MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

D.S.,

Appellant,

v.

Review Board of the Indiana Department of Workforce Development,

Appellee.

June 22, 2022

Court of Appeals Case No. 21A-EX-1629

Appeal from the Review Board of the Department of Workforce Development

Steven F. Bier, Chairperson
Lawrence A. Dailey, Member
Heather D. Cummings, Member

Review Board No. 21-R-0351

Altice, Judge.

Case Summary

[1] D.S., pro se, appeals the decision of the Review Board (the Review Board) of the Indiana Department of Workforce Development (the Department), which affirmed the decision of Administrative Law Judge (ALJ) Cassandra Clark denying D.S. Pandemic Unemployment Assistance (PUA) benefits under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. D.S. presents two issues for our review:

> 1. Did the Review Board erroneously conclude that D.S. was not entitled to PUA benefits?
>
> 2. Did the telephonic hearing held by ALJ Clark comport with due process requirements?

[2] We affirm.

Facts & Procedural History

[3] In October/November 2019, D.S. began full-time employment with Don Purdy Masonry through Local #4 Bricklayers and Allied Craftsman and worked on the construction of the White River State Park Amphitheater. D.S. worked at the site until March 5, 2020, at which time he was "laid off." *Transcript Vol. 2* at 8. D.S. eventually filed for PUA benefits.

[4] On September 22, 2020, a claims investigator with the Department determined that D.S. was ineligible for PUA from April 4, 2020, through December 26,

2020, because the information D.S. provided showed that he was "not working or scheduled to work on or after 01/27/2020." *Appellant's Appendix Vol. II* at 3. D.S. appealed the investigator's decision.

[5] On January 29, 2021, ALJ Clark made a "cold-call" to D.S., and advised him at the outset as follows:

> I'm calling from [the Department] about an unemployment appeal that you filed on September 25th, 2020 to a determination that stated you were not entitled to [PUA].
>
> * * *
>
> I am calling today to see if you are willing to waive notice to conduct the hearing at this time.
>
> * * *
>
> You are legally entitled to receive ten days' notice before a judge conducts a hearing concerning an issue that could affect your benefit rights. However, you may elect to participate without that notice if you choose to. If you are willing to waive your ten days' notice, then we can proceed today on that issue which will enable you to get a decision without additional delay. I anticipate this hearing will take less than 30 minutes. If you elect not to waive notice and decide not to go forward at this time, we will schedule this for a hearing on a future date and you will receive a Notice of Hearing in the mail and electronically . . advising you of the specific date and time of the hearing. Are you willing to waive your ten days' notice and proceed with the hearing at this time?

Transcript Vol. 2 at 3-4. D.S. responded affirmatively. ALJ Clark began the telephonic hearing by advising D.S. about the hearing procedures, to which D.S. indicated that he had no questions. ALJ Clark then conducted the hearing, which consisted of ALJ Clark's questions and D.S.'s responses.

[6] D.S. stated that he started working full-time for Don Purdy Masonry in "October or November of 2019" and that he thought he stopped working there on March 5, 2020. *Id*. at 7. When ALJ Clark asked why he stopped working, D.S. stated, "I guess they ran out of work." *Id*. ALJ Clark sought clarification, asking, "And what did the employer tell you specifically about why you weren't going to be working anymore?", to which D.S. responded, "Well, they just actually told me like I guess they kind of – work was getting slow." *Id*. at 7-8. When asked if "the slowdown of work had anything to do with Covid-19," D.S. stated, "nobody actually just said anything to me about anything. I actually – I wasn't even really hearing about the Covid-19 at first because I didn't kind of watch the news, so nobody kind of mentioned it at all at that time, but the job actually wound up getting shut down. I thought they would call me back and the job had got shut down." *Id*. at 8. D.S. did not know why the job was "shut down," pointing to a "lack of communication at the company." *Id.* ALJ Clark asked again, "Do you think that the work ran out that you were performing for Don Purdy Masonry as a result of Covid-19?" D.S. answered, "I'm not for sure how to answer that question because I can't say. You know, construction jobs usually come to an end, so I'm not sure how to answer that totally, but I'm pretty sure that a lot of the stuff had got – like

jobs were getting shut down because of the Covid-19." *Id*. at 8-9. D.S. reiterated, "when they laid me off, I figured work was getting slow but I figured I'd get called back." *Id*. at 9.

[7] ALJ Clark issued her written decision on February 1, 2021, in which she found that D.S. "was laid off from that work due to lack of work. [D.S.] was not told that the lack of work was due to the COVID-19 pandemic."[1] *Appellant's Appendix Vol. II* at 13. ALJ Clark therefore affirmed the claims investigator's determination that D.S. was ineligible for PUA. D.S. appealed to the Review Board. On June 30, 2021, the Review Board, without holding a hearing or accepting additional evidence, affirmed the decision of the ALJ. D.S. now appeals.

Discussion & Decision

1. Sufficiency

[8] Judicial review of a Review Board decision is limited to "the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact." Ind. Code § 22-4-17-12(f); *see McClain v. Review Bd. of Ind. Dep't of Workforce Dev.*, 693 N.E.2d 1314, 1317 (Ind. 1998). Pursuant to this standard, (1) the Review Board's findings of basic fact are reviewed for substantial evidence; (2) its findings of ultimate fact—mixed questions of law

[1] Contrary to the investigator's finding that D.S. was not working or scheduled to work after January 27, 2020, ALJ Clark found that D.S. was employed until March 5, 2020.

and fact—are reviewed for reasonableness; and (3) its legal propositions are reviewed de novo. *Chrysler Grp. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 122-23 (Ind. 2012). We will reverse "only if there is no substantial evidence to support the Review Board's findings." *J.M. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 975 N.E.2d 1283, 1286 (Ind. 2012).

[9] Due to the economic effect of the Covid-19 pandemic, Congress passed the CARES Act of 2020. 15 U.S.C. § 9001, *et seq.* The CARES Act created three temporary federal unemployment programs, which provided unemployment benefits above and beyond Indiana's unemployment insurance program "by increasing benefits, extending the duration of benefits, and awarding benefits to those who otherwise would be ineligible." *Holcomb v. T.L.*, 175 N.E.3d 1177, 1179 (Ind. Ct. App. 2021). PUA was one of the programs created by the CARES Act and it "provided benefits to those who do not qualify for traditional unemployment benefits (e.g., independent contractors, the self-employed, gig workers)." *Id*. (citing 15 U.S.C. § 9021). PUA provided that a "covered individual" must first not be entitled to traditional unemployment benefits through the State's program, and second, must provide self-certification that the individual:

> (I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because--

(aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID-19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(gg) 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;

> (hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
>
> (ii) the individual has to quit his or her job as a direct result of COVID-19;
>
> (jj) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
>
> (kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

15 U.S.C. § 9021(a)(3)(A)(ii).

[10] On appeal, D.S. asserts that he "was out of work as a result of the Covid-19 pandemic" and thus, the Review Board's determination that he is not eligible for PUA benefits was in error. *Appellant's Brief* at 8. Specifically, he claims that he was entitled to PUA under 15 U.S.C. § 9021(a)(3)(A)(ii)(gg), *supra*. In support of his claim, D.S. directs us to a press release dated March 17, 2020, that he included in his appendix on appeal. The press release concerns closure of White River State Park due to the COVID-19 pandemic.

[11] D.S.'s argument fails. First, D.S. did not submit the press release to the ALJ or ask the Review Board to accept additional evidence. *See* 646 Ind. Admin. Code 5-10-11(b) (providing that the Review Board's review is confined to the evidence submitted before the ALJ unless the Review Board requests additional evidence or either party submits a written application to introduce new

evidence, and for good cause shown). Second, even if D.S. had presented this evidence to the ALJ, it does not support his argument as it simply states that "scheduled programs, activities, and events" at White River State Park and Military Park were temporarily closed. *Appellant's Appendix* at 18. The article does not state that construction projects at the White River State Park Amphitheater were also shut down. The fact that D.S.'s employer may have shut down the jobsite due to Covid-19 after D.S. had been laid off due to a lack of work does not render his unemployment a direct result of the Covid-19 pandemic.

[12] The record before the Review Board included D.S.'s responses that he was laid off due to a lack of work. The ALJ sought clarification several times as to whether his unemployment was due to Covid-19, and D.S. presented no evidence that it was. Simply being out of work did not trigger D.S.'s entitlement to PUA. The Review Board's determination that D.S. did not qualify for PUA is not unreasonable.

2. Due Process

[13] Although the Review Board is allowed latitude in conducting its hearings, due process must be given parties whose rights will be affected. *Art Hill, Inc. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 898 N.E.2d 363, 367 (Ind. Ct. App. 2008). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *NOW Courier, Inc. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007). Whether a party was afforded due process in an unemployment

proceeding is a question of law. *Scott v. Review Bd. of Ind. Dep't of Workforce Dev.*, 725 N.E.2d 993, 996 (Ind. Ct. App. 2000).

[14] Ind. Code § 22-4-17-6(e) provides that "[e]ach party to a hearing before an [ALJ] . . . shall be sent a notice of the hearing at least ten (10) days before the date of the hearing specifying the date, place, and time of the hearing, identifying the issues to be decided, and providing complete information about the rules of evidence and standards of proof that the [ALJ] will use to determine the validity of the claim." The ALJ may hold the hearing by telephone absent an objection from an interested party and after determining that a hearing by telephone is proper and just. I.C. § 22-4-17-8.5(b)(4).

[15] D.S. argues that he was denied due process because he did not receive "actual notice of the hearing." *Appellant's Brief* at 10. He further claims that "[t]he cold-call did not afford [him] an adequate opportunity to make his case." *Id*. at 11.

[16] We conclude that D.S. waived his right to notice of the hearing before the ALJ. "Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it." *McGraw v. Marchioli*, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004). As set out above, immediately after contacting D.S. by telephone, ALJ Clark identified herself and the matter about which she was calling. She also advised him about his right to a ten-day notice and his ability to waive such notice and proceed with the hearing at that time. She reiterated the notice requirement by setting out D.S.'s options —i.e., waive his right to notice and proceed with the hearing

or choose to not waive his right to advance, written notice and the matter would be handled in accordance with the statutory requirements. D.S. affirmatively stated that he was "willing to waive [his] ten days' notice and proceed with the hearing." *Transcript Vol. 2* at 4. D.S. does not deny that he was advised of his right to notice of the hearing or that he affirmatively indicated his intention to waive such notice.

[17] To the extent D.S. argues that he was not afforded "an adequate opportunity to make his case," we note that D.S. does not explain how he was so deprived.[2] He does not assert that he wished to present additional evidence or that the way ALJ Clark conducted the hearing foreclosed his opportunity to present his case. ALJ Clark questioned D.S. about his employment and sought clarification several times as relevant to D.S.'s claim for PUA. A review of the transcript of the telephonic hearing establishes that D.S. was provided a meaningful opportunity to be heard. D.S. was not denied due process.

[18] Judgment affirmed.

Vaidik, J. and Crone, J., concur.

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[2] D.S.'s dispute with the investigator's determination concerned the timing as to the last day of his employment. The investigator determined that it was in January 2020 and D.S. presented evidence that it was actually in March 2020. ALJ Clark accepted D.S.'s evidence in this regard but concluded that such did not change the conclusion that D.S. was not entitled to PUA.