

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

In the Matter of)	
)	
JOSEF KOPECKY)	OAH No. 21-1441-PUA
_____)	Agency No. P21 661

APPEAL DECISION AFTER REMAND

Docket Number: P21 661

Hearing Date: 9/22, 10/7

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Josef Kopecky

Cristen Alexander

CASE HISTORY

The claimant, Josef Kopecky, timely filed an appeal after the Division of Employment and Training Services (DETS) issued an March 17, 2021 determination denying him Pandemic Unemployment Assistance (PUA) benefits effective the week ending February 8, 2020. The appeal was heard in a recorded hearing over two dates, September 22 and October 7, 2021. Mr. Kopecky appeared telephonically and was represented by his attorney, Lynn Allingham. On October 7 the DETS was represented by Cristen Alexander, who participated telephonically. A decision issued on October 19, 2021, affirming the Division's determination and finding the claimant not eligible for PUA benefits beginning the week ending February 8, 2020. On November 17, 2021 Mr. Kopecky filed a timely appeal of the decision.

The decision was screened in for review as it appeared that portions of the evidence might have been overlooked in the original decision. Accordingly, pursuant to 8 AAC 85.155(c)(2), the decision was remanded for a reconsideration of findings and conclusions based on the following:

1. the original hearing record and recording;
2. all briefing received in this appeal, including Ms. Allingham's brief of January 3, 2022 that pointed to specific excerpts from the hearing testimony; and
3. Mr. Kopecky's October 13, 2021 affidavit and exhibits thereto, as resubmitted on January 3, 2022.

At the preliminary conference held at the commencement of this matter, the DETS indicated no desire to respond to Ms. Allingham's January 3 brief, waived cross examination with regard to the October 13 affidavit, and did not object to any of Mr. Kopecky's submissions in support of his appeal.

FINDINGS OF FACT

Josef Kopecky established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. The Division initially paid benefits for several weeks, but ultimately determined that the claimant was not eligible because he was not impacted by COVID-19 in a manner that made him a covered individual under the program. He apparently is now being asked to repay benefits.

The claimant is 72 years old. He has worked as commercial fisherman out of southeast Alaska for several decades, at times as the owner of his own boat, at others as a crewmember.

In September 2019 Mr. Kopecky was hired to work as a crewmember on the F/V April Lane, a commercial vessel operating out of Dutch Harbor, Alaska that primarily harvests pacific cod and sablefish. Captain and part owner Jason Miller testified credibly that the 2019/2020 Southeast pacific cod fishing season was unremarkable. Deliveries were slightly lower than previous years, but this was offset by higher pacific cod prices. The F/V April Lane's season ended on schedule in March, before the COVID-19 pandemic began to have a significant impact on the Alaska fishing industry.

Mr. Kopecky contends that he earned substantially less on the F/V April Lane from January – mid-March 2020 than he had in other pacific cod seasons, seemingly due to draws he had taken on 2019 paychecks.¹ Accordingly, after Mr. Kopecky finished helping clean and store the F/V April Lane's fishing equipment, as is expected of the crew at the end of each season, he began actively looking for employment as a crewmember on another boat in Dutch Harbor to augment his poor 2020 earnings. He was not successful. He testified that having been fishing full time on the F/V April Lane for several months with no outside communication, he was initially confused and did not entirely understand that there was a worldwide pandemic afoot.² He testified that no boats were hiring crew members, and that everyone in Dutch Harbor was scared, sheltering in place and wearing masks.

Jason Miller explained that he knew the claimant was looking for additional work, but that his operation was shut down until June 15th. Additionally, Mr. Kopecky was not considered for a crew job on the Miller family's salmon seiner, the F/V Aleutian Spirit, operating out of Petersburg from June through September, as he has far more experience as a pot and troll fisherman than he does on a seiner. Also, to minimize corona virus exposure from travel, all crew members were hired locally. The claimant

¹ Ex. 11. Mr. Kopecky's 2019 fishing season and corresponding income was impacted by the sinking of one boat he worked on, leading to the loss of many of his belongings, and the mechanical issues of another. See Record, see also Supplement to Initial Brief in Commissioner Appeal.

² See Record, see also Supplement to Initial Brief in Commissioner Appeal.

hardly missed a lucrative season, however, as Captain Miller described the salmon run that summer as the worst he had seen in 47 years.

At the beginning of April Mr. Kopecky opted to fly back to Anchorage and stay with friends, as he felt he had better chances of finding employment in a larger city. He testified that in the fall he planned to return to fish the pacific cod B season on the F/V April Lane.

In the following months, however, the pandemic began to gather momentum in Alaska. Captain Miller testified that he planned to hire the claimant as crew on the F/V April Lane out of Dutch Harbor for the pacific cod B season in September 2020, but the boat remained tied up for many weeks due to myriad pandemic related issues. Restaurant closures worldwide lead to the market crash of specific varieties of fish, serious outbreaks of COVID-19 at canneries caused protracted closures, and the limited availability of flights to and from the Aleutians made getting to Dutch Harbor difficult. When the F/V April Lane began fishing again, it was with a reduced crew, and Captain Miller was forced to withdraw the crew position he had originally offered the claimant.

Mr. Kopecky never returned to Dutch Harbor to work as crew on a commercial fishing vessel in 2020.

The claimant submitted into the record multiple copies of tax returns and 1099 forms documenting his gross income as a commercial fisherman over the last six years to demonstrate the significant diminution of his earnings in 2020.³

2015 income	\$70,890.76
2016 income	\$24,820.71
2017 income	\$65,108.05
2018 income	\$38,898.60
2019 income	\$29,685.05
2020 income	\$12,913.91

³ Ex. 1-11. Note: during the hearing there was some confusion about nominal amounts of money that Mr. Kopecky earned in 2019 on the F/V April Lane that he was actually paid in 2020. Determining if these sums should be attributed to 2019 or 2020 is immaterial, as his 2020 gross commercial fishing income clearly represents a substantial reduction, regardless.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance

(3) COVERED INDIVIDUAL.—The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides 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; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(B) does not include—

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

Unemployment Insurance Program Letter (UIPL) 16-20, Change 2, Issued July 21, 2020, by the U.S. Department of Labor:

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 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.⁴

Unemployment Insurance Program Letter (UIPL) UIPL 16-20, Change 2, pg 1-6:

14. 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.

APPLICATION

The CARES Act, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance (PUA) defines a “covered individual” as a person who is not eligible for unemployment benefits under any State or Federal program and who is unemployed because of one or more reasons related to the COVID-19 pandemic. It appears undisputed that the claimant’s work history did not qualify him for a claim for regular or other unemployment benefits in 2020.

As mentioned above, initially DETS apparently found the claimant eligible for PUA benefits, he was paid benefits, then he was informed by DETS that it had determined he was not eligible for PUA benefits. The question presented here is whether the DETS reversal of its eligibility determination was correct.

At the hearing DETS explained that the claimant began filing for PUA benefits beginning March 12, 2020 and was approved as a covered individual from March 14, 2020 - April 4, 2020 and was denied from April 11 – September 26, 2020. This was because Mr. Kopecky listed his fishing season as September – April on his March 16, 2021 application for PUA.⁵ DETS asserts that multiple attempts were made to solicit additional information about the claimant’s dates of self-employment, but it was not successful in contacting Mr. Kopecky. Therefore, on March 17, 2021 DETS issued a redetermination finding that the claimant was not a covered individual the week ending February 8, 2020.

Guidance from the US Department of Labor in UIPL 16-20 Change 2, above, holds that an independent contractor who experiences a significant reduction in income as a direct result of the pandemic may be considered a covered individual. Mr. Kopecky

⁴ Emphasis added.

⁵ Ex. 1, p. 12.

earned less than half his usual gross income as a commercial fisherman in 2020 than he did any of the five years. However, from September 2019 – March 2020 Captain Miller testified that the pacific cod season was not unusual. Harvest numbers were down, but fish prices were up, resulting in a normal season. During this time the claimant did not fall within the eligibility category of a self-employed person who experienced a “significant diminution” of business or income due to the pandemic.

Instead, Mr. Kopecky avers that he became a covered individual in March, at the end of the 2020 cod season, when he could not find employment in Dutch Harbor. He asserts that at that point pandemic fears had escalated in the community such that people were sheltering in place, masking, and that boat captains had stop hiring crewmembers.⁶

However, this is not entirely credible. In late March 2020 the pandemic still just gaining a foothold in the Aleutians. It was not until April 15, 2020, that Unalaska/Dutch Harbor Mayor Vincent Tutiakoff, Sr. signed a preemptive resolution mandating face coverings, despite no cases of COVID-19 having yet been identified in the City of Unalaska.⁷ Although they cut back on service to other rural communities, as of April 3, 2020, Ravn Air was still operating four flights a week in and out of Unalaska.⁸

Additionally, it is not reasonable to presume that Mr. Kopecky would have been offered a job as a walk-up crewmember even in a year with no pandemic concerns. There are no Alaska fisheries that begin at the end of March, so there are fewer boats seeking to hire crew members. Also, much of the claimant’s past fishing experience involves black cod and opilio, brown, tanner, blue and red king crab, all fisheries which open later in the summer.⁹ The claimant submitted no evidence of having previously held a crew position on a boat in March/April on a commercial vessel operating out of Dutch Harbor, and therefore having the expectation of being hired back in the spring of 2020. There was no testimony he was offered a crew position in March 2020 that was withdrawn due the pandemic. Instead, he perhaps very prudently opted to abandon the search after just a few weeks and relocate to Anchorage.

To qualify for PUA benefits, there must be a direct connection between the claimant’s loss of income and the COVID-19 pandemic. An applicant must meet one of the specific definitions of a covered individual under the CARES Act as listed above. Mr. Kopecky made a general argument that finding work was hard in March and April 2020, but he did not make a sufficiently pointed showing that he fell under one of the

⁶ Record, *see also* Supplement to Initial Brief in Commissioner Appeal.

⁷ City of Unalaska, Alaska, International Port of Dutch Harbor, Resolutions 2020, available at <https://www.ci.unalaska.ak.us/citycouncil/page/resolutions-2020>.

⁸ Ravn Announces Unalaska Air Service Will Continue, KUCB, April 3, 2020, <https://www.kucb.org/regional/2020-04-03/ravn-announces-unalaska-air-service-will-continue>.

⁹ *See* Josef Kopecky’s resume, which reflects his work history from 1982-2013.

definitions listed above. As clarified in the response posted above to the query regarding UIPL 16-20, Change 2, this does not meet the requirements of the CARES Act.

In September 2020, however, Mr. Kopecky had an expectation of returning to fish the pacific cod B season on the F/V April Lane, based having previously held this position, had been proffered a verified job offer from Justin Miller. The job did not come to fruition, however, due transportation issues, cannery closures, and Covid-19 outbreaks, all reasons that caused the boat to remain tied up in the harbor during the 2020 pacific cod season. As a result, Mr. Kopecky suffered a “significant diminution” of his income as a crewmember beginning September 1, 2020 and onward, the opening date of the pacific cod B season, when if not for the pandemic he would have been working for Captain Miller on the F/V April Lane.


If the net result of this decision does not fully resolve the issue of the Division’s overpayment claim, the claimant may qualify for a waiver from recoupment. The present referral does not encompass these issues, and the present decision does not decide them for or against the claimant.

The Division has advised OAH that its Benefit Payment Control (BPC) office handles **waiver requests for overpayments and recoupments**. For questions and information regarding options that may be available, the claimant can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The determination issued on March 17, 2021 is **REVERSED**. The claimant meets the program eligibility requirements for benefits from the Pandemic Unemployment Assistance program effective the week ending August 29, 2020 and onward.

Dated: February 16, 2022.



Danika B. Swanson
Administrative Law Judge

APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party’s control. A statement of rights and procedures is enclosed.

CERTIFICATE OF SERVICE

I certify that on February 16, 2022, the foregoing decision was served on Lynn Allingham, Attorney (by mail/email); Cristen Alexander, DETS Representative (by email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.



Office of Administrative Hearings



*Alaska Department of Labor and Workforce Development
Appeals to the Commissioner _*

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

**ALASKA DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
COMMISSIONER'S HEARING OFFICER**
P.O. BOX 115509 JUNEAU ALASKA 99811-5509

Phone: (800) 232-4762 E-mail: appeals@alaska.gov Fax: (907)465-3374