

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

In the Matter of)
)
BRADLEY JOSEPH KUTYNA) OAH No. 21-0337-PUA
) Agency No. P20 360
_____)

APPEAL DECISION

Docket Number: P20 360

Hearing Date: April 1, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Bradley Kutyna

None

CASE HISTORY

The claimant in this case, Bradley Kutyna, timely appealed an October 27, 2020 determination¹ which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. That decision was recorded in Letter ID L0005873748. 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 matter was heard in a recorded hearing on April 1, 2021. Mr. Kutyna testified under oath. At its own election, the Division of Employment and Training Services (DETS) provided only written materials for the hearing, and was not a live participant.

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

FINDINGS OF FACT

Mr. Kutyna established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. The Division ultimately found that he was not impacted by COVID-19 in a manner that made him a covered individual under the program, believing that he lost no work as a direct result of the pandemic.

Bradley Kutyna lives and works out of Kodiak. In the period leading up the pandemic, including the entirety of 2019, his profession was serving as a deckhand on fishing boats. In 2019, he made \$67,000 in this profession.

¹ The notice letter for the decision was dated October 28, 2020.

Deckhands are typically hired as gig workers and paid a half, three-quarter, or full share based on skill and experience (a full share, in his case, being 8% of the proceeds of the voyage). Mr. Kutyna, who has been doing this work since 2007, is able to command a full share.

Hiring is informal. Skippers and deckhands find each other by word of mouth. A skipper may have a prospective deckhand come down and work on equipment for a day or two to see how the person performs, and then offer a position for a trip or a season. Positions are sometimes offered just a day or two before sailing.

In early 2020, Mr. Kutyna had a job on the ALASKAN to work the Gulf of Alaska pollock A and B seasons. He worked the A season, which began January 20, but declined to work the B season because COVID-19 issues were beginning to affect the boats and he felt he could not risk the B season not working out (if the trip were truncated due to an outbreak, for example, he would earn nothing). He stayed on shore because he had a good prospect for shore work, but that did not work out. He then began a very active and broad search for work, but with no success.

In normal circumstances, and experienced and able deckhand like Mr. Kutyna could have gotten on another boat to work the flatfish season starting in late March and the rockfish season starting (typically) about May 1. However, COVID concerns were causing a slowdown in fishing in Kodiak, plus keeping existing crew members confined to their boats so that positions would not open up, and despite active efforts Mr. Kutyna could not get on another boat until the end of July.

At the end of July, Mr. Kutyna was able to secure an offer to work the pollock C and D seasons (again, as it happened, on the ALASKAN). The C season did not start until about August 29. Mr. Kutyna accepted and worked that job, and apparently has since been employed (although he later switched professions).

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—

* * *

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; . . .

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.

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 one of a list of reasons related to the COVID-19 pandemic. The claimant’s history of independent contractor employment did not represent employment that would qualify her for a claim for regular or emergency unemployment benefits in 2020.

Guidance from the US Department of Labor in UIPL 16-20 Change 2, above, holds that independent contractor who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual. Mr. Kutyna has a very strong and established history of securing and working deckhand jobs in the Kodiak fisheries.

Mr. Kutyna’s decision to step off the ALASKAN at the end of that vessel’s participation in the pollock A season may have been a rational response to the uncertainties of

COVID-19, but it was a voluntary job loss that the CARES Act does not compensate. However, Mr. Kutyna was an independent contractor with proven ability to get other fishing gigs at the Kodiak docks. It was COVID-19 that caused his inability to do so in the spring and summer of 2020, representing a “significant diminution” of his independent contracting income. Once he went to sea again in late August, his COVID-related economic effects ended.

DECISION

The determinations in Letter ID Letter ID L0005873748 is **AFFIRMED** for the period from the week ending February 8, 2020 through the week ending March 28, 2020, and for the period beginning the week ending September 5, 2020 and thereafter. It is **REVERSED** with respect to the intervening period. *The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning the week ending April 4, 2020 and ending the week ending August 29, 2020.*

Dated: April 6, 2021

Signed

Christopher Kennedy
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 April 6, 2021 the foregoing decision was served on Bradley Kutyna (by mail and by email). A courtesy copy was emailed to the UI Appeals Office for recordkeeping.

Signed

Office of Administrative Hearings