IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NAVEED POPAL,
Appellant,
vs.
THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; AND LYNDA PARVEN, AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION,
Respondents.

No. 84291-COA

FILED

OCT 20 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Naveed Popal appeals from a district court order denying his petition for judicial review. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Popal started driving for Lyft, an app-based ride share company, in 2017.[1] Popal did not own his own car, so he relied on Lyft's partnership with Hertz Rental Car, known as the Express Driver Program, to secure a weekly rental car for work. In September 2019, Popal took a break from driving "due to health and personal issues" but planned to return to driving.

In March 2020, Popal tried to return to work. However, when he arrived to claim his weekly rental car, he discovered that the Express Driver Program had been shut down due to the COVID-19 pandemic. To help cover his lost wages, Popal applied for Pandemic Unemployment

[1]We recount the facts only as necessary for our disposition.

Assistance[2] (PUA) through the Nevada Employment Security Division (the Division). Popal's application was approved, and he received PUA benefits throughout the spring and summer of 2020.

Yet, in September 2020, the Division terminated Popal's benefits. The Division did so because it determined he did not meet the requirements of the CARES Act, in that he was not truly out of work due to the pandemic. Rather, the Division found that Popal was unemployed because he had quit his job in September 2019 and his employer purportedly shut down in February 2020.

Popal appealed his termination and was given a telephonic hearing with the Division's appeals referee.[3] In his hearing, Popal provided sworn testimony that he had "stopped working" due to his health and for personal reasons, but that he had always planned to return to driving in early 2020. The referee did not ask Popal to explain how either his health or personal reasons justified an extended leave of absence but did ask for evidence that he intended to return to work after his break. However, because the Express Driver Program did not require a driver to give advance notice of his or her intent to rent a car for the week, Popal offered primarily his own testimony. His testimony included that he physically tried to return to work in March 2020 but could not because the Express Driver Program located in Las Vegas was closed due to the pandemic shutdown, such that he was now unemployed only because of the pandemic.

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[2]*See* 15 U.S.C. § 9021(a)(3). PUA is provided under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). *See* 15 U.S.C. §§ 9001-9021.

[3]Popal was unrepresented by counsel during the hearing.

Based on Popal's use of the phrase "stopped working," the referee found in August 2021 that Popal had actually quit his job and was thus unemployed for reasons not related to the pandemic, nor compensable under the CARES Act. Yet, the referee made no findings as to the credibility of Popal's self-certification, his testimony, or the sufficiency of his evidence. Also, the Division did not present any contradicting evidence to Popal's sworn testimony of being solely on a break from work, nor did the referee explore whether the reasons for his break would render the length of it unreasonable. Furthermore, the referee did not find Popal's testimony that the Express Driver Program was his place of business inaccurate, insufficient, or not credible; nor that his testimony was mistaken or incorrect that it was shut down in March 2020 because of the pandemic.

Popal appealed the referee's decision to the Board of Review (the Board), but the Board adopted the referee's findings and reasons, thereby affirming the referee's decision. Popal then petitioned the district court for judicial review. The district court denied the petition, determining that the Board acted within its discretion and had "followed the law" with a citation to the United States Department of Labor's (the DOL) "Question 14" as authority. This appeal followed.

Popal raises the following issues on appeal: first, that the Division, appeals referee, and Board incorrectly interpreted the CARES Act when his PUA benefits were denied; second, that the DOL's guidance under "Question 14" does not control the Division's denial of Popal's PUA benefits. We agree and address each argument in turn.

PUA was a temporary federal unemployment assistance program offered to claimants who were not eligible for traditional unemployment benefits, but who were nevertheless unemployed or

underemployed as a result of the COVID-19 pandemic. *See* 15 U.S.C. § 9021. To effectuate the legislative purpose of the CARES Act, President Biden directed administrative agencies by executive order, long before the referee's decision in this case, to "specifically consider actions that . . . improve access to, reduce unnecessary barriers to, and improve coordination among programs funded . . . by the Federal Government . . . [and] should prioritize actions that provide the greatest relief to individuals." Exec. Order No. 14002, Fed. Reg. 7229 (Jan. 22, 2021), *reprinted in* 15 U.S.C.A. § 9001, 86.

To qualify for PUA benefits at the time Popal applied,[4] an applicant needed to show three things: (1) ineligibility for standard unemployment benefits, (2) self-certification that he or she was "otherwise able to work and available for work . . . except [that he or she is] unemployed, partially unemployed, or unable or unavailable to work"; and (3) self-certification that the reason for being unable to work was for one of eleven pandemic-related reasons enumerated within the statute. 15 U.S.C. § 9021(a)(3)(A). One of the enumerated reasons that allowed for PUA eligibility was if an applicant could self-certify his or her "place of employment [was] closed as a direct result of the COVID-19 public health emergency." *Id.* at (a)(3)(A)(ii)(I)(jj). There is no burden on an applicant found in the statute beyond credible, honest self-certification.

Because individual states' workforce agencies were tasked with administration of the PUA program, the DOL gave periodic updates and

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[4]The CARES Act was amended to add a documentation requirement to receive PUA benefits for those claiming self-employment. This amendment was made after the relevant facts in this case; however, Popal's self-employment is not in dispute. *See* 15 U.S.C. § 9021(a)(3)(A)(iii).

guidance through a series of letters directed to the states. In these letters, the DOL answers states' frequently asked questions about how to determine an applicant's PUA eligibility. Relevant here is "Question 14," which is found under the DOL's Unemployment Insurance Program Letter No. 16-20, Change 2:

> Question: If an individual becomes unemployed for reasons unrelated to COVID-19, and now is unable to find work because businesses have closed or are not hiring due to COVID-19, is he or she eligible for PUA?
>
> Answer: No. An individual is only eligible for PUA if the individual is otherwise able to work and available to work but is unemployed, partially unemployed, or unable or unavailable for work for a listed COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I) of the CARES Act. Not being able to find a job because some businesses have closed and/or may not be hiring due to COVID-19 is not an identified reason.

U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20, Change 2*, I-6 (July 21, 2020).

Thus, the DOL has directed states to deny PUA benefits to applicants who quit their jobs for reasons unrelated to the pandemic but who later have difficulty reentering the workforce due to pandemic-related business closures and hiring freezes.

We review the factual findings of an administrative agency for clear error or an abuse of discretion. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Although this court normally defers to an agency's conclusions of law that are closely related to the facts, we review purely legal issues de novo, including matters of statutory interpretation. *See Sierra Pac. Power Co. v. State Dep't of Tax'n*, 130 Nev. 940, 944, 338 P.3d 1244, 1247 (2014).

Legislative bodies are the parents of unemployment benefits. *See Anderson v. State, Emp't Sec. Div.*, 130 Nev. 294, 304, 324 P.3d 362, 368 (2014). When we are called upon to interpret a statute, the starting point is the statute's plain language. *See Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). If the language of the statute is clear, we do not go beyond it. *Id.* The Division is a Nevada state agency that interpreted a federal statute when it, the referee, and the Board determined that Popal did not qualify to receive PUA. While we defer to the referee for findings of fact, we review de novo whether she properly applied the law to the facts.

The gig-economy[5] is a rapidly increasing and important portion of our economy, but it has presented considerable challenges for lawmakers who are trying to meet the policy goals of unemployment benefits under the restrictions of traditional employment law. *See* Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 YALE L.J. FORUM 799 (2022). In this case, Popal met his burden to prove his eligibility for PUA benefits under the plain language of the CARES Act. First, as a gig worker, he was ineligible for standard unemployment benefits. Next, he self-certified to the Division that he was otherwise able to work and available for work. Finally, he self-certified that he was out of work because his place

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[5]The "gig economy" refers to self-employed, non-farm workers who provide "clients with on-demand services." Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 YALE L.J. FORUM 799, 802 (2022). As of 2017, as many as 55 million Americans, or 34% of our labor force, worked in the "gig" economy. *Id.* at 799-800. Recent projections for 2020 data reach as high as 43% of the work force, with nearly three-quarters of those workers on app-based gig platforms, like Lyft, who are relying on gigs as their primary source of income. *Id.* at 802-03.

of employment, the Express Driver Program, was closed as a direct result of the COVID-19 public health emergency. Therefore, Popal satisfied the elements for PUA eligibility under the plain language of the CARES Act.

The referee apparently relied on the length of Popal's absence from work and his use of the phrase "stopped working" to infer that he quit his job. While the length of Popal's absence was significant, the length does not prove he quit. In other employment situations, extended absences from work are allowed during periods such as short-term disability, pregnancy, or family leave without effecting a worker's status. For example, the Family and Medical Leave Act (FMLA) protects an employee who takes an extended leave of absence for pregnancy, caring for a servicemember, adoption, and other things. *See* 29 U.S.C. § 2612(a)(1). In fact, in some instances, leaves of absences of up to 26 work weeks are allowed under the FMLA. *See id.* at § 2612(a)(3). The referee failed to find if such a situation might apply to Popal, thus the mere length of Popal's absence cannot be substituted for a finding that his self-certification was not credible.

As to the phrase "stopped working," "stopped" is not necessarily synonymous with "quit." Logically, workers can reasonably say that they "stopped working" for the day or longer, or that they will "stop working" on a project, without creating the sole inference that their intent is to quit their jobs. The referee did not ask Popal to clarify what he meant when he said he "stopped working" when he also testified that he intended to resume driving with Lyft after his break. Thus, Popal's use of the phrase "stopped working" cannot be substituted for a finding by the referee that his self-certification was not credible.

The referee inferred that Popal quit his job in September 2019 under the subheading of "Fact Finding" in her denial of Popal's appeal.

However, the referee's conclusion is not supported by substantial evidence.[6] As already discussed, the phrase "stopped working" was too imprecise to unequivocally infer that Popal meant to quit as opposed to taking a leave of absence with the intent to return.[7] Also, no evidence was presented to rebut Popal's sworn testimony. Additionally, the referee made no finding of fact as to the reasonableness of the length of his break, since Popal's personal and health circumstances remained unknown. Further, the referee did not provide if she considered how the nuance of gig work or the Express Driver Program's no-notice requirement affected her interpretation of Popal's self-certification. And finally, there was no finding by the referee that Popal's sworn testimony lacked credibility.[8]

Thus, the referee implicitly created an additional element to PUA self-certification that is not found under the statute: the applicant bears a burden of proof beyond self-certification without a finding that his or her testimony lacks credibility. In this case, this was an apparent

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[6]We may overturn a finding of fact if it lacks the support of substantial evidence. *See Elizondo,* 129 Nev. at 784, 312 P.3d at 482.

[7]Lyft drivers who have been accepted into the Express Driver Program may take breaks from serving customers without needing to reapply. Lyft Express Drive, *Terms*: *19. Relationship with Lyft,* https://www.lyft.com/terms (last visited Oct. 17, 2022) (last updated April 2021).

[8]*See Simmons v. Ariz. Dep't of Econ. Sec.*, No. 1 CA-UB 21-0171, 2022 WL 4350555, at *1 (Ariz. Ct. App. Sept. 20, 2022) (reversing the administrative denial of PUA benefits and noting that the applicant's sworn testimony was sufficient evidence to establish his eligibility absent a finding by the administrative tribunal that his testimony lacked credibility); *In re Chandler*, No. A21-1594, 2022 WL 3348646, at *2 (Minn. Ct. App. Aug. 15, 2022) (deferring to an administrative law judge's finding of fact that a PUA applicant's testimony was not credible).

narrowing of the CARES Act by the Division, the referee, and the Board, which created an additional barrier to individual economic relief in contravention of the CARES Act and President Biden's executive order directing agencies like the Division that distribute federal funds to provide the "greatest relief" to individuals like Popal.[9]

We turn now to the referee's reliance on the DOL's guidance through Question 14 and her application of it to Popal. There is a notable difference between the statutory language of the CARES Act, which allows for PUA benefits when an applicant self-certifies that his *"individual*[ ] place of employment is closed" as a result of the pandemic, when compared to the DOL's Question 14, which directs agencies to deny PUA benefits when an applicant cannot find work because "*some businesses* have closed and/or may not be hiring due to COVID-19." (Emphasis added.) The DOL guidance speaks to the effect of general business closures on a PUA application, whereas Congress directs a state to grant PUA benefits to an applicant who self-certifies that his or her individual place of business closed as a result of the pandemic.

Popal self-certified that the basis for his PUA eligibility was that his individual place of business, the Express Driver Program, was closed as a result of the pandemic, satisfying his burden under the CARES Act. However, the appeals referee affirmed the termination of Popal's PUA

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[9]Additionally, the Supreme Court of Nevada has stated that the purpose of unemployment statutes in Nevada is "to advance the protective purposes of Nevada's unemployment compensation system of providing temporary assistance and economic security" and "to soften the economic burdens of those who find themselves unemployed through no fault of their own." *Anderson*, 130 Nev. at 300, 304, 324 P.3d at 365, 368 (internal quotations omitted).

benefits without considering where the location of Popal's individual place of business was, nor finding that his self-certification of it being the Express Driver program was not credible. By so doing, the referee effectively treated the closure of the Express Driver Program as a general sector business closure instead of Popal's individual place of employment.

It is undisputed that Popal was self-employed as a Lyft driver, but he did not own his own car. It is also undisputed that Popal rented a car weekly through the Express Driver Program for more than two-and-a-half years. If the Express Driver Program was Popal's individual place of employment as he certified, and there was no finding by the referee otherwise, then apparently the Division improperly further narrowed the CARES Act by restricting Popal, an app-based gig worker, from having a claim for an individual place of employment being shut down under 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj). This conclusion is problematic since Popal testified that the Express Driver Program was shut down in March 2020 because of the pandemic, and that as a result, he could not return to work.

Furthermore, the referee cited the DOL's Question 14 and its direction to state agencies to deny PUA benefits to applicants who become "unemployed" for reasons other than the pandemic in her decision to deny Popal PUA benefits. Yet we note that the DOL has itself classified people as "unemployed" only if "they do not have a job, have actively looked for work in the prior 4 weeks, and are currently available for work." Bureau of Labor Statistics, *Who is Counted as Unemployed?*, https://www.bls.gov/cps/faq.htm (last visited Oct. 5, 2022). Thus, by the DOL's own definition, it takes more than a mere absence from work before it will consider a person to be unemployed.

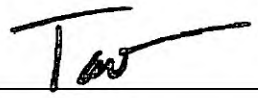
The DOL's definition of unemployed is instructive because the Division is a state agency interpreting federal law. In this case, Popal was not looking for work prior to March 2020 because, according to his sworn testimony, he believed he would return to his regular job in the Express Driver Program. He also testified that the job was his to return to. Accordingly, Popal's situation may not have met the DOL's definition of unemployment as used in Question 14.

Because of the foregoing, Popal's application cannot properly fall within the DOL's guidance under Question 14 absent a finding by the referee that his sworn testimony was not credible. The language of the CARES Act is plain; Popal satisfied his burden under the law when he self-certified to each requirement to receive PUA benefits and he was not otherwise disqualified.

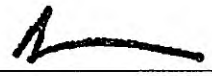
Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND with instructions to direct the Board to reinstate Popal's PUA benefits.[10]

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

[10]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Joanna Kishner, District Judge
Nevada Legal Services/Las Vegas
State of Nevada/DETR
Eighth District Court Clerk