**APPEAL TRIBUNAL DECISION**

**Docket Number:** P20 230 **Hearing Date:** December 23, 2020

 January 19, 2021

**CLAIMANT:**

TERRY ROBINSON

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Terry Robinson Richard Doogan

Tammy Robinson

Colin Lowe

#### CASE HISTORY AND FINDINGS OF FACT - TIMELINESS

The claimant filed an appeal against a July 29, 2020 determination that denied benefits under Public Law 116-136 Sec. 2102 on the grounds that the claimant did not meet eligibility requirements. The Division mailed the determination to the claimant’s address of record on July 29, 2020. The claimant’s appeal was filed on September 2, 2020, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant does not recall receiving the determination. He noted several instances when expected mail was not delivered or was delivered damaged and he complained to the Post Office about the delivery problems.

The claimant became aware of the determination because his wife checked his unemployment account online and told him to contact the Division and file an appeal, which he did as soon as he was aware there was an issue.

#### PROVISIONS OF LAW - TIMELINESS

**AS 23.20.340 provides in part;**

 (e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part;**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION - TIMELINESS

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*Once a notice has been properly mailed to an individual's last known address, the Department has discharged its "notice" obligation. The appellant's asserted failure to receive the notice does not establish cause for an extension of the appeal period. Andrews, Com. Dec. 76H-167, Oct. 8, 1976; aff'd Andrews v. State Dept. of Labor, No. 76-942 Civ. (Alaska Super. Ct. 1st J.D., April 13, 1977). There is a rebuttable presumption that a notice placed in the mail will be timely delivered. Rosser, Com. Dec. 83H-UI-145, June 15, 1983.*

The claimant has overcome the presumption that the determination was delivered to him timely. His delayed appeal is due to circumstances beyond his control.

#### DECISION - TIMLINESS

The claimant’s appeal from the notice of determination issued on July 29, 2020 is **ACCEPTED** as timely filed.

#### CASE HISTORY - PUA

The determination issued July 29, 2020 denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The issue before the Appeal Tribunal is whether the claimant meets the eligibility requirements of the Act.

**FINDINGS OF FACT - PUA**

The claimant established a claim for Pandemic Unemployment Assistance benefits effective March 29, 2020. The Division determined that the claimant was not eligible for regular unemployment benefits because he did not have sufficient wages in covered employment on which to base a claim.

The claimant has worked as a seasonal shuttle bus driver for a fishing guide service for the past 12 years. The business changed hands before the 2020 season and the previous owner recommended that the new owners hire the claimant. The new owners contacted the claimant in January or February 2020 to see if the claimant planned to work the 2020 season. The claimant agreed that he would return and the new owner was to notify him of the date of the guide meeting that starts the season. There was no further contact between the employer and the claimant. The employer’s season starts on June 11 each year when river fishing opens and the claimant would usually arrive and start prep work well in advance of that date.

The claimant’s doctor recommended in mid-May 2020 that the claimant not travel to Alaska at that time due to the COVID-19 pandemic. The claimant has medical conditions that put him at risk for complications of the COVID-19 virus. In early June, the claimant learned that masks were being required on planes and that center seats were being left empty. The claimant believed that it was safe for him to travel at that point, and made arrangements. The claimant was further delayed in traveling from Alabama to Alaska because he had to get tested for the COVID-19 virus and it took three days of searching and calling to locate a testing site in Alabama. A negative test was required to enter Alaska, or the claimant would have been required to quarantine for two weeks.

The claimant arrived in Cooper Landing on June 8, 2020. The next day he went to the employer’s place of business. The new owner introduced another person to the claimant as the “new driver” and then walked away from the claimant.

The claimant did not discuss matters with the employer further. The claimant believed that he was not hired because he was not there far enough in advance. Documents in the record from the new employer indicate that the employer thought the claimant had failed to show up for the work.

**STATUTORY PROVISIONS - PUA**

**AS 23.20.080 Federal-state cooperation**

(a) In the administration of this chapter, the department shall cooperate, to the extent consistent with this chapter, with the Secretary of Labor, and shall take action through the adoption of regulations, administration methods, and standards that is necessary to obtain for this state and its citizens all advantages available under 26 U.S.C. 3303 and 3304 (Internal Revenue Code) and the Wagner-Peyser Act, as amended. The department shall comply with the regulations of the Secretary of Labor relating to the receipt or expenditure by this state of money granted under these federal laws and shall make reports in the form and containing the information which the Secretary of Labor requires. The department shall comply with the provisions which the Secretary of Labor may from time to time find necessary to assure the correctness and verification of the reports. The department may cooperate with every agency of the United States charged with the administration of an unemployment insurance 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).

**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 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.

 **CONCLUSION - PUA**

The CARES Act, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance defines a “covered individual” as a person who is not eligible for unemployment benefits under any State of Federal program and who is unemployed because one of a list of reasons related to the COVID-19 pandemic. The claimant in this case has not recently worked in covered employment that would qualify him for a claim for regular unemployment benefits.

The CARES Act holds that a claimant is a covered individual if they are prevented from getting to their place of work because of a quarantine, mandate or advice from their health care provider. The claimant in this case was prevented from traveling by his doctor’s advice and then further delayed by a mandate that he get a COVID-19 test before traveling, which was difficult to obtain in his area.

*A Hearing Officer must base his decision on a "preponderance of evidence." See e.g. Patterson, Com. Dec. 86H-UI-233, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.28, 10/16/86. "Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." Adelman, Com. Dec. 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P. 861, 863 (WA).*

The preponderance of the evidence establishes that the claimant was scheduled to begin work and did not begin the work because he was not in Alaska in time to begin due to the COVID-19 pandemic, and another person was hired in his place.

The Tribunal finds the claimant meets the requirement to be considered a covered individual for the purposes of the Pandemic Unemployment Assistance program at the point he expected to begin work, June 9, 2020.

**DECISION - PUA**

The determination issued on July 29, 2020 is **REVERSED** and **MODIFIED**. The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning with the week ending June 13, 2020.

####  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.

Dated and mailed on January 20, 2021.

 Rhonda Buness, Appeals Officer