

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

In the Matter of)
)
KIRK ROBERTSON) OAH No. 21-0254-PUA
) Agency No. P20 557
_____)

APPEAL DECISION

Docket Number: P20-254

Hearing Date: April 12, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Kirk Robertson
Kurt Dobszinski

None

CASE HISTORY

Kirk Robertson appealed an October 22, 2020 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The issue for resolution is whether he meets the eligibility requirements of the Act.

FINDINGS OF FACT

Mr. Robertson filed a claim for PUA benefits. His request was denied on October 22, 2020. Notations in the Division file indicate the denial was based on the conclusion that he did not have “a valid fishing permit.”

Mr. Robertson appealed.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings. 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 April 12, 2021. At its own election, the Division of Employment and Training Services (Division) provided only written materials for the hearing and was not a live participant. Mr. Robertson testified under oath. Kurt Dobszinski, his employer, also testified. Mr. Robertson was assisted by David Rossendin, an attorney who previously aided Mr. Robertson on an Elder Care related matter.

The following facts were established at the hearing. Mr. Robertson is a long-time resident of southeast Alaska. He has an almost 30-year commercial fishing history. There was a hiatus in that history from approximately 2016 to 2018 when he provided full-time home-care for his mother and an elderly friend prior to their deaths.

In 2018 Mr. Robertson returned to fishing as a deckhand aboard the F/V Sovereign Grace. He fished the summer salmon season. His income from a 10% crew share was \$16,000.00.

In 2019 Mr. Robertson accepted a position on the F/V Jillie Marie. The F/V Jillie Marie is owned by Kurt Dobszinski, a permit holder. Captain Dobszinski has fished every salmon season in Alaska since 1974, with one exception. He begins the season the first Sunday in July which is the established opening day for pink season and fishes until pink season closes. The closure typically occurs in mid-August.

The F/V Jillie Marie fishes Unit 21 around Ketchikan, Alaska. Mr. Robertson's crew share was 12%. His income for the summer salmon season was \$20,000.00. Mr. Robertson and the Captain Dobszinski agreed they made a successful crew and planned to continue working together in the future.

Captain Dobszinski does not live in Ketchikan, however. He lives in Point Roberts, Washington, and brings the F/V Jillie Marie up the Inside Passage each year. Point Roberts is located on the southernmost tip of the Tsawwassen peninsula south of Vancouver, British Columbia, Canada. It can be reached only by boat through international waters or by driving 25 miles through Canada.

Captain Dobszinski's wife is Canadian, and they also have a home in Canada. When they first heard rumors about COVID, the Dobszinski went to their Canadian home.

The Canadian American border closed with the first Covid announcements. In Alaska Health Mandates were issued restricting travel for fishing purposes and requiring quarantine. As a result of those orders, Captain Dobszinski was unable to plan the 2020 salmon season: he could not be assured that if he left Canada he would be permitted to return and he could not get approval to take the F/V Jillie Marie through Canadian waters. The announced rules were fluid and unpredictable.

The 2020 pink season started July 5, 2020. The F/V Jillie Marie was in Washington, Captain Dobszinski was in Canada, and Mr. Robertson's scheduled job did not start.

It was not until sometime in July 2020 that Canadian Prime Minister Justin Trudeau and the Canadian authorities determined that commercial fishing qualified as an essential service and permit the F/V Jillie Marie to move through Canadian waterways. Captain Dobszinski was able to get permission to travel and return.

Thus, in July 2020 Mr. Robertson flew to Washington State to meet Captain Dobszinski, prepare the boat, and return up the inside passage for the Southeast

salmon season. The return trip started July 7, 2020. When they reached Ketchikan, the fisherman had to quarantine for 14 days.¹ .

The F/V Jilli Marie, therefore missed the first 5 weeks of pink salmon season. The boat was able to fish the 6th opener, but with only a 3-person rather than 5-person crew. It is traditional for smaller seiners to round out the crew with “walk-aboard” and temporary crew from Outside, but those workers were not available due to the quarantine restrictions that made travel for such itinerant labor cost ineffective. The boat’s “catch” was impacted by the reduced crew. For example, as testified by Captain Dobszinski, a 3-person crew can do only 3-4 sets in the time a 5-person crew can run 10-12. In addition, labor problems at the cannery had a spill-over impact on delivery and offload.

The pink salmon season ended August 14, 2020, when Fish and Game determined the escapement was no longer large enough to support another opener.

Fish tickets from Trident Seafoods demonstrate that at the end of the 2020 pink salmon season the F/V Jilli Marie delivered 22,800 pounds of gross stock. This is the lowest gross stock weight that Captain Dobszinski has ever delivered. Even his inaugural catch in 1974 using an old boat and few electronics had a 29,000 lb. gross delivery. He is certain missing the first half of the season due to Covid restrictions and subsequent impact on daily operations from the skeleton crew had a significant impact.

Mr. Robertson made \$2,500.00 for the 2020 salmon fishing season. This is less than half his income from 2019. In addition, Captain Dobszinski testified the only reason Mr. Robertson received that much was because the captain obtained a PPP loan to offset what otherwise have been larger losses.

STATUTORY PROVISIONS

Alaska Regulation 8 AAC 85.151 Filing of Appeals

(a) An interested party may file an oral or written appeal from a determination of redetermination issued under AS 23.20 and this chapter. The appeal may be filed in person, by mail, or by telephone. An or written protest indicating a desire to appeal is an appeal to a referee or the commissioner.

¹ At that time and throughout most of the summer of 2020 the controlling Governor’s Health Mandate required all commercial fishing, oil, and other seasonal workers to quarantine at their own or employers’ expense before they could work in rural communities ,

(b) An appeal from a determination or redetermination on a claim for benefits may be filed with a referee or at any office of the division. An appeal must be filed no later than 30 days after the determination or redetermination is personally delivered to the appellant or no later than 30 days after the date the determination or redetermination is mailed to the appellant'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 appellant shows that the failure to file within this period was the result of circumstances beyond the appellant's control.

The Department of Labor denied Mr. Robertson's claim on October 22, 2020. He appealed the same day: October 29, 2020. The appeal was timely.

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law. A nearly \$2 trillion economic stimulus package, the Act provides an estimated \$260 billion in enhanced and expanded unemployment insurance (UI) to millions of workers throughout the country who are being furloughed, laid off, or finding themselves without work through no fault of their own because of the COVID-19 pandemic and our public health response to it.²

The CARES Act creates three new UI programs: Pandemic Unemployment Compensation (PUC), Pandemic Emergency Unemployment Compensation, (PEUC) and Pandemic Unemployment Assistance (PUA). PUA provides emergency unemployment assistance to workers who are left out of regular state UI or who have exhausted their state UI benefits(including any Extended Benefits that might become available in the future).³ The Alaska Department of Labor was tasked with implementing the CARES Act and related Federal law to obtain for "this state and its citizens all advantages available."⁴

To be eligible, PUA applicants must establish that they are (1) partially or fully unemployed, or (2) unable and unavailable to work due to one or more of the To be eligible, PUA applicants must establish that they are (1) partially or fully unemployed, or (2) unable and unavailable to work due to one or more of the circumstances set out

² CARES Act, S. 3548, 116th Cong. (2002).

³ *Id.*

⁴ AS 23.20.080.

in the ACT.⁵ Workers are also not eligible for PUA if they can either telework with pay or are receiving paid sick days or paid leave.⁶

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

⁵ CARES Act, Pub. L .No. 116-136 § 2102(a)(3)(A)(1)(I)(aa)-(kk). 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).

⁶ CARES Act, Pub. L .No. 116-136 § 2102(a)(3)(B).

because one of a list of reasons related to the COVID-19 pandemic. The claimant would not qualify to claim regular unemployment benefits.

Whether a self-employed person is a covered individual under the Act is determined by reference to § 201(a)(3)(A)(ii)(I)(kk). That section applies when the applicant is unemployed, partially unemployed, or unable or unavailable to work because he meets “additional criteria established by the Secretary for unemployment assistance under this section.” The U.S. Department of Labor (USDOL) issued two Unemployment Insurance Program Letters (UIPL) outlining eligibility criteria for self-employed people seeking state PUA relief. Under those standards the claimant must prove that he was 1) self-employed and 2) suffered a *significant diminution* of business as a direct result of the COVID-19 pandemic.⁷

Ms. Robertson that criteria. Deckhands in Alaska are not required to have a personal commercial fishing permit: they work under the umbrella of the operator’s permit. Work as a deckhand for a crew share is a legitimate form of seasonal self-employment. Mr. Robertson made an average of \$18,000.00 per year for the two years prior to the pandemic and, although vagaries in the seasons prevent a precise finding of

⁷ UIPL 16-20, Issued by USDOL April 5, 2020 item (kk): The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor *with reportable income* may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities and has thereby forced the individual to suspend such activities. . . . [italics added]

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.

anticipated future income, his fishing history is sufficiently established to demonstrate the legitimacy of his self-employment claim.

In 2020 Mr. Robertson's work was significantly impacted by the pandemic in two ways. First, the F/V Jillie Marie could not start the season on July 5, 2020 due to travel restrictions governing the Canada-American border. Mr. Robertson was scheduled to commence employment and could not do so as a direct result. His work was thereafter delayed due to a required quarantine. This makes him eligible for PUA assistance under § 201(a)(3)(A)(gg) from the week of July 6, 2020 to the week of August 3, 2020.

Mr. Robertson's work was also impacted by the unavailability of a full crew. The lack of additional crew was a direct result of Covid on the labor pool. A reduced crew cannot harvest with the same efficiency as a full one, and Mr. Robertson's employment and resulting income were affected as a result. Given the totality of circumstances and the significant diminution of Mr. Robertson's income as a direct result of a late start to the season due to Covid and fewer co-workers, he is eligible for PUA assistance under § 201(a)(3)(A)(ii)(I)(kk) for the full fishing season ending the week of August 10, 2020.

DECISION

The determination issued on October 16, 2020 is **Reversed**.

Mr. Robertson is eligible for PUA benefits from the week of July 6, 2020 through the week of August 10, 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 emailed on April 14, 2021.

Signed

Carmen E. Clark
Administrative Law Judge

I certify that on April 14, 2021 this Decision was sent to Kirk T. Robertson (by email); a courtesy copy has been emailed to the UI Appeals Office for record keeping.

Signed

Office of Administrative Hearings