

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**

In the Matter of )  
 )  
KIMBERLY GUNDERSEN ) OAH No. 21-0930-CAP  
 ) Agency No. P20 271  
\_\_\_\_\_ )

## DECISION OF THE COMMISSIONER

## I. Introduction

On February 17, 2021 the claimant timely appealed to the Commissioner of Labor and Workforce Development an Appeal Tribunal decision that affirmed a decision by the Division of Employment and Training Services (DETS/Division) from August of 2020. The DETS decision had determined that Mr. Gundersen was not a “covered individual” under the CARES Act, Public Law 116-136 for the Pandemic Unemployment Assistance (PUA) program, and therefore not eligible to receive PUA benefits.

The Appeal Tribunal decision is partly erroneous as it applies an overly restrictive analysis as to whether impacts are a “direct result” of the COVID-19 pandemic. The Appeal Tribunal decision is MODIFIED.

## II. Procedural History

The Division referred this Tribunal decision appeal to the Office of Administrative Hearings (OAH) on May 6, 2021. On May 27, 2021 OAH held a short, recorded case planning conference. The parties agreed to a scheduling order that assigned the Division a deadline of June 4, 2021 to submit an optional brief on appeal. Mr. Gundersen was given a deadline of June 9, 2021 to request an opportunity to provide a written or oral response.

On June 4, 2021 the Division notified the parties that it would let the record stand, and would not submit an appeal brief. The record closed.

### III. Facts

The facts are undisputed. Mr. Gundersen is 65 years old and lives in Sand Point, Alaska, a village reachable only by sea and air. He has been self-employed as a commercial fisherman in Alaska for several decades. He owns the registered vessel GULF STORM, and consistently holds both seasonal gillnet and cod fishing permits.

At the beginning of April Mr. Gundersen ordinarily fishes for cod, bringing in over 2600 pounds over the course of that month in 2019. Jigging for cod is work he can do alone. He sells his catch to Trident Seafoods, the only local fish purchasing company in Sand Point. According to the evidence in this case,<sup>1</sup> Trident would normally have opened on April 1, but in 2020—due to the COVID-19 pandemic and associated travel curtailments—the company delayed opening its doors until the second week of May. With no fish buyer, Mr. Gundersen could not participate in the 2020 April cod season.

After the loss of the potential cod profits, Mr. Gundersen began to prepare for the salmon season, which in 2019 he had fished from June through September. As his gillnet operation involves hauling 800 to 1200 pounds of anchors and operating four to six nets, every year Mr. Gundersen hires a seasonal crew. He hires from the multitude of people who fly into Sand Point every summer, looking for work at Trident or on the many fishing boats.

In 2020, however, Covid-19 mandates severely restricted travel, and Sand Point had very limited places for people arriving to quarantine for the required two weeks. Few people came to help with the summer fishing season. Mr. Gundersen was never able to hire the crew he needed to operate his boat. During the salmon season, his brother allowed him to fish on another boat for four days in July to help him pay his boat insurance and harbor fees, and he made two short trips alone that had poor results due to the lack of help, but aside from these short stints his 2020 fishing season provided no income.

#### **IV. Excerpts of Relevant Sections of Law**

##### **UIPL 16-20, Change 2 Issued by USDOL July 21, 2020**

Clarification on item (kk) of acceptable COVID-19 related reasons. Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act provides for the Secretary of Labor to establish any additional criteria under which an individual may self-certify eligibility for PUA benefits. Section C.1.k. of Attachment I to UIPL No. 16-20 provides for coverage of an independent contractor whose ability to continue performing his or her customary work activities is severely limited because of the COVID-19 public health emergency. The example provided includes a driver of a ride sharing service who has been forced to suspend operations because of COVID-19. Question 42 of Attachment I to UIPL No. 16-20, Change 1, explains that an independent contractor who experiences a “significant diminution of work as a result of COVID-19” may be eligible for PUA. With

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<sup>1</sup> Neither side offered evidence of any other reasons for the Trident plant not opening in time for a cod fishery.

these examples in UIPL Nos. 16-20 and 16-20, Change 1, the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency, even absent a suspension of services.

### **Attachment I of UIPL No. 16-20, Change 2**

Question 11 explains that a freelance writer who works from home but is no longer getting paid for work may be eligible for PUA: “Section 2102(a)(3)(B) of the CARES Act provides that an individual who has the ability to telework with pay is not covered under PUA. However, *if the freelance writer has experienced a significant diminution of freelance work because of COVID-19, regardless of his or her ability to telework*, he or she may be eligible for PUA under the additional eligibility criterion established by the Secretary pursuant to Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, though his or her benefit amount may be reduced because of income from continued partial employment.”<sup>2</sup>

### **UIPL 16-20, Change 5 Issued by USDOL February 25, 2021**

The Department approves the following COVID-19 related reason for an individual to self-certify for PUA eligibility: “*An individual is an employee and their hours have been reduced or the individual was laid off as a direct result of the COVID-19 public health emergency.*” [italics in original]

## **V. Analysis**

This is a discretionary appeal that was accepted because it presented a question requiring the Department’s opinion. Under 8 AAC 85.155(c), upon acceptance of an appeal the Commissioner may affirm, modify, or reverse the findings or conclusions of the appeal tribunal solely based on evidence previously submitted, or upon the basis of additional evidence that she may take or direct to be taken. Like the decision to accept the appeal, the decision to admit additional evidence is discretionary. Here, no new evidence was offered or solicited in this matter as the Appeal Tribunal decision is erroneous due to a mistake of law, not fact. In fairness to the Appeal Tribunal, thinking regarding this issue of law at the state and national level has evolved substantially in the six months since the decision under review was issued, with new federal guidance having been issued.

In affirming the DETS determination, the Tribunal decided that Mr. Gundersen was not a covered individual eligible to receive PUA benefits because any economic losses he suffered in

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<sup>2</sup> Emphasis added.

2020 were not a “direct result” of the COVID-19 pandemic, but rather the result of a longer chain of events precipitated or exacerbated by the pandemic. The Tribunal made this determination for *both* parts of Mr. Gundersen’s claim—that is, the part relating to the cod season and the part relating to the salmon season.

The Tribunal cited early guidance from the U.S. Department of Labor indicating that causation should be analyzed by analogy to 20 C.F.R. § 625.5(c), providing (in the context of disaster relief) that covered unemployment must be “an immediate result of the major disaster itself, and not the result of a longer chain of events precipitated or exacerbated by the disaster.” This guidance is still in effect, and the Department continues to enforce it as evidenced by such recent decisions as *In re Jimenez*, a Commissioner decision issued March 31, 2021.<sup>3</sup> But its application has been loosened somewhat over time to honor the intent of the Act and ensure fair and consistent coverage of self-employed workers in relation to other workers.

Under UIPL Change 5, Attachment I (issued after the Tribunal decision under review), the self-certification required of self-employed workers is simply this:

I am self-employed (including an independent contractor and gig worker) and experienced a significant reduction of my customary or usual services because of the COVID-19 public health emergency.

It is not an onerous certification; it does not require that the “significant reduction” be directly imposed by a government mandate or prohibition. All that is required is that the person’s business be depressed owing to market conditions or other circumstances that are fairly and directly attributable to the pandemic. The U.S. Department of Labor has given examples like Uber drivers whose ridership has fallen off, or freelance writers who have lost opportunities to sell their work. Mr. Gundersen made a convincing showing in support of such a certification for the first part of his claim.

Mr. Gundersen was unable to fish the cod season because it delayed the opening of Trident Seafoods, the only fish buyer for Sand Point cod. Trident’s inability to open on schedule in early April was a direct and inevitable result of the travel restrictions in the very early stages of the pandemic, coupled with the precautions associated with protecting a residential workforce housed in dorms. By interpreting the concept of a “direct result” too

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<sup>3</sup> DLWD Docket No. P20 216. *Jimenez* sustained a salon owner’s PUA benefits while COVID-related school closures prevented her from working, but declined to sustain them afterward on the basis that her decision not to even attempt to do business during the summer broke the chain of causation between the pandemic and her loss of income.

narrowly in the context of independent businesspeople, the department would risk unfairness. Had Mr. Gundersen been an employee of Trident (as some fishermen are) and been laid off because the company had decided to curtail operations due to the risks of the pandemic, he would receive benefits without question under UIPL 16-20, Change 5. It should be no different that he was an independent contractor, with Trident as his only potential customer. The company's decision to forego the cod season affected him just as much, and just as directly, as it did the crews of company vessels. As the U.S. Department of Labor has refined the interpretation of the CARES Act, it had striven to treat small businesspeople and members of the gig economy on the same footing as traditional employees. In keeping with that objective, this decision finds that the closure of Trident during the cod season, and Mr. Gundersen's unemployment during that season, were directly-enough connected to support PUA benefits.

By way of further explanation, we note that other individuals in more traditional professions impacted in a similar manner have been routinely approved for PUA benefits. For example, under § 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act an individual is eligible to receive PUA benefits if a child for which the individual has primary caregiving responsibility is unable to attend a school that is closed as a direct result of the COVID-19 public health emergency, and having the child in school is required for the individual to work. Obviously, in 2020 schools were not shuttered because all teachers and employees had become infected with the coronavirus. Rather, the impact of COVID-19 was a little more indirect: the school was closed as part of a reasonable measure to *prevent* the virus from spreading. The closures forced many parents and caregivers to have to remain home, unable to report to their regular places of employment. Similarly, Trident's delayed opening was not because workers and boat captains themselves had all become sickened with the virus, but due to mandates and precautions implemented to control potential COVID-19 infections spread through work and travel. Like the schools within the ambit of subsection (dd), the closure of the processing plants was a direct precaution to prevent the spread of the pandemic. Mr. Gundersen, with nowhere to send his cod, is like the parents with nowhere to send their children. The connection is sufficiently direct to fall within the scope of the Act.

The second part of Mr. Gundersen's claim relates to the salmon season. Here, the connection is more nuanced and indirect. COVID-19 constricted the supply of deckhands in Sand Point, which Mr. Gundersen had been able to rely upon for 30 years. Unaffiliated


deckhands from outside Sand Point did not simply show up in large numbers and make themselves available on the docks. Mr. Gundersen did not have a relationship with a local deckhand he could hire, and had no contacts with specific outside deckhands to arrange to bring in. While some other Sand Point employers (such as Trident) were able to bring in workers for salmon season, he did not manage to do so. His inability to work the salmon season stemmed partly from decisions to hire in this way, and it was not a direct and automatic result of the pandemic. Further, Mr. Gundersen's testimony was vague regarding how the worker shortage came about and what efforts he made to overcome it. While we recognize that Mr. Gundersen's work was affected by COVID-19 in the summer of 2020, we agree with the hearing officer that Mr. Gundersen did not carry his burden of showing that his unemployment during salmon season was a *direct* result of the pandemic.

## **VI. Conclusion**


The decision of the Appeal Tribunal is **MODIFIED**. Mr. Gundersen is eligible to receive PUA benefits for from the week ending April 4, 2020, the beginning of the cod fishing season, through the week ending May 16, 2020, when the Trident Seafoods plant opened.

**FURTHER APPEAL** may be had from this decision by filing a Notice of Appeal in Superior Court for the State of Alaska within 30 days from the date of mailing of this decision, as provided in AS 23.20.445, AS 44.62.560-570, and the Rules of Appellate Procedure of the State of Alaska. Unless an appeal is filed within the 30-day period, this decision is final.


Recommended July 8, 2021:

  
Christopher Kennedy  
Administrative Law Judge

Adopted July 9, 2021:

  
Dr. Tamika L. Ledbetter  
Commissioner

CERTIFICATE OF SERVICE. I certify that on July 12, 2021, the foregoing Corrected Decision was served by mail on Kimberly Gundersen. Courtesy copies have been emailed to Jaime Watts (DETS UI Technical Team), Tonia Haight (DETS UI Support Team), and [appeals@alaska.gov](mailto:appeals@alaska.gov).

  
Office of Administrative Hearings