

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0190

Order No. 24-UI-247776 – Reversed – Eligible for PUA Benefits weeks 53-20 through 01-21, 04-21 through 10-21, 12-21 through 19-21, 21-21 through 31-21, and 33-21 through 35-21

Order No. 24-UI-247811 – Reversed – No Overpayment

PROCEDURAL HISTORY: On March 17, 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 starting December 27, 2020. On April 6, 2022, the March 17, 2022, PUA determination became final without claimant having filed a request for hearing. On September 15, 2022, the Department served notice of an administrative decision concluding that claimant was paid \$6,355 in PUA benefits and \$9,300 in Federal Pandemic Unemployment Compensation (FPUC) benefits to which he was not entitled and must repay the Department (decision # 120152). On September 28, 2022, claimant filed a late request for hearing on the March 17, 2022, PUA determination and a timely request for hearing on decision # 120152. On February 9, 2024, ALJ Fraser conducted separate hearings on the March 17, 2022, PUA determination and decision # 120152. On February 9, 2024, ALJ Fraser issued Order No. 24-UI-247776 allowing claimant's late request for hearing and affirming the March 17, 2022, PUA determination. On February 12, 2024, ALJ Fraser issued Order No 24-UI-247811 affirming decision # 120152. On February 21, 2024, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 24-UI-247776 and 24-UI-247811. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0189 and 2024-EAB-0190).

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.

EAB considered the entire consolidated hearing record. EAB agrees with the portion of Order No. 24-UI-247776 allowing claimant's late request for hearing on the March 17, 2022, PUA determination. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-247776 is **adopted**.

FINDINGS OF FACT: (1) Prior to November 9, 2020, claimant lived in New York. In September 2018, claimant started a self-employment venture, YoC Global. Claimant's business provided consulting services to start-up companies on manufacturing and product development and involved a significant amount of international travel.

(2) Following the onset of the COVID-19 pandemic, the services claimant performed through YoC Global were negatively impacted because international travel was restricted and many of the companies for whom claimant consulted put their operations on hold.

(3) From August 3, 2020, through October 16, 2020, claimant worked as chief operating officer of Sparks Grill, a company located in Colorado. Claimant performed this work part of the time remotely from his home in New York and part of the time in-person in Colorado. The Sparks Grill work was a traditional employment relationship, with Sparks Grill paying claimant a salary and benefits, although claimant may have thought of the work as one of the projects he undertook doing business as YoC Global. On October 16, 2020, claimant's employment with Sparks Grill ended.

(4) On November 9, 2020, claimant moved from New York to Portland, Oregon. Shortly thereafter, claimant registered YoC Global as a business with the Oregon Secretary of State. Following the move to Oregon, claimant performed some services for clients doing business as YoC Global, primarily through consulting with companies over the phone. Because of international travel restrictions, claimant performed only about three hours of phone consultation work per day after moving to Oregon.

(5) On December 18, 2020, a business called UberDesign, which was located in California, offered to employ claimant as chief operating officer of the company, and claimant accepted the offer. Shortly thereafter, "due to economic conditions result[ing] from the COVID-19 [pan]demic", UberDesign was unable to secure funding and rescinded the offer of work. Exhibit 1 at 3. Claimant was to have performed this work part of the time remotely from his home in Oregon and part of the time in-person in California.

(6) On December 23, 2020, claimant filed an initial application for PUA benefits. Thereafter, he claimed PUA benefits for the weeks including December 27, 2020, through January 9, 2021 (weeks 53-20 through 01-21), January 24, 2021 through March 13, 2021 (weeks 04-21 through 10-21), March 21, 2021 through May 15, 2021 (weeks 12-21 through 19-21), May 23, 2021 through August 7, 2021 (weeks 21-21 through 31-21), and August 15, 2021 through September 4, 2021 (weeks 33-21 through 35-21). These are the weeks at issue.

(7) The Department paid claimant PUA benefits in the amount of \$6,355 for the weeks at issue. The Department also paid claimant FPUC benefits in the amount of \$9,300 for the weeks at issue.

(8) Claimant was not eligible for regular unemployment insurance (regular UI), extended benefits, or pandemic emergency unemployment compensation (PEUC) during the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was entitled to receive Pandemic Unemployment Assistance benefits for the weeks at issue. Claimant was not overpaid the PUA and FPUC benefits he received during the weeks at issue, and therefore is not liable to repay those benefits.

Order No. 24-UI-247776 – PUA Eligibility. The Department paid claimant benefits for the weeks at issue. Therefore, the Department had the burden to prove that claimant should not 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 benefits should not have been paid).

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)(I)-(II).

Order No. 24-UI-247776 concluded that claimant was not a covered individual entitled to PUA benefits because, the order reasoned, claimant did not establish that he was unemployed due to a COVID-19 related reason and did not prove he was attached to the Oregon labor market. Order No. 24-UI-247776 at 5. The record does not support these conclusions.

As an initial matter, the Department’s witness testified at hearing that the basis of the March 17, 2022, determination that claimant was not eligible to receive PUA benefits was that claimant did not establish a “connection to the labor market in Oregon.” Order No. 24-UI-247776 Transcript at 17. In particular, the witness testified this was so because the documents claimant submitted to the Department as proof of employment or self-employment, or the planned commencement of employment or self-employment, was a 2019 New York state tax return and an affidavit of the CEO of UberDesign, the business located in California that offered claimant work on December 18, 2020, and then rescinded the offer. Order No. 24-UI-247776 Transcript at 17; *see also* Exhibit 1 at 3-4. However, the record evidence is sufficient to show that claimant had an attachment to the Oregon labor market and was working in Oregon via his self-employment venture, YoC Global, at the time he filed his initial claim for PUA benefits.

The notion that it is necessary for a PUA claimant to have an attachment to a particular state’s labor market appears rooted in the language of 15 U.S.C. § 9021(a)(3)(A)(ii)(II) that a person who “does not have sufficient work history” and therefore does not qualify for regular UI, may be eligible for PUA if they are rendered unemployed or partially unemployed because of one of the listed COVID-19 qualifying reasons. U.S. Department of Labor guidance elaborates that a person “lacking sufficient work history” is an individual who does not have sufficient base year wages to monetarily qualify for regular UI benefits, is unemployed or partially unemployed because of a listed COVID-19 reason, and has “a recent attachment to the labor force” meaning they “worked at some point from the start of the applicable tax year to the date of filing” their initial PUA application. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20) Change 4 (January 8, 2021), at I-4-5.

Relatedly, in response to a question regarding where an individual should file if they lived in one state and was self-employed in another state, U.S. Department of Labor guidance states: “The self-employed individual must file with the state where he or she was working at the time of becoming unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in

section 2101(a)(3)(A)(ii)(I) of the CARES Act. If an individual worked in more than one state at this time, the individual may file in any of those states.” Unemployment Insurance Program Letter No. 16-20, Change 1 (April 27, 2020), at I-3.

Applying these authorities, claimant had a recent attachment to the labor force because he moved to Oregon on November 6, 2020, and between then and the date of his December 23, 2020 initial PUA application he worked in Oregon providing consulting services via his self-employment venture, YoC Global, albeit in a reduced capacity of phone consultations because his ability to travel internationally was restricted. Similarly, since claimant worked in Oregon performing services as YoC Global, and those services were reduced because of claimant’s inability to travel internationally, the record is sufficient to conclude that claimant filed for PUA with a state where he was working, Oregon, at the time he became unemployed or partially unemployed via the international travel restrictions that existed during the pandemic. For these reasons, the Department did not show that claimant lacked a recent attachment to the labor force or that he failed to file with the state where he was working as a self-employed individual at the time of becoming unemployed or partially unemployed because of a COVID-19 related reason.

Turning to the elements of PUA covered individual status, the Department did not meet its burden to show that claimant was not a covered individual and should not have been paid benefits for the weeks at issue. First, claimant was not eligible for regular unemployment insurance, extended benefits, or PEUC during the weeks at issue, so the first element of PUA eligibility was satisfied. Second, the record is sufficient to conclude that claimant was rendered unemployed or partially unemployed during the weeks at issue because of a COVID-19 related circumstance recognized by the CARES Act.

One of 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.”

The record shows that claimant’s self-employment venture, YoC Global, was a business that provided consulting services to start-up companies on manufacturing and product development, which claimant registered with the Oregon Secretary of State shortly after moving to Oregon in November 2020. The record is sufficient to show that, after claimant became a resident of Oregon, YoC Global amounted to his primary source of income, given that, by then, claimant’s work for Sparks Grill had ended. During that time, claimant experienced a significant diminution of the services YoC Global provided in that claimant’s ability to travel internationally was restricted by COVID-19 restrictions and he was able only to provide about three hours of phone consultation per day.

Alternatively, another COVID-19 related circumstance recognized by the CARES Act is 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(gg), that “the individual was scheduled to commence employment and does not

have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency.” U.S. Department of Labor guidance elaborates that this provision applies where “an individual does not have a job because the employer with whom the individual was scheduled to commence employment has rescinded the job offer as a direct result of the COVID-19 public health emergency.” UIPL 16-20 Change 4 at I-7.

Claimant’s offer of work from UberDesign fulfilled 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(gg). The record shows that before claimant filed his initial PUA application and claimed the weeks at issue, UberDesign offered to employ claimant, and claimant accepted the offer, but that UberDesign was unable to secure funding and rescinded the offer of work “due to economic conditions result[ing] from the COVID-19 [pan]demic[.]” Exhibit 1 at 3. Claimant was to have performed this work part of the time remotely from his home in Oregon and part of the time in-person in California. The Department offered no evidence to rebut that the rescission of the UberDesign job offer was a direct result of the COVID-19 public health emergency.¹

Thus, whether satisfied by means of item (kk) or item (gg), the record establishes that claimant was rendered unemployed or partially unemployed by means of a COVID-19 related reason recognized by the CARES Act, and the Department did not meet its burden to show otherwise. Accordingly, claimant was a covered individual under the Act, and was therefore eligible to receive PUA benefits for the weeks at issue.

Order No. 24-UI-247811 – PUA and FPUC Overpayments. Order No. 24-UI-247811, relying on the conclusion reached by Order No. 24-UI-247776 that claimant was not eligible to receive PUA benefits for the weeks at issue, concluded that claimant received \$6,355 in PUA benefits and \$9,300 in FPUC benefits to which he was not entitled and was required to repay the Department. Order No. 24-UI-247811 at 3. The record does not support this conclusion.

Claimant received \$6,355 in PUA benefits and \$9,300 in FPUC benefits for the weeks at issue. However, as discussed above, claimant was a covered individual entitled to receive PUA benefits for the weeks at issue. Because claimant was entitled to the PUA benefits he received for the weeks at issue, he was entitled to the FPUC benefits he received for the weeks at issue as well. *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) at I-5 (“If the individual is eligible to receive at least one dollar (\$1) of underlying benefits for the claimed week, the claimant will receive the full \$[3]00 FPUC.”). Accordingly, Claimant was not overpaid the PUA and FPUC benefits he received during the weeks at issue, and therefore is not liable to repay those benefits.

DECISION: Orders No. 24-UI-247776 and 24-UI-247811 are set aside, as outlined above.

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

DATE of Service: March 29, 2024

¹ At hearing, the Department’s witness testified that the Department considered the UberDesign rescinded offer of work as insufficient merely because UberDesign was located in California. Order No. 24-UI-247776 Transcript at 18. The witness otherwise agreed that if someone was offered work to be performed in Oregon “and were not able to start because of Covid, that is considered a Covid impact.” Order No. 24-UI-247776 Transcript at 19.

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 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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