

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

In the Matter of )  
 )  
JAMES VERMILLION ) OAH No. 21-0600-PUA  
 ) Agency No. P20-605

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**APPEAL DECISION**

**Docket Number:** P20-605

**Hearing Date:** May 3, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

James Vermillion

None

**CASE HISTORY**

The claimant, James Vermillion, submitted an appeal of a December 16, 2020 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was noticed in Letter ID 0007195364 on December 17, 2020. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in April 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 3, 2021. Mr. Vermillion 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. Vermillion established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. The Division initially paid many thousands of dollars in benefits, but later determined that the claimant was not eligible for PUA benefits because he was not impacted by COVID-19 in a manner that made him a covered individual under the program.

Mr. Vermillion is a 75-year-old gentleman living in Syracuse, N.Y., where his spouse is a physician. He owns a business that operates solely in Alaska, called Concrete Polishing and Artistic Staining of Alaska. It is a niche business that has operated for 15 years. It does not advertise.

In 2019, Mr. Vermillion commuted to Alaska to do three jobs. One took about a week and the other two were much smaller still. Mr. Vermillion declined to provide information about his 2018 business volume. I infer from his refusal to answer that the answers to questions in this subject would be unfavorable to his claim, indicating a lack of business activity.

Very early in 2020, on advice of health professionals including his spouse, Mr. Vermillion went into seclusion and determined that he should not be available for jobs. He did this because his age bracket made him vulnerable to severe COVID-19. He continued to answer the phone but would tell anyone interested that he would have to wait and see how the pandemic developed.

Mr. Vermillion does seem to have been available for projects in the fall of 2020 but did not get any.

#### **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, Issued by USDOL April 5, 2020**

k. 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. [italics added]

**APPLICATION**

Mr. Vermillion’s claim cannot be sustained. He was not a gig worker within the meaning of the two UIPLs quoted above, because his tiny and irregular work volume in 2019 (and probably in 2018 as well) did not create a pattern of “customary work.” In these circumstances, the CARES Act does not provide benefits.

DETS reached a similar conclusion (albeit with different reasoning) but did not do so until December 2020. For most of the period prior to that it paid benefits. Mr. Vermillion has been asked to repay these benefits. It is not clear whether there was formal written notice to repay—then or at a later time—or whether Mr. Vermillion has been informed of the opportunity to seek a waiver, the opportunity for a hearing, and any other matters covered in UIPL 16-20 Change 4, Sec. 4(d) & Att. I sec. C.21.b.

Although Mr. Vermillion has never been eligible for PUA benefits, it is possible that he could qualify for a waiver from recoupment or, if a waiver were not granted, that he must be afforded an appeal hearing in which such matters as estoppel and hardship could be explored. The present referral does not encompass these issues, and the present decision does not decide them for or against Mr. Vermillion.

The Division has advised that its Benefit Payment Control (BPC) office handles waiver requests for overpayments and recoupments. For questions and information regarding options that may be available, the claimant can call the BPC at 907-465-2863, 1-888-810-6789, or email to [jnu.bpc@alaska.gov](mailto:jnu.bpc@alaska.gov).

### **DECISION**

The determination issued on December 16, 2020 ( [REDACTED] on December 17, 2020) is **AFFIRMED**.

Dated: May 10, 2021

[REDACTED]  
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 May 10, 2021 the foregoing decision was served on James Vermillion (by mail and by email). A copy was emailed to the UI Support Team and UI Appeals Office.

[REDACTED]  
Office of Administrative Hearings