

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARTIN DOUGLAS BENES,
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 CHAIRPERSON
OF THE EMPLOYMENT SECURITY
DIVISION BOARD OF REVIEW,
Respondents.

No. 85942-COA

FILED

APR 24 2024

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

ORDER OF REVERSAL AND REMAND

Martin Douglas Benes appeals from a district court order denying a petition for judicial review in an unemployment matter. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

Benes filed an application for Pandemic Unemployment Assistance (PUA) and Federal Pandemic Unemployment Compensation (FPUC) under the federal Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act) in which he self-certified that he became unemployed in February 2020 because his place of employment closed due to the COVID-19 pandemic.¹ While Benes initially received PUA and FPUC

¹Benes's self-certification was made in an online form application, which directed the applicant to select from a list of pandemic-related reasons for unemployment that "best fit[] your circumstances."

benefits pursuant to his application, respondent State of Nevada Employment Security Division (ESD) later informed him that his eligibility to receive the same was under review and requested that he submit documentation to substantiate his claim. Benes did not timely respond to those requests, although he later submitted certain relevant documentation, albeit without providing proof of his earnings from self-employment as ESD had requested. Eventually, ESD determined that Benes was ineligible to receive PUA or FPUC benefits under the CARES Act and was therefore liable for an overpayment of benefits, finding that he failed to provide documentation establishing that he was previously employed and became unemployed as a result of the pandemic.

Benes appealed ESD's determination to an appeals referee, and the matter proceeded to an administrative hearing. During the hearing, the appeals referee questioned Benes concerning his self-certification that he became unemployed in February 2020 due to the pandemic, seeking an explanation as to how the pandemic affected Benes's employment when Nevada closure of nonessential businesses did not commence until March 2020.² As discussed in greater detail below, Benes testified that he was a

²For example, the appeals referee observed that "Nevada did not enter into [a]n emergency shutdown o[f] nonessential personnel until . . . March 17th of 2020" and proceeded to pose the following question: "[s]o how were you COVID-affected by the COVID-19 pandemic five weeks prior to the COVID-19 shutdown of the state of Nevada?" Moreover, during the hearing, the appeals referee repeatedly circled back to Nevada's March 2020 shutdown, questioning Benes as to whether he last worked prior to the shutdown and whether he had arrangements to work following the shutdown.

gig worker and that his services were not needed after he last worked in February 2020 due to the chilling effect that the pandemic had on businesses even before Nevada's nonessential businesses were directed to close.

Following the hearing, the appeals referee affirmed ESD's decision, concluding that the evidence established Benes was unemployed for reasons unrelated to the pandemic, that he was therefore ineligible to receive benefits under the CARES Act, and that he was liable for an overpayment of such benefits because he had misrepresented his eligibility for the same. In reaching that decision, the appeals referee found that Benes testified he became unemployed in February 2020 due to Nevada's closure of nonessential businesses, that the closure did not commence until March 2020, and that Benes testified he did not have any job offers retracted due to the pandemic. Based on the foregoing findings, the appeals referee further found that Benes was an incredible witness. Benes subsequently appealed the referee's decision to the ESD Board of Review, which declined to review the decision.

Benes 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 Benes's petition for judicial review, reasoning that substantial evidence supported the appeals referee's decision since Benes represented in his application that he became unemployed because his place of employment closed due to the pandemic even though the record established he stopped working prior to the shutdown of non-essential businesses. Moreover, the

district court determined that Benes failed to comply with ESD's reasonable requests for documentation supporting his identity and pandemic-related unemployment. 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 (2012). 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 Benes 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). If an individual met the requirements to receive PUA benefits, then he or she was also entitled to receive benefits under the FPUC program, which was another temporary federal unemployment assistance program that provided supplemental benefits to individuals receiving various forms of unemployment benefits. 15 U.S.C. § 9021(d)(1) (listing FPUC benefits as part of the benefit amount that an individual who is eligible for PUA benefits is entitled to receive for a week of unemployment, partial unemployment, or inability to work); 15 U.S.C. § 9023(b)(1), (i)(2)(C) (providing for individuals who receive regular unemployment compensation under state law to also receive FPUC benefits, and indicating that any reference in the statute to unemployment benefits includes, as relevant here, PUA benefits).

On appeal, Benes initially contends that the appeals referee misapplied the CARES Act by focusing on the fact that Benes largely failed to produce documents substantiating his self-employment as ESD had requested rather than simply accepting his testimony as his self-certification under 15 U.S.C. § 9021(a)(3)(A)(ii)(I) that he was unemployed for pandemic-related reasons. However, although the appeals referee questioned Benes on this point during the relevant hearing, the referee did not address it in his written decision, much less make any findings indicating that he determined that Benes was ineligible to receive PUA or

FPUC benefits based on Benes's failure to fully comply with ESD's document production request.³ Thus, relief is unwarranted on this basis.

The parties' next dispute focuses on whether Benes established two of the enumerated pandemic-related reasons for unemployment—specifically, those set forth at 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj) and (kk)—such that the appeals referee improperly found that Benes failed to satisfy the eligibility test's third requirement. Under subsection (jj), an individual was 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.” As to subsection (kk), it was a catchall provision that authorized the United States Secretary of Labor to establish additional pandemic-related reasons for unemployment sufficient to establish eligibility for benefits under the CARES Act, which the Secretary did for self-employed individuals who “experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency.” U.S. Dep't of Labor,

³While the appeals referee did not address the documents issue in the underlying decision, we nonetheless note that, although 15 U.S.C. § 9021(a)(3)(A)(ii)(I) established a self-certification procedure, individual states were nevertheless authorized to ensure the efficacy and integrity of the self-certification process by “tak[ing] reasonable and customary precautions to deter and detect fraud,” including requesting supporting documentation. U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20, attachment 1*, I-7 (April 5, 2020); U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20, change 4*, I-8 to 9 (January 8, 2021) (“States may request supporting documentation at any point during an investigation for potential fraud or improper payments.”); see also 15 U.S.C. § 9021(f) (requiring states to have “adequate system[s] for administering . . . assistance [under the CARES Act]”).

Unemployment Insurance Program Letter No. 16-20, Change 4, I-8 (January 8, 2021) (identifying the foregoing as one of the additional pandemic-related reasons for unemployment).

Benes contends that his uncontroverted evidence and testimony were sufficient to satisfy 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj) and (kk) and that the appeals referee improperly concluded otherwise based on an erroneous credibility determination.⁴ During the hearing before the appeals referee, Benes testified that he was a gig worker who provided web design services, stated that he provided such services for “people” who needed them during the period running from 2019 through 2020, and indicated that he last performed services for a party bus company for a couple days in February 2020. Benes further testified that he provided services to the party bus company on an as-needed basis and that, although he did not have subsequent arrangements to perform services for the company, its owner

⁴Insofar as Benes further argues that the appeals referee misapplied the CARES Act by considering his credibility rather than simply accepting his testimony as his self-certification that he was unemployed for pandemic-related reasons pursuant to 15 U.S.C. § 9021(a)(3)(A)(ii)(I), his argument fails for the same reason discussed *supra*, at note 1. Moreover, to the extent that Benes argues the appeals referee was required to accept his testimony because it was uncontroverted, his argument is unavailing because uncontroverted evidence and testimony need not be accepted if it is determined to be lacking in credibility. *See, e.g., Hirschfeld v. N.M. Corr. Dep’t*, 916 F.2d 572, 580 (10th Cir. 1990) (reasoning that uncontroverted evidence is insufficient to meet a party’s evidentiary burden if the evidence is not credible); *Glauser Storage, L.L.C. v. Smedley*, 27 P.3d 565, 571 (Utah Ct. App. 2001) (“Even where testimony is uncontroverted, a trial court is free to disregard such testimony if it finds the evidence self-serving and not credible.” (internal quotation marks omitted)).

eventually told him that his services had not been needed since February 2020 because the company's operations stalled due to the pandemic.

As discussed above, the appeals referee found that Benes was an incredible witness, reasoning in part that, although Benes testified he became unemployed in February 2020 due to Nevada's closure of nonessential businesses, the closure did not commence until March 2020. Benes interprets the foregoing to mean that the appeals referee erroneously concluded his testimony was incredible because the referee believed that benefits under the CARES Act were unavailable for periods of unemployment that began prior to Nevada's closure of nonessential businesses.⁵ *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).⁶

⁵As discussed above, during the administrative hearing in this matter, the appeals referee repeatedly referred to Nevada's shutdown in a line of questioning directed at Benes concerning how he became unemployed in February 2020 due to the pandemic when Nevada's shutdown did not commence until March 2020, which lends support to Benes's interpretation of the referee's determination.

⁶FPUC benefits did not become available to claimants in Nevada until the State entered into an agreement with the United States Secretary of Labor concerning implementation of the FPUC program. *See* 15 U.S.C. § 9023(b)(3) (setting forth the amount of FPUC benefits that were available to claimants for weeks of unemployment beginning after states entered into implementation agreements with the United States Secretary of Labor). However, as discussed above, if Benes was eligible to receive PUA benefits, then he eventually became eligible to receive FPUC benefits when they were available. *See* 15 U.S.C. § 9021(d)(1); 5 U.S.C. § 9023(b)(1), (i)(2)(C).

Rather than directly addressing Benes's challenge to the propriety of the foregoing rationale underlying the referee's credibility determination, respondents simply assert that this court cannot reevaluate witness credibility. However, although it is generally true that an appellate court cannot reevaluate witness credibility, an appeals referee's credibility determination must still be made for appropriate legal reasons and based on substantial evidence. *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 System, 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); *see also Elizondo*, 129 Nev. at 784, 312 P.3d at 482. And because respondents fail to meaningfully address Benes's argument concerning the reasoning underlying the appeals referee's credibility determination, we conclude that they have waived any opposition to Benes's position on this point. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. 346, 352 n.4, 449 P.3d 461, 466 n.4 (2019) (concluding that respondent waived an issue by failing to advance it on appeal).

By extension, insofar as the appeals referee relied on the mere fact that Benes last worked in February 2020 as a basis to go beyond an evaluation of Benes's credibility and find that the evidence affirmatively proved that he was unemployed for reasons unrelated to the pandemic, we conclude that the referee clearly erred. *See Elizondo*, 129 Nev. at 784, 312

P.3d at 482. Indeed, as Benes correctly argues, Congress implicitly recognized that the pandemic affected workers' employment prior to the individual states' shutdowns by making PUA benefits available for periods of unemployment that began on or after January 27, 2020. See 15 U.S.C. § 9021(c)(1).

The only other basis that the appeals referee provided for finding that Benes was an incredible witness was that he testified he did not have any job offers that were retracted due to the pandemic. However, Benes testified that he was a gig worker. And workers in the gig economy generally provide "on-demand services" through "informal, contingent, or otherwise unconventional working arrangements." See Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 YALE L.J. FORUM 799, 802 (2022) (discussing the gig economy); *Popal v. State, Emp. Sec. Div.*, No. 84291-COA, 2022 WL 12455235, at *3 n.5 (Nev. Ct. App. Oct. 20, 2022) (Order of Reversal and Remand) (approvingly citing *Unemployment Insurance for the Gig Economy's* discussion of the nature of the gig economy).

Given the nature of the gig economy, the mere fact that Benes did not have any job offers retracted as a result of the pandemic does not mean that he was unemployed for reasons unrelated to the pandemic, as his services simply may not have been needed between February 2020 when he finished his last job for the party bus company and the onset of the pandemic. This is among the scenarios that the CARES Act was enacted to address, see U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20, attachment 1*, I-7 (April 5, 2020) (explaining that the CARES Act was "designed to mitigate the economic effects of the COVID-19 pandemic

in a variety of ways,” including by providing temporary benefits for individuals who are ineligible for regular unemployment benefits, such as gig workers), which is why the CARES Act has been interpreted to authorize payment of benefits to self-employed individuals who “experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency.” U.S. Dep’t of Labor, *Unemployment Insurance Program Letter No. 16-20, Change 4*, I-8 (January 8, 2021); see also 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk).

Because the appeals referee’s decision lacks any findings to demonstrate that he considered the nuances of Benes’s gig work and whether he suffered a significant diminution of his usual services due to the pandemic, we conclude that the appeals referee improperly relied on Benes’s testimony that he did not have any job offers retracted due to the pandemic as a basis to conclude that he was an incredible witness. See *Popal*, No. 84291-COA, 2022 WL 12455235, at *3 & n.5 (Nev. Ct. App.) (holding that the appeals referee improperly affirmed ESD’s denial of an applicant’s claim for PUA benefits based, in part, on the referee’s failure to provide whether she considered the nuances of the applicant’s gig work).

Moreover, insofar as the appeals referee found that the evidence affirmatively showed that Benes became unemployed for reasons unrelated to the pandemic because he did not have any job offers retracted due to the pandemic, the referee’s finding was clearly erroneous, since, as Benes correctly argues, he could qualify for benefits under the CARES Act if he experienced a significant diminution of his usual services due to the pandemic. See U.S. Dep’t of Labor, *Unemployment Insurance Program*


Letter No. 16-20, Change 4, I-8 (January 8, 2021); see also 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk).

Thus, absent any other findings to support the appeals referee's decision, we conclude that the appeals referee abused his discretion by determining that Benes was ineligible for PUA and FPUC benefits and liable for an overpayment of the same. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142-43 (2015) (explaining that specific findings and an adequate explanation are crucial to appellate review and that deference is not owed to "findings so conclusory they may mask legal error"); *Langman*, 114 Nev. at 206-07, 955 P.2d at 190. Accordingly, we reverse the district court's order denying Benes's petition for judicial review and we remand this matter to the district court with instructions to remand the case to the appeals referee for consideration of Benes's claim for PUA and FPUC benefits in light of the structure of the CARES Act and nuances of Benes's gig work.

It is so ORDERED.⁷


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

⁷Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Christy L. Craig, District Judge
Jonathan L Andrews, Settlement Judge
Nevada Legal Services/Las Vegas
State of Nevada/DETR - Las Vegas
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Eighth District Court Clerk