

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0416

Reversed
Eligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On July 8, 2022, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not eligible for PUA benefits effective March 1, 2020. Claimant filed a timely request for hearing. On August 1, 2022, notice was mailed to claimant of a hearing scheduled for August 15, 2022. On August 15, 2022, ALJ Scott convened a hearing at which claimant filed to appear, and issued Order No. 22-UI-200534, dismissing claimant's request for hearing due to his failure to appear. On August 30, 2022, claimant filed a timely request to reopen the hearing. On October 24 and November 27, 2023, ALJ Frank conducted a hearing, and on December 5, 2023, issued Order No. 23-UI-242615, denying claimant's request to reopen the hearing and leaving Order No. 22-UI-200534 undisturbed. On December 26, 2023, Order No. 23-UI-242615 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On December 29, 2023, claimant filed a late application for review of Order No. 23-UI-242615 with EAB.

On February 5, 2024, EAB issued EAB Decision 2024-EAB-0036, allowing claimant's late application for review, reversing Order No. 23-UI-242615 by allowing claimant's request to reopen the August 15, 2022, hearing, and remanding the matter for a hearing on the merits of the July 8, 2022, PUA determination. On April 8, 2024, ALJ Frank conducted the hearing, and on April 16, 2024, issued Order No. 24-UI-252361, affirming the July 8, 2022, PUA determination by concluding that claimant was ineligible for PUA benefits for the weeks from March 8, 2020, through August 28, 2021 (weeks 11-20 through 34-21). On May 1, 2024, claimant filed a timely application for review of Order No. 24-UI-252361 with EAB.

WRITTEN ARUGMENT: EAB considered claimant's argument in reaching this decision.

FINDINGS OF FACT: (1) On April 20, 2020, claimant filed an initial application for PUA benefits. Claimant thereafter claimed benefits for the weeks of March 8 through December 12, 2020 (weeks 11-20 through 50-20) and December 27, 2020, through September 4, 2021 (weeks 53-20 through 34-21). These are the weeks at issue. Claimant was not eligible for regular unemployment insurance (regular UI) or other similar benefits during these weeks.

(2) The Department paid claimant PUA benefits for the weeks at issue with a weekly benefit amount (WBA) of \$205. Claimant did not receive remuneration from self-employment during any of the weeks at issue that was equal to or greater than \$205.

(3) In 2019, claimant operated two businesses that had previously been registered with the Oregon Secretary of State. One business, a ServiceMaster franchise, offered janitorial services and was operated as a sole proprietorship. The other business, which claimant operated as a general partnership with his wife, sold roasted nuts at various events and markets, totaling more than 160 venues in 2019.

(4) In his initial application for PUA benefits and subsequent weekly claims, claimant disclosed only information relating to the roasted nut business because he believed his management of the ServiceMaster business did not constitute employment or self-employment.

(5) Claimant filed a federal tax return for 2019. On that return, claimant reported that he “materially participate[d]” in the operation of the ServiceMaster business and paid self-employment tax on the profits of that business. Exhibit 1 at 30-31. Claimant reported a net profit of \$9,066 on gross revenue of \$139,269 for ServiceMaster. He also reported a net profit of \$20,148 from the roasted nut business on behalf of the partnership.

(6) Claimant filed a federal tax return for 2020. Claimant again reported material participation in the operation of the ServiceMaster business on the return. Claimant reported a net loss of \$3,663 on gross receipts of \$106,649 for ServiceMaster. Claimant reported a loss of \$17,448 from the roasted nut business on behalf of the partnership.

(7) Beginning on or around March 8, 2020, both businesses experienced a decline in gross receipts as the COVID-19 pandemic slowed demand for janitorial services and closed venues at which the nuts were sold. These declines in revenue resulting from the pandemic continued through at least September 4, 2021.

CONCLUSIONS AND REASONS: Claimant is eligible for PUA benefits for the weeks at issue.

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.¹ 15 U.S.C. § 9021(a)(3)(A)(i)-(ii). Regulations

¹ A third element of “covered individual” status, added to the Act via the Continued Assistance for Unemployed Workers Act of 2020, enacted on December 27, 2020, requires a claimant to provide documentation substantiating their employment or self-employment within a required timeframe. 15 U.S.C. § 9021(a)(3)(A)(iii); U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at 5 (“Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 . . . are required to provide documentation of employment or self-employment[.]”) Claimant’s 2019 and 2020 tax returns met this requirement.

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).

Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department paid claimant benefits for the weeks at issue and therefore had the burden of proving claimant should not have been paid benefits for those weeks.

The order under review concluded that claimant was ineligible for PUA benefits for the weeks at issue because he did not establish that he had been “employed in 2019 or 2020” or that he was unemployed during those weeks for an enumerated COVID-19 reason. Order No. 24-UI-252361 at 3. The record does not support this conclusion.

Self-employment. Claimant did not assert that he was employed by another person or entity from 2019 through 2021. It can be inferred from the payment of PUA benefits that the Department determined that claimant could not establish a monetarily valid claim for regular UI or similar benefits from wages earned in traditional employment, and the facts have been found accordingly. The record instead shows that claimant was self-employed in the operation of two businesses from at least 2019 through 2021. Claimant registered both businesses with the Oregon Secretary of State prior to 2019 and filed federal tax returns listing financial information relating to both businesses for 2019 and 2020. While tax and other financial information for 2021 is not in the record, it is reasonable to infer that both businesses continued operating that year with approximately the same levels of revenue and expenses as in 2020. Claimant therefore was self-employed prior to and during the COVID-19 pandemic, including the weeks at issue.

Claimant testified that he did not report the ServiceMaster business information on his initial PUA application because he did not consider it self-employment, instead likening it to a form of passive investment such as earning interest on a savings account. *See* Audio Record at 15:29 to 15:50; 17:55 to 18:10. However, while this testimony suggests that claimant did not perform janitorial work, he testified that he that he was the “manager” of that business. Audio Record at 15:40. This testimony, along with claimant reporting his material participation in the business on his tax returns and paying self-employment tax on ServiceMaster profits, established that claimant was participating in self-employment rather than a passive investment with regard to ServiceMaster. Therefore, both businesses constituted self-employment. As explained below, however, the record shows that both businesses experienced a significant diminution of services due to the COVID-19 pandemic.

Significant diminution of services. For purposes of meeting the elements of “covered individual” status, one of the enumerated COVID-19 related reasons in the CARES Act 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.

Regarding the partnership’s operation of the roasted nut business, claimant stated on his PUA application that sales were conducted at over 160 “events and shows” in 2019. Exhibit 1 at 20. Claimant

further wrote that these sales venues, which he considered his places of employment for that business, were closed due to governmental COVID-19 advisories and orders beginning March 7, 2020. Exhibit 1 at 18. Claimant's tax returns show the business had a profit of \$20,148 in 2019 and a loss of \$17,448 in 2020. It can reasonably be inferred that the pandemic's impact on the roasted nut business continued for all of the weeks at issue. Therefore, the partnership likely experienced a significant diminution of services in their roasted nut business because of the COVID-19 public health emergency.

The record is less specific regarding COVID-19's effects on the ServiceMaster business because claimant erroneously believed that his management of that business did not constitute self-employment. He therefore did not respond to the questions on the PUA application with information about that business. However, it can reasonably be inferred from a significant loss of revenue in 2020 as compared to 2019 that demand for the business' janitorial services lessened due to commercial buildings being closed during the pandemic. Tax returns show that the ServiceMaster business had gross income declining from \$139,269 in 2019 to \$106,649 in 2020, with a corresponding net profit of \$9,066 in 2019 falling to a net loss of \$3,663 in 2020. It can also be inferred that similar losses attributable to the pandemic continued for the rest of the weeks at issue. The Department therefore has not met their burden of showing that the ServiceMaster business did not experience a significant diminution of services because of the COVID-19 public health emergency.

For these reasons, the record shows that claimant had a qualifying COVID-19 reason relating to his self-employment as to both businesses pursuant to 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk).

Remuneration. At hearing, the Department asserted that if claimant had reported the details of his self-employment with the ServiceMaster business on his initial PUA application or in his weekly claims, benefits would not have been paid "because his self-employment would have exceeded his weekly benefit [amount]." Audio Record at 10:39. The record does not support this assertion.

With exceptions set forth in 15 U.S.C. § 9021 not applicable here, an individual is not eligible for benefits, including PUA benefits, if they are not "unemployed." ORS 657.155(1)(e) ("An *unemployed individual* shall be eligible to receive benefits with respect to any week . . .") (emphasis added). Per ORS 657.100(1), an individual is deemed "unemployed":

in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount.

Self-employment proceeds received during a week in which PUA benefits were claimed were generally considered remuneration. *See former* OAR 471-030-0017(1)(d) (effective January 11, 2018, to December 13, 2022). The Department required that the gross receipts during a claimed week, less one-fourth the expenses of the previous month, be reported as remuneration for that week. *See* August 5, 2020, Memorandum "PUA Gross Income for Self-Employed Claimants" from Lisa Shriver, Deputy Division Director for Operations and Policy. The record contains neither ServiceMaster's weekly gross receipts nor its monthly expenses specific to the weeks at issue. However, claimant's 2020 tax return contains gross receipt and expense information for that year. Exhibit 1 at 50. OAR 471-030-0017(4)(d) provided, for purposes of ORS 657.100, that where remuneration was received for services rendered in

self-employment and the dates of service are not clearly established, “allocation shall be made upon a reasonable estimate provided by the individual. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered[.]”² It therefore is appropriate to allocate ServiceMaster’s 2020 gross receipts and expenses equally over the course of the year.

On a weekly basis, gross receipts are allocated as \$2,050.94.³ On a monthly basis, total expenses are allocated as \$9,192.67, and one-fourth of allocated monthly expenses is \$2,298.17.⁴ Because one-fourth of the previous month’s expenses exceeded the weekly gross receipts in each week allocated, claimant had no reportable remuneration from ServiceMaster during the 2020 weeks at issue. Absent other evidence to the contrary, it can reasonably be inferred that ServiceMaster’s receipts and expenses similarly generated no reportable remuneration for the 2021 weeks at issue. The Department therefore has not shown that claimant had unreported remuneration for any of the weeks at issue that rendered him ineligible for PUA benefits.

For these reasons, the record shows that claimant was a “covered individual” entitled to PUA benefits during the weeks at issue. Claimant met the first element of PUA eligibility because he was not eligible for regular UI or similar benefits during the weeks at issue. As to the second and third elements, claimant provided proof that he was self-employed at the start of the pandemic, and both of his self-employment ventures suffered a significant diminution of services as a direct result of the COVID-19 pandemic, a qualifying reason enumerated under 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). Claimant’s remuneration from self-employment did not exceed his weekly benefit amount of \$205 during any of the weeks at issue. Accordingly, claimant was eligible for PUA benefits for the weeks of March 8 through December 12, 2020 (weeks 11-20 through 50-20) and December 27, 2020, through September 4, 2021 (weeks 53-20 through 34-21).

DECISION: Order No. 24-UI-252361 is set aside, as outlined above.

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

DATE of Service: June 13, 2024

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

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

² It should be noted that *former* OAR 471-030-0017(4)(a) provided that remuneration from services were allocable to the week in which the services were *performed*. However, the Department gave differing guidance with respect to reporting gross receipts from self-employment on PUA claims in the August 5, 2020, memorandum in order to comply with federal requirements, as discussed above.

³ \$106,649/52 weeks = \$2,050.94.

⁴ \$2,726 in “[r]eturns and allowances” plus \$107,586 in other expenses equal \$110,312 in total expenses. Exhibit 1 at 50. \$110,312/12 months = \$9,192.67. \$9,192.67/4 = \$2298.17.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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