

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

In the Matter of)
)
DIANA ZITMANIS) OAH No. 21-0744-PUA
) Agency No. P20 587
_____)

APPEAL DECISION

Docket Number: P20 587

Hearing Date: May 11, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Diana Zitmanis

None

CASE HISTORY

The claimant, Diana Zitmanis, timely appealed a December 4, 2020 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor referred the appeal to the Office of Administrative Hearings on April 1, 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 May 11, 2021. The record was left open for an additional day for the submission of outstanding tax returns. Ms. Zitmanis testified under oath. The Division of Employment and Training Services (DETS) provided written materials but 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. Zitmanis established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 21, 2020. The Department of Labor and Workforce Development initially found her eligible for PUA and issued her benefits. It subsequently redetermined the case and found that she was not impacted by Covid-19 in a manner that made her a covered individual for purposes of PUA. It requested repayment of approximately \$12,000.

Ms. Zitmanis is 49 years old. She lives in Palmer, Alaska. Her primary income source for the past several years has been commissions from her sales as a realtor. She pays for real estate listings and advertisements with money earned working part time as a massage therapist and singer songwriter.

In 2019 she concentrated most of her time on building her career in real estate. On the side she booked gigs as a performer, and she offered massages sporadically. Ms. Zitmanis completed an estimated 12 real estate transactions and her total annual earnings as a real estate agent were approximately \$36,000.

In 2020 the Covid-19 pandemic began to gain momentum, and some sectors of the economy slowed. Ms. Zitmanis reported that she showed a few homes, but people were reluctant to meet with real estate agents and tour properties wearing masks. In March a three-week music gig she had booked was cancelled, as bars and restaurants began to shut down or limit hours. Then, on March 20, 2020, one of her dogs bit off a quarter of her finger, requiring emergency surgery.

In the weeks following Ms. Zitmanis could not play the guitar due to the incident, nor could she offer any massages. Typing was also impossible. However, she continued to reach out to potential buyers and sellers by phone in an effort to maintain her struggling real estate business. Persistent outreach was necessary, especially since she no longer had income from massage and music to invest in advertising on popular real estate websites like Zillow. To her credit, in April and May of 2020 she closed on three separate properties in Palmer and Talkeetna. In July and August she completed three more sales, then two more in December.

In December 2020 Ms. Zitmanis placed her real estate license in inactive status.

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;

(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); 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.

* * * *

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 of one or more listed reasons related to the COVID-19 pandemic. There is no disagreement that the claimant was not eligible for a claim for regular or emergency unemployment benefits in 2020.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that a self-employed individual who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual. This is true even for individuals who could earn some income through telework, as Ms. Zitmanis did with a limited success in 2020.

On March 11, 2020 Governor Dunleavy issued an initial disaster declaration regarding the imminent threat of an outbreak of Covid-19 in Alaska. Many businesses began to reduced their hours as people became more aware of the need to socially distance. Initially due to Covid-19, Ms. Zitmanis had fewer opportunities to earn income as a massage therapist or musician. But about a week later, on March 20, 2020, Ms. Zitmanis lost a quarter of her finger, making it impossible for her to work in either profession.

Ms. Zitmanis was not entirely sure how long she was in physical therapy following the dog bite, but she testified that her treating physician advised her that it would take 6 months to a year for her finger to heal completely. She remembered playing a gig in July 2020, but with difficulty. She thought she gave a single massage in October 2020.

Ms. Zitmanis continued to work as a real estate agent in the months following the March 2020 finger injury. She reported that the market slumped, sales dropped, and few people were interested in purchasing real estate due to the pandemic. In fact, perhaps due in part to exceptionally low interest rates, the housing market in the Matanuska Valley remained consistently strong during the pandemic. Despite the setback she suffered due to her finger injury the claimant still sold eight properties between April and December of 2020.

Ms. Zitmanis is not a covered individual under the Cares Act. Any reduction in massage and music opportunities was not due to Covid-19, but rather her finger injury, rendering her unable to do either. As for her job as a real estate agent, home sales was one of the sectors of the economy that did not suffer a crash during the pandemic. While showing houses may have been more difficult with masks and social distancing, real estate was still being sold, including multiple properties by Ms. Zitmanis herself.

DECISION

The determination issued on December 4, 2020, is **AFFIRMED**.

Dated: May 13, 2021



Danika B. Swanson
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 May 14, 2021, the foregoing decision was served on Diana Zitmanis (by mail/email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

A solid black rectangular box redacting the signature of the official.

Office of Administrative Hearings