

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

In the Matter of)
)
RUSSELL WYATT) OAH No. 21-0332-PUA
) Agency No. P20 359
_____)

APPEAL DECISION

Docket Number: P20 359

Hearing Date: June 2, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Russell Wyatt

None

CASE HISTORY

The claimant, Russell Wyatt, timely appealed an October 30, 2020 determination¹ which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in February 2021. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to PUA appeals. AS 44.64.060 procedures do not apply.

The recorded hearing took place on June 2, 2021. Mr. Wyatt testified under oath and submitted documents. The Division of Employment and Training Services (DETS) provided written materials but was not a live participant. The record closed on June 23, 2021.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

According to the October 30, 2020 denial determination, Mr. Wyatt established a claim for Pandemic Unemployment Assistance benefits effective the week ending July 4, 2020. The determination found that he was not impacted by COVID-19 in a manner that made him a covered individual under the PUA program as of that time.

The denial determination created confusion because it also identifies March 10, 2020 as a date of potential first impact from COVID-19. During the hearing, the claimant addressed income impacts from COVID-19 starting in March. After the hearing, the undersigned asked DETS to submit prior denial determinations referencing eligibility

¹ Written notice of the decision issued on November 2, 2020.

starting in March 2020. The undersigned also asked whether DETS objected to including the March 10 through June 27, 2020 time frame in this appeal.

DETS did not acknowledge those questions. Instead, it responded by raising a new issue for the first time, stating that the claimant may be ineligible for PUA because he is or was eligible for regular UI benefits. It did not make clear whether this concern related only to 2021 income and UI eligibility, or whether the claimant was potentially eligible for UI in 2020.

This decision declines to address PUA eligibility for weeks from mid-March through the week ending June 27, 2020. The 18-page agency record in Exhibit 1 reveals no processing history showing a claim for weeks in March through June. This decision therefore adopts the week ending July 4, 2020 as the appropriate effective date under review.

This decision also declines to assume that Mr. Wyatt may have been eligible for regular UI benefits in 2020 based on his Door Dash and other delivery income. The agency's post-hearing email on that topic was unclear. The undersigned reads it to mean his delivery income might make him eligible for UI in 2021, which could impact any 2021 PUA eligibility. An attachment showed that Mr. Wyatt declined further communication with DETS, again presumably regarding 2021 PUA eligibility. The agency did not request a remand or a second hearing session to address 2020 UI issues, and this forum is not equipped to make a UI eligibility determination in the first instance.

Since late 2017, Mr. Wyatt has been a gig worker for app-based services such as Door Dash, Uber Eats, and Uber. Door Dash has been his primary source of income. Prior to the pandemic, he was available to work 7 days per week and roughly 42-50 hours per week. He estimates that he earned about \$250 per day during the week and \$350 per day on weekends. His 2019 gross annual receipts were \$52,910, or roughly \$1000 per week. After expenses, his net profit was \$37,092. His 2018 income was similar to that in 2019.

From January to mid-March 2020, the claimant's business was normal. Starting in mid-March, Mr. Wyatt noticed that business demand had fallen and he was earning less. He attributed the decreased demand to people's fears about COVID-19 and contact with others, restaurants that had not yet signed up or learned how to use Door Dash services properly, and people's unwillingness to spend money when many were losing their jobs. The claimant did not attempt to work for about three weeks.

Mr. Wyatt started marking himself available for gigs again around April 1, 2020. The initial decrease in demand for Door Dash services soon reversed and demand increased dramatically. The claimant then started having trouble finding available time slots for work on Door Dash because so many new drivers were doing the same work. The increased competition made it harder to get scheduled work times and gigs,

particularly during the more limited hours Mr. Wyatt could work while his children's schools were closed.

The claimant earned some income, but significantly less than he had before. He was often earning about \$30 per day, which was not enough to cover his gas expenses. As of the hearing date, the claimant continued to regularly make himself available for delivery jobs, with two exceptions in which he tested positive for COVID-19 and was instructed by health care providers to isolate.

Mr. Wyatt first tested positive on September 9, 2020. He was severely ill and unable to work for about 3 weeks. He sought another COVID test in early October to assure he was COVID-free and clear to work. He got that result and began working again on October 3, 2020. Mr. Wyatt was advised to test again on January 1, 2021, after his child's daycare reported new cases. He tested positive again for COVID-19 on January 1, 2021. He was required to isolate and could not work until January 11, 2021.

The claimant is a single parent of two elementary-aged children, now 6 and 11. Both attended an Anchorage public school that closed due to COVID-19 in mid-March 2020. The transition to online learning impacted Mr. Wyatt's availability and ability to work. His younger child typically was in daycare after her school closed, but the daycare also closed for periods of time due to COVID-19 infections in the school community. When the younger child could be at daycare, Mr. Wyatt worked as much as possible - often with his older child doing online school from the claimant's truck while he did food deliveries. Though the claimant did his best to keep working despite the school closure, this situation limited his work availability.

The claimant experienced a significant reduction in gig work and income from mid-March 2020 through the end of the year. He submitted his 2020 federal tax return. Schedule C shows gross receipts of \$19,742 and a net profit of \$9,139. This is more than a 50% reduction from his 2019 income.

Mr. Wyatt's income has not returned to normal in 2021, except for a three-week period in February 2021 when he worked in Washington state while visiting his parents.

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;

* * *

(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;

* * *

(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;

* * *

(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 by U.S. Department of Labor on 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.

APPLICATION

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 or federal program and who is unemployed because of one or more listed reasons related to the COVID-19 pandemic.

According to the agency’s Exhibit 1, the claimant’s history of gig work did not qualify him for a claim to regular, extended, or emergency unemployment benefits in 2020.

Mr. Wyatt claimed PUA program eligibility based on his two positive test results for COVID-19 and ensuing inability to work, his significantly reduced income from delivery service work as a direct result of the pandemic, and his children’s school closures that significantly limited the hours he could work.

Regarding his positive COVID-19 test results, the claimant is a covered individual for the weeks in which he tested positive and could not work while required to isolate. This includes the week ending September 12, 2020 through the week ending October 3, 2020. If the Division determines Mr. Wyatt was not eligible for regular UI in January 2021, he also qualified as a covered individual from the week ending January 2, 2021 through the week ending January 16, 2021.

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

Mr. Wyatt showed that, from the week ending April 4, 2020 into 2021, he was working as much as possible but earning less than half the income he earned prior to the pandemic. This constitutes a significant diminution of income.

The next question is whether the claimant's reduced income was a direct result of the COVID-19 pandemic. The evidence supports the finding that it was. Most significantly, while the claimant tried to work after his children's schools were closed, his ability to do so was limited while he was needed to provide childcare and assist with online school. In addition, he had difficulty getting scheduled time slots on Door Dash. This was in part because of an influx of new drivers during the pandemic, but also because his childcare/school obligations limited the time slots he could work.


This qualifies as a significant diminution of services as a direct result of the pandemic. Mr. Wyatt meets the definition of a covered individual beginning the week ending July 4, 2020 and ongoing through the date of the decision under review.

DECISION

The October 30, 2020 determination in Letter ID L0005915427 is **REVERSED**. The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning the week ending July 4, 2020 and ongoing.

This decision does not address eligibility prior to the week ending July 4, 2020 because DETS did not provide a denial determination for those weeks and the agency record does not address them. If Mr. Wyatt believes he should have been permitted to appeal an eligibility determination for prior weeks, he can address that issue in an appeal to the Commissioner of the Department of Labor & Workforce Development.

Dated: June 28, 2021


For: Kathryn Swiderski
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 June 28, 2021 the foregoing decision was served on Russell Wyatt (by mail and by email to [REDACTED]). A courtesy copy has been emailed to the DETS UI Technical Team, UI Appeals Team, & UI Support Team.

[REDACTED] _____
Office of Administrative Hearings