

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

In the Matter of )  
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CAROLE JOHNS-OKAMOTO ) OAH No. 21-0316-PUA  
) Agency No. P20 448

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**APPEAL DECISION**

**Docket Number:** P20 448

**Hearing Date:** March 30, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Carole Lou Johns-Okamoto

None

**CASE HISTORY**

The claimant, Carole Johns-Okamoto, timely appealed an October 26, 2020 determination<sup>1</sup> 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 March 30, 2021. Ms. Johns-Okamoto 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**

Ms. Johns-Okamoto established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 21, 2020. The Division initially found the claimant was eligible for PUA and paid her \$13,791 in benefits, but subsequently redetermined the case to find that she was not impacted by COVID-19 in a manner that made her a covered individual under the program, demanding that all benefits be repaid.

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<sup>1</sup> The notice letter for the decision was dated October 27, 2020.

Ms. Johns-Okamoto is a healthy widow in her upper seventies who lives in waterfront property on the Kasilof River. In 2006, she and her husband built a rental apartment on the property, which the two of them—and then she alone—have operated as a licensed business ever since. The primary use of the apartment is for short-term summer tourist rentals, although it has generally also been rented in the fall, either to intermittent short-term guests or to longer-term tenants paying a discounted monthly rate. The general pattern (and the pattern in 2019) has been that the property generates income from May 1 through the end of December, but not from January through April. 2019 revenue from rentals was \$7954. This income has been critical to Ms. Johns-Okamoto, who is otherwise mostly dependent on Social Security.<sup>2</sup>

The rental income is not passive. It is, effectively, self-employment. Ms. Johns-Okamoto works throughout the rental season to market the property, maintain it, clean it, take bookings, and interact with customers.

In early 2020, Ms. Johns-Okamoto invested in a major website upgrade to increase the number of rentals. Had there been no pandemic, there is no basis to conclude that her income from the property would have been any less than 2019, and it may have been greater.

Because of COVID-19 and particularly the extreme decline in tourism, Ms. Johns-Okamoto had a 78 percent decline in revenue in 2021. She was able to rent the property for the whole month of July at a discounted rate, together with two nights in September. This yielded a total revenue of \$1761 for the year.

The decline in revenue, notwithstanding improved marketing, is extremely well documented in the record. However, it did not occur through canceled bookings. Ms. Johns-Okamoto does not have the kind of rental where bookings are generally made many months in advance. The advent of the COVID-19 pandemic depressed demand before Ms. Johns-Okamoto had any bookings for the summer of 2020. This does not mean, however, that she did not have a concrete and proven loss of business due to the pandemic. Her longstanding business and excellent recordkeeping give overwhelming evidence that COVID-19's effect on tourism had a devastating effect.

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<sup>2</sup> From a tax standpoint, Ms. Johns-Okamoto's CPA has been able to offset the income with expenses, including the paper expense of depreciation. However, this is misleading because of the favorable tax treatment given to businesses like this, which enables the owner to legally expense outlays that would occur anyway even if the business were not open. In terms of her cash flow and disposable income in the real world, the \$7954 is, effectively, almost entirely real, disposable income for Ms. Johns-Okamoto.

## 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.

10. Question: Is a self-employed child care provider who is providing child care for fewer children as a result of the COVID-19 pandemic eligible for PUA?

Answer: If the self-employed child care provider can establish that he or she has experienced a significant diminution of his or her customary full-time services because of COVID-19, 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. This individual's benefit amount may be reduced because of income from continued partial employment.

11. Question: Is a freelance writer who works from home, but is no longer getting paid for any work, eligible for PUA?

Answer: It depends. 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.

### **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 self-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. A person operating a tourist accommodation on a fishing river is essentially a gig worker who has suffered a loss of demand for services. She is similar to the example, quoted above, of a person providing in-home child care who suffers a major loss of demand for services due to the pandemic.

For someone with a history of regular rentals the tourist season, a specific set of canceled bookings is not required to demonstrate that the person would, more likely than not, have generated regular rental income in the coming season just as she had in prior years. This means that the complete collapse of the tourist economy as a result of COVID-19 is a proximate cause of that loss of income during the 2020 season.

A slight challenge is presented by the months of July, 2020, when Ms. Johns-Okamoto was able to rent the property and net about \$1400 over the course of four weeks. July is peak season, and Ms. Johns-Okamoto testified convincingly that she would commonly have more than \$1400 in revenue over the course of that month. Nonetheless, the \$350 per week she realized over the course of July is greater than her overall average—\$250 per week—across the eight months per year this property is normally rented. On balance, I am not able to find that she had a “significant diminution” of business during the four July weeks.

The Tribunal finds the claimant meets the definition of a covered individual beginning the week ending May 8, 2020 and continuing through the week ending July 3, 2020, and again from the week ending August 7, 2020 forward. She ceased being a covered individual on this basis at the end of calendar 2020, because she does not normally rent the apartment during January through April.

### **DECISION**

The determination in Letter ID L0005782942 is **AFFIRMED** with respect to the period prior to and including the week ending May 1, 2020, and for the period from the week ending July 10, 2020 through the week ending July 31, 2020, inclusive, but it is **REVERSED** for all other periods. The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning the week ending May 8, 2020 and continuing through the week ending July 3, 2020, as well as from the week ending August 7, 2020 through the remainder of 2020.

Dated: April 5, 2021

Signed \_\_\_\_\_  
For: 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 5, 2021 the foregoing decision was served on Carole Johns-Okamoto (by mail and by email). A courtesy copy was emailed to the UI Appeals Office for recordkeeping.

Signed \_\_\_\_\_  
Office of Administrative Hearings