

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CRAIG MISSEN, AN INDIVIDUAL,
Appellant,
vs.
THE STATE OF NEVADA
EMPLOYMENT SECURITY DIVISION,
AND LYNDA PARVEN, IN HER
CAPACITY AS ADMINISTRATOR OF
THE EMPLOYMENT SECURITY
DIVISION; AND J. THOMAS SUSICH,
IN HIS CAPACITY AS CHAIR OF THE
EMPLOYMENT SECURITY DIVISION
BOARD OF REVIEW,
Respondents.

No. 86774-COA

FILED

MAY 28 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Craig Missen appeals from a district court order denying a petition for judicial review in an unemployment matter. Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

Missen filed an application for Pandemic Unemployment Assistance (PUA) under the federal Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act) in which he self-certified that he became unemployed in March 2020 because his place of employment closed due to the COVID-19 pandemic. Respondent State of Nevada Employment Security Division (ESD) subsequently denied Missen's claim, finding that he failed to provide required information and, as a result, did not demonstrate that he was unemployed for pandemic-related reasons.

Missen appealed ESD's determination to an appeals referee, and the matter proceeded to an administrative hearing. As discussed in greater detail below, Missen testified during the hearing that he was a self-

employed senior consultant who provided services for Treehouse Lounge Holdings LLC (Treehouse) in connection with a construction project, which was placed on hold in February 2019 after it lost funding due to certain regulatory changes. According to Missen, Treehouse continued to pay him through February 2020 while it sourced alternate funding, but he became unemployed in March 2020 after financiers with which Treehouse had been negotiating decided to hold off on investing while they assessed the effects of the pandemic.

Following the hearing, the appeals referee affirmed ESD's decision. For support, the appeals referee found that, although Missen testified Treehouse paid him \$1,000 per week through February 2020, the bank statements he produced showed that he last received such a payment on August 26, 2019. The appeals referee further found that, while Missen testified Treehouse found financiers who decided to hold off on investing until after the pandemic, he failed to provide any credible evidence to support the assertion. Based on the foregoing, the appeals referee concluded that Missen was ineligible for PUA benefits because he did not demonstrate that he had any specific paid employment that was cancelled due to the pandemic. Missen subsequently appealed the appeals referee's decision to the ESD Board of Review, which declined to review the decision.

Missen then petitioned the district court for judicial review, and respondents, which include ESD; Lynda Parven, who is the administrator of ESD; and J. Thomas Susich, who is the chair of the Board of Review, filed an answer. Following a hearing, the district court entered an order denying Missen's petition for judicial review, reasoning that substantial evidence supported the appeals referee's decision because Missen did not produce credible evidence showing that he was paid, and, therefore, attached to the

workforce, beyond August or September 2019 or that he became unemployed due to the pandemic. This appeal followed.

The appellate court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). The appellate court, therefore, gives no deference to the district court's decision. *Id.* Like the district court, this court reviews the evidence presented to the administrative agency in order to determine whether the agency's decision was arbitrary or capricious and thus an abuse of the agency's discretion. *Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998). This court reviews the factual findings of an administrative agency for clear error or an abuse of discretion and will not disturb those findings unless they are unsupported by substantial evidence. *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Substantial evidence is that which a reasonable person could find adequate to support the agency's decision. *Id.* Although this court normally defers to an agency's conclusions of law that are closely related to the facts, *State v. Talalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013), we review purely legal issues de novo, *Sierra Pac. Power Co. v. State, Dep't of Tax'n*, 130 Nev. 940, 944, 338 P.3d 1244, 1247 (2014).

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 qualify for PUA benefits at the time Missen applied, 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 to work . . . except [that he or she was] 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 within the statute. 15 U.S.C. § 9021(a)(3)(A).

On appeal, the parties’ dispute focuses on whether Missen established that he was unemployed for the pandemic-related reason set forth at 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj), which made an individual eligible to receive benefits if his or her “place of employment [wa]s closed as a direct result of the COVID-19 public health emergency.” Missen specifically contends that the appeals referee improperly concluded that he failed to establish that he was eligible for benefits under 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj) even though he presented substantial evidence showing that he consulted on the construction project for Treehouse in 2019 and that the project terminated when funds became unavailable due to the pandemic.¹

Initially, Missen’s argument in this respect is flawed in that he could not establish eligibility for PUA benefits under the CARES Act by simply showing that he consulted on the project for Treehouse at some point in 2019 and that the project later terminated due to the pandemic. Instead, Missen was required to show that he became unemployed due to the pandemic, meaning that his consulting relationship with Treehouse must

¹To the extent Missen suggests that the appeals referee could not consider or weigh the credibility of his testimony and was instead required to simply accept the testimony as his self-certification that he was unemployed for pandemic-related reasons, he waived that issue by failing to raise it before the appeals referee or board of review. *Cf. State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (concluding that issues not raised to an administrative body are waived when raised for the first time before the district court on judicial review).

have been ongoing until the pandemic had its purported effect. *See* 15 U.S.C. § 9021(a)(3)(A)(ii)(I) (providing that an individual is eligible for PUA benefits if he or she is “able to work and available for work within the meaning of applicable State law, except that the individual is unemployed, partially unemployed, or unable or unavailable to work [due to one of the enumerated pandemic-related reasons]”); *see also* U.S. Dep’t of Labor, *Unemployment Insurance Program Letter No. 16-20, Change 2, I-6* (July 21, 2020) (explaining that an individual does not qualify for PUA benefits if he or she becomes unemployed for reasons unrelated to the pandemic and is later unable to find work because businesses have closed or are not hiring due to the pandemic).

With respect to whether Missen became unemployed due to the pandemic, the evidence and testimony he presented at the hearing before the appeals referee was inconsistent. On one hand, Missen testified that he consulted on Treehouse’s construction project from 2017 until February 2019 when the project was placed on hold after a financier dropped out due to regulatory changes, which is not a pandemic-related reason for unemployment. *See* 15 U.S.C. § 9021(a)(3)(A)(ii)(I). On the other hand, Missen also testified that Treehouse proceeded to seek alternate funding sources and continued to pay him \$1,000 per month until February 2020 when the project terminated because financiers with which Treehouse had been negotiating elected to hold off on investing while they assessed the effects of the pandemic. Essentially, his testimony on this point was that his place of employment closed due to the pandemic, which is one of the enumerated pandemic-related reasons for unemployment that gives rise to eligibility for PUA benefits. *See* 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj). Consistent with such testimony, Missen produced letters from Treehouse’s

manager and its investor, which taken together, indicated that Missen consulted for Treehouse, was paid for his services,² and that his services were discontinued in February 2020 after Treehouse lost funding for the project due to the pandemic.

However, Missen also produced bank statements from 2019 to demonstrate that Treehouse paid him \$1,000 per week, which when considered together with his testimony and a statement he submitted following the hearing before the appeals referee, raised questions as to whether he continued to provide consulting services for Treehouse at a time when the pandemic could have affected his employment for purposes of the CARES Act. In particular, the bank statements that Missen produced only showed \$1,000 deposits through September 17, 2019. *See* 15 U.S.C. § 9021(c)(1) (stating that claimants were eligible to receive PUA benefits for pandemic-related periods of unemployment, partial unemployment, or inability to work that began on or after January 27, 2020). When the appeals referee questioned Missen on this point in light of his earlier testimony that Treehouse paid him \$1,000 per week through February 2020, Missen indicated that Treehouse began paying his living expenses on an unspecified date rather than making direct payments to him. While the appeals referee invited Missen to submit bank statements from 2020 following the hearing to confirm the foregoing, Missen instead submitted a brief statement in which he indicated that Treehouse actually reduced his weekly payments to \$500 in August 2019. According to Missen's statement, this was corroborated by a \$500 deposit shown on his September 2019 bank

²The investor stated that Treehouse paid Missen's living expenses while the manager indicated that Missen received \$1,000 per week from Treehouse.

statement and a \$12,000 deposit on his October 2019 bank statement, which he described as an advance on his weekly payments through the end of February 2020, notwithstanding that he testified before the appeals referee that he could not recall the purpose of the \$12,000 deposit.

Hence, although Missen testified that Treehouse continued to pay him \$1,000 per week after the construction project was placed on hold due to a loss of funding caused by regulatory changes and presented letters from Treehouse's investor and manager that provided some degree of support for the foregoing, there were also significant inconsistencies in the evidence and testimony that he presented in an effort to show that he maintained a consulting relationship with Treehouse through February 2020. Given those inconsistencies, the appeals referee's decision was supported by substantial evidence insofar as he determined that there was no credible evidence or testimony to show that Missen became unemployed in February 2020 due to the financier's pandemic-related decisions. *See Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973) ("We should not pass upon the credibility of witnesses... but limit review to a determination that the board's decision is based upon substantial evidence." (internal quotation marks omitted)); *Energy Enhancement Sys., LLC v. Dep't Bus. & Indus.*, No. 79192-COA, 2021 WL 1687056, at *3 (Nev. Ct. App. Apr. 28, 2021) (Order Affirming in Part, Reversing in Part, and Remanding) (considering whether an administrative law judge's credibility determination was supported by substantial evidence). Because this court is not at liberty to reweigh the evidence or the appeals referee's credibility determinations on appeal, *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000)

(refusing to reweigh evidence on appeal), we likewise conclude that substantial evidence supported the appeals referee's determination that Missen failed to meet the CARES Act's eligibility requirements for PUA benefits because he did not show that he became unemployed for one of the enumerated pandemic-related reasons, *see* 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

Consequently, the district court did not err by denying Missen's petition for judicial review, and we therefore affirm that determination.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Danielle K. Pieper, District Judge
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