not show that online gambling was a sufficient substitute for claimant’s customary participation in in-person competitions to affect his status as a “covered individual.” Order No. 23-UI-242985 suggested that claimant’s failure to take the steps necessary to immediately participate in online gambling (such as “establishing accounts”) showed that claimant’s unemployment was due to “a longer chain of events precipitated or exacerbated by” the pandemic, rather than a direct result of the pandemic itself. Order No. 23-UI-242985 at 6. However, by the time claimant attempted to engage in online gambling, he was *already* unemployed because of the pandemic because the in-person gambling venues had closed due to the pandemic—meaning that claimant’s unemployment was a direct result of the pandemic. That claimant had difficulty, or faced delays, in engaging in substitute income-generating activities does not alter this fact.

Furthermore, to the extent that Order No. 23-UI-242985 meant to suggest that claimant was not a “covered individual” because he had the ability to telework with pay, the record fails to show that claimant could telework with pay. A reasonable interpretation of that provision of the CARES Act would suggest that it applies to individuals who can perform essentially the same work, and receive the same pay, either on-site or remotely. The record establishes that the online gambling in which claimant eventually engaged was not of the same type as the competitions he participated in prior to the pandemic, and further shows that he was not earning the same amount of money in doing so. Thus, the record supports the conclusion that claimant’s in-person professional gambling prior to the pandemic qualified him as a “covered individual,” despite his delayed entry into online gambling.

Finally, although Order No. 23-UI-242985 did not address the timeliness of claimant’s submission of substantiating documentation because it found claimant ineligible on other grounds, the topic merits a brief discussion here. Under the applicable federal guidance, the substantiation requirements may be extended if the individual has shown good cause under state law. The record shows that claimant’s responses to the Department’s substantiation requests were filed late for the same reason that claimant filed his hearing requests late. As adopted here, both orders under review concluded that claimant had good cause for filing his respective late requests for hearing. Order No. 23-UI-242985 at 3; Order No. 23-UI-242989 at 6. Therefore, it stands to reason that claimant also had good cause to submit the substantiating documentation to the Department, and claimant is not considered ineligible for PUA benefits due to those late submissions.

Overpayment. Order No. 23-UI-242989 concluded that claimant was overpaid PUA, FPUC, and LWA benefits for the weeks at issue because he was not eligible for PUA benefits for those weeks. Order No. 23-UI-242989 at 12–13. As discussed above, however, the record shows that claimant was eligible for benefits for those weeks. As this was the sole reason for assessing the overpayment, the record does not show that claimant was overpaid benefits for the weeks at issue.

For the above reasons, claimant was eligible for PUA benefits for the weeks at issue, and was not overpaid benefits that he is required to repay to the Department.

DECISION: Orders No. 23-UI-242985 and 23-UI-242989 are modified, as outlined above.

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

DATE of Service: January 31, 2024

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.

NOTE: This decision modifies orders that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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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