

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

In the Matter of)
)
KUNAL CHHABRIA) OAH No. 21-0335-PUA
) Agency No. P20 378
_____)

APPEAL DECISION

Docket Number: P20 378

Hearing Date: April 1, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Kunal Chhabria

None

CASE HISTORY

The claimant, Kunal (Kris) Chhabria, timely appealed an October 30, 2020 determination 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 matter was heard in a recorded hearing on April 1, 2021. Mr. Chhabria 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. Chhabria established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. After initially paying the claim, the Division redetermined that the claimant was not a covered individual under the program and eligible for PUA benefits, as it believed he had the ability to telework with pay.

In 2014 Mr. Chhabria opened Jewels by Kris on the street directly across from the cruise ship dock in Juneau. He is the sole owner of the business. His business is geared to cruise ships as his primary source of customers, and he makes the vast majority of his revenue during the cruise ship season. The first cruises begin arriving in Juneau the last week of April and final ships leave by October 10. During the

winter months his store is generally closed, as he is busy manufacturing new product, shopping for inventory and preparing the store. However, the store did open briefly in January of 2020 for local customers, even though the volume was a tiny fraction—perhaps two percent—of summer traffic.

Mr. Chhabria was a forthright and credible witness, and he testified that in 2019 his business grossed approximately \$72,000 after expenses. He and his wife both worked in the store, and he had several employees.

In January of 2020 Mr. Chhabria left to attend a gem show in Tucson, Arizona. When he returned from Arizona he described exhibiting all of the symptoms of COVID-19. He was diagnosed with type A influenza, but at the time testing for COVID-19 was still limited. The store was closed in February because of a combination of this illness and the very low off-season customer volume.

On 13, 2020, the primary trade association for cruise lines (Cruise Lines International Association) announced the first of a series of voluntary suspensions of U.S. cruises, and on March 14, 2020 the Centers for Disease Control issued a no sail order.” The 2020 cruise ship season in Southeast Alaska did not occur. As a direct result of the complete cessation of the cruise season, it did not make economic sense for Mr. Chhabria to reopen his cruise dock store for that season, and he did not do so.

Jewels by Kris remained closed until the first week in November, when Mr. Chhabria attempted to reopen the business for local residents. However, he testified that sales were 1-2% of what he would make during the regular tourism season. He continued to maintain the website for his business, which showcases a sampling of his products for potential buyers. However, the vast majority of his clients have consistently been walk-in tourists vacationing in Juneau. The website exists to prime tourists for walk-in visits when their ship arrives in port, or to facilitate follow-up sales after a walk-in visit. Mr. Chhabria does not operate a mail-order type jewelry business (which is extremely different from in-person jewelry sales), and his website has never generated any meaningful sales on its own.

One final aspect of the business is important to this decision. Although well over 90% of sales occur during the tourist season, the business is a year-round operation, not seasonal work. This is because the winter is spent manufacturing jewelry to sell, purchasing additional stock, and otherwise preparing the ground for a successful summer.

In January of 2021 Mr. Chhabria was again forced to close his storefront. To pay his mortgage he has begun to sell off his inventory to larger businesses. He currently delivers food to generate income. His wife has accepted a position at Bartlett Hospital.

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;

* * *

(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; . . .

(B) does not include—

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

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.¹

Question 11 of Attachment I of UIPL No. 16-20, Change 2 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.²

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. The claimant in this case is an independent business owner who does not qualify for regular unemployment benefits.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, cited above, holds that a self-employed individual who experiences a significant diminution in services as a direct result of the pandemic may be considered a covered individual. That is the situation in this case. Mr. Chhabria’s business, a jewelry store that caters almost exclusively to cruise ship tourists, suffered a dramatic diminution of business due to the suspension of cruise ships in response to the Covid-19 pandemic. His sales dropped to 1-2% of his average earnings the prior year. This marked loss of income due to the pandemic is within the scope of Covid-19 impacts PUA was intended to address.

¹ Emphasis added.

² Emphasis added.

In denying his claim, the Division focused on Mr. Chhabria's perceived ability to telework by transitioning his jewelry business online. But as explained in question 11 addressed by the U.S. Department of Labor in UIPL 16-20 Change 2, quoted above, an individual who can telework but who has experienced a significant diminution of work due to Covid-19 may still be eligible for PUA if the ability to telework during the pandemic does not compensate for a demonstrated loss of income.

Mr. Chhabria owns a store directly across from the cruise ship docks specifically to cater to cruise ship tourists. He sells jewelry to people wanting a tangible souvenir or celebratory purchase of a memorable and perhaps romantic trip to southeast Alaska. This is not a shopping situation that can be re-created by simply offering the same product online, to the general public. As Mr. Chhabria verified at the hearing, while he maintains a website for his store as almost all businesses do, it cannot substitute for his cruise passenger walk-in business.

Because Mr. Chhabria's cruise-ship-dependent business was severely and directly impacted by the pandemic, and telework cannot fill the resulting void, he is eligible for PUA. The start date of Mr. Chhabria's eligibility requires closer examination, however. In February and early March, the business was closed due to his illness, which may have been COVID-19. But it is impossible to determine whether the illness was in fact COVID—it was, in fact, diagnosed as something else—and therefore that period should be treated as a closure due to unrelated causes.

It was, in any event, the suspension of cruise ship operations that had the true economic impact on Mr. Chhabria, creating the conditions whereby a revenue-producing summer would be impossible. While revenues were not affected immediately (revenue is typically close to zero in March and early April), the fact that this is a year-round business in which workload and revenue do not match up perfectly means that it would be unfair to limit eligibility to the weeks when ships actually arrive in port. In keeping with the considerations explored in *In re Corrington*, Labor Docket P20-468 (OAH March 24, 2021), eligibility will be placed at the same time the industry-wide suspension announcements made Mr. Chhabria's shoreside business untenable. This tribunal finds the claimant meets the definition of a covered individual beginning the week ending March 14, 2020.

DECISION

The determination issued on October 30, 2020 is **AFFIRMED** as to the period from the week ending February 8, 2020 through the week ending March 7, 2020, inclusive, but is **REVERSED** for the period thereafter. The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program as of week ending March 14, 2020 and ongoing.

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, a true and correct copy of this order was distributed as follows: Kunal Chhabria (by mail and by email). A courtesy copy has been emailed to the UI Appeals Office for record keeping.

Signed

Office of Administrative Hearings