BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF LABOR & WORKFORCE DEVELOPMENT

In the Matter of	)	
	)	
RUSSELL WYATT	)	OAH No. 21-1933-CAP
	)	Agency No. P20 359

DECISION OF THE COMMISSIONER

The Division of Employment and Training Services, timely appealed a June 28, 2021, Appeal Tribunal decision reversing a determination that Mr. Wyatt was ineligible for Pandemic Unemployment Assistance (PUA) benefits. Under AS 23.20.435, an appeal to the Department by a party is a matter of right if the decision of the Tribunal reverses or modifies the Division's initial determination, or if a question arising under AS 23.20.383 is presented. In this case, the Tribunal decision reversed the Division's initial determination based on the record before it, holding that Mr. Wyatt was eligible for PUA benefits under the CARES Act of 2020[1], 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(aa), (dd) and (kk). The Division argues that the Tribunal's decision is clearly erroneous as a matter of law because the Division determined (albeit belatedly) that Mr. Wyatt was eligible for regular unemployment compensation. Mr. Wyatt asserts that he was eligible for PUA benefits because he was not paid regular unemployment compensation and that his eligibility goes back to March 10, 2020. For reasons explained below, the Appeal Tribunal decision is MODIFIED.

FINDINGS OF FACT

Based on the record before it at the time, the Appeal Tribunal made no clearly erroneous findings of fact. Based on that record, we adopt the following findings:

- Mr. Wyatt worked for Door Dash, Inc. as a driver delivering food in Anchorage, Alaska beginning late 2017. He obtained work through a Door Dash app. After expenses, Mr. Wyatt's net profit in 2019 was $37,092. He earned a similar amount in 2018.

[1] The Coronavirus Aid, Relief, Economic Security Act, or CARES Act, Pub. L. 116-136, Title II, Sec. 2102 (Mar. 27, 2020) established Pandemic Unemployment Assistance. It was amended in the Consolidated Appropriations Act, (Continued Assistance Act), Pub. L. 116-260, Div. N, Title II, subchapter IV, Sec. 241 (a) (Dec. 27, 2020), and the American Rescue Plan Act of 2021, Pub. L. 117-2, Title IX, Sec. 9011(a) & (b) (Mar. 11, 2021). The CARES Act is codified as 15 U.S.C. §§ 9001-9141.

- Mr. Wyatt's business was normal during January and February of 2020. He began noticing a drop in demand in mid-March 2020. For the next three weeks or so, Mr. Wyatt voluntarily did not attempt to respond to "time slots" on the Door Dash app.
- After his voluntary hiatus, Mr. Wyatt began making himself available April 1, 2020, but noticed a substantial increase in competition for slots as more people signed up to work through the Door Dash app.
- Mr. Wyatt has two school-aged children, aged six and eleven years. They attended a public school in Anchorage, which closed in March 2020.[2] The younger child was in daycare while the school closed, but the daycare closed from time to time as positive cases were reported in the school community. As a result, Mr. Wyatt's availability to accept gigs and slots was limited. He worked as much as he could when his younger child was in daycare, often with his older child doing online school from his truck while he did deliveries.
- Mr. Wyatt contracted COVID-19 September 9, 2020. He was very ill, and he was unable to work for about three weeks.
- He contracted COVID-19 again on January 1, 2021, and was required to isolate until January 11, 2021.
- Mr. Wyatt's income fell in 2020. He made a net profit of $9,139, a more than 50% drop in income.
- Mr. Wyatt filed a claim for PUA benefits effective the week ending July 4, 2020.
- The Division issued a denial determination October 30, 2020, concluding Mr. Wyatt was ineligible because he voluntarily withdrew from the workforce when he stopped driving on or about March 10, 2020. (Record Ex. 1, pg. 2).[3]
- Mr. Wyatt appealed. Although Mr. Wyatt personally appeared by telephone for the hearing, the Division elected to appear by documentation and submitted Exhibit 1 as its case.
- According to Division's Exhibit 1, Mr. Wyatt's history of gig work did not qualify him for a claim to regular, extended, or pandemic emergency unemployment benefits in 2020. (Record Ex. 1, pg. 4). A person who is eligible for those benefits is disqualified from PUA benefits and may not be considered a "covered individual" under the CARES Act.[4]

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2 COVID-19 Health Mandate 001, eff. Mar. 16, 2020; extended in COVID-19 Health Mandate 008 through May 1, 2020, and through the end of the school year in COVID-19 Health Mandate 013. The Anchorage School District schools remained closed through the end of December 2020.

3 The record also reflects the Division staff comment that "Adjudicated COVID-19 impact. Ineligible. Clmt quit driving for doordash due to more people starting to work for doordash. May be eligible for UI claim under the new TA, but wages will need to be sent to the new TAX." Ex. 1, pg.

4 15 U.S.C. § 9102(a)(3)(A)(i).

- The Division's October 30, 2020 PUA determination denial stated Mr. Wyatt was denied because the Division considered him to have voluntarily withdrawn from the workforce because he stopped driving March 10, 2020. (Record Ex. 1, pg. 2).[5]

The appeal hearing took place June 2, 2021. At the hearing, Mr. Wyatt asserted he was entitled to PUA benefits for the period beginning the week ending March 14, 2020 through the week ending June 27, 2020 as well as the period beginning the week ending July 4, 2020 expressly covered by the Division's October 30, 2020 denial determination.

Following the hearing, the Tribunal sought input from the Division regarding that assertion and whether the Division objected to including that period in the appeal. The Tribunal wrote the following request to the Division:

> - Russell Wyatt is copied on this email. The notice in Exhibit 1 denies PUA eligibility effective the week ending July 4, 2020. Mr. Wyatt testified to COVID-related impacts prior to that date, and the record suggests he claimed PUA eligibility starting March 10, 2020.
> - Is there another denial determination that addresses his eligibility from the week ending March 14 through the week ending June 27, 2020? If the Department could "reply all" and send that in, it would be helpful. Does the Department have any objection to including those weeks in this appeal?

The Division's reply, dated June 17, 2021, did not directly respond to the Tribunal's questions. It stated:

> Attached is additional information that was taken after the appeal was filed for Mr. Wyatt. We have attempted to get wage information from the claimant regarding his employment with Door Dash to determine his eligibility in unemployment. We have requested the claimant send in his 1099 documents in which he has chosen not to do so. These documents *could* make the claimant eligible for an UC claim if provided. (*Emphasis added*.)

The Tribunal noted that this reply did not make it clear whether potential UC claim eligibility related only to 2021 income or whether Mr. Wyatt was potentially eligible for regular unemployment in 2020 as well.[6] In the absence of an affirmative record showing Division

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5 The record also reflects the Division staff comment that "Adjudicated COVID-19 impact. Ineligible. Clmt quit driving for DoorDash due to more people starting to work for DoorDash. May be eligible for UI claim under the new TA, but wages will need to be sent to the new TAX." Ex. 1, pg.

6 *In re R. Wyatt*, Appeal Decision pg. 2, OAH No. 21-0332-PUA / P20 359, June 28, 2021.

determination of regular unemployment, extended benefits, or pandemic emergency unemployment eligibility, the Tribunal concluded it lacked authority to determine that Mr. Wyatt was eligible for regular unemployment benefits in the appeal.[7]

Consequently, the Appeal Tribunal's decision did not address Mr. Wyatt's eligibility prior to the week ending July 4, 2020.[8] The Appeal Tribunal's decision also did find Mr. Wyatt eligible for PUA benefits effective the week ending July 4, 2020 and on-going.[9]

The Division appealed that decision on July 29, 2021. In its appeal notice, the Division stated it "respectfully requests more time to gather evidence not available at the time of the OAH hearing. OAH ruled Mr. Wyatt to be eligible for Pandemic Unemployment Assistance benefits. Since the decision, the Division has learned Mr. Wyatt is eligible for regular unemployment insurance benefits."[10]

Limits may be placed on the admission of new evidence on appeal, AS 23.20.435 (b), although the usual practice is to remand the matter to gather the evidence if any is needed. In this case, the scheduling order issued by the Administrative Law Judge assigned to conduct pre-decisional proceedings directed that no new evidence would be taken and limited parties to submitting documents that were in their possession before June 21, 2021.[11] However, the Division was also directed to supply the "*factual* and legal authority for the position that he is an employee of DoorDash as opposed to an independent contractor." Both parties submitted supporting documents beyond those required for argument. Specifically, the Division included evidence that, after it received the Tribunal's decision, it concluded Mr. Wyatt was eligible for regular unemployment insurance effective July 27, 2020 and, as a result the Tribunal decision should be reversed. To the extent the submitted documents directly support the parties' claims made on appeal, they will be considered.

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7 The appeal was referred to the Office of Administrative Hearings, for hearing by an Administrative Law Judge (ALJ). Procedures are specific to PUA appeals only. The terms of referral limit the ALJ to determining issues under the CARES Act.

8 *In re R. Wyatt, supra*, at 6.

9 *Id*.

10 DETS Commissioner Appeal Memorandum, dated July 29, 2021.

11 *In re R. Wyatt*, OAH 21-1933-CAP, Scheduling Order, Aug. 27, 2021.

DISCUSSION

Several issues are presented in this Commissioner's Appeal. First, did the Appeal Tribunal err when it failed to consider Mr. Wyatt's PUA eligibility for the period the week ending March 14, 2020 through the week ending June 27, 2020? Second, if so, was Mr. Wyatt a "covered individual" for purposes of the CARES Act during that period as well as the period adopted by the underlying Tribunal Appeal Decision? Third, does the Division's subsequent determination Mr. Wyatt was eligible for regular unemployment benefits disqualify him for any period? Due to procedural deficiencies, we do not address the merits of the Division's claim that Mr. Wyatt was an employee of a covered employer, so as to make him eligible for regular unemployment benefits.

A. Mr. Wyatt's eligibility as of the time he was impacted by the pandemic in March 2020 should have been evaluated.

The Appeal Tribunal declined to consider whether Mr. Wyatt was eligible for PUA benefits during the period from March 10 to the week ending July 4, 2020.[12] Mr. Wyatt claimed in his initial interviews with the Division and his testimony to the Appeal Tribunal that he was impacted by the COVID-19 pandemic much earlier, by March 10, 2020. While he agrees he voluntarily took time off for about three weeks[13] as business slowed, he testified he was seeking gigs and time slots by April 1, 2020.

The Tribunal enquired whether the Division objected to consideration of this period on appeal as set out above. The Division's response did not object to including the weeks from March 10, 2020 to June 27, 2020 in the appeal; it was silent on whether there was another denial determination. The record before the Tribunal indicated Mr. Wyatt did claim he was impacted by COVID-19 March 10, 2020, prior to filing his appeal (Record Ex. 1, pg. 9). The record omitted a complete copy of Mr. Wyatt's initial online application. In short, the Division was provided an opportunity to object to consideration of the earlier weeks or to explain why it chose July 26, 2020, as the date of eligibility, but it failed to do so.

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12 It appears June 27, 2020, became the start date of eligibility because of an "able and available" determination of July 4, 2020. Record Ex. 1, pg. 16.

13 It is noted that the period of time Mr. Wyatt was not working coincided with Spring Break in the school district and the first COVID-19 school closure ordered by the State of Alaska. It is clear, however, that Mr. Wyatt, a single parent, did not "quit" his DoorDash business, as he testified that by April 1, 2020, he was seeking gigs.

A.S. 23.30.415(d) provides:

> (d) In addition to the issues raised by the determination which is appealed, the tribunal may hear and decide additional issues affecting the claimant's rights to benefits if, by the date of hearing, the department has issued no final determination concerning the additional issues and the parties involved have been notified of the hearing and of the pendency of the additional issues.

In this case, the Division had notice of "the pendency of the additional issues" and chose not to respond. No final determination had been issued affecting Mr. Wyatt's rights to benefits after March 10, 2020, and before July 26, 2020. No explanation or defense was offered as to the choice of date, notwithstanding the potential claim eligibility to February 8, 2020 (Record, Ex. 1, pg. 16). Under the statute, the Tribunal had authority to hear and decide the issue of whether or not Mr. Wyatt was eligible for PUA benefits prior to the week ending July 4, 2020.

A.S. 23.30.420(a) directs that "Each party shall be promptly given a reasonable opportunity for fair hearing. An appeal tribunal *shall inquire into and develop all facts bearing on the issues* and shall receive and consider evidence without regard to statutory and common law rules." By refusing to consider whether Mr. Wyatt was eligible for benefits prior to July 4, 2020, the Tribunal effectively deprived Mr. Wyatt of the opportunity for a fair hearing on his claim, as by the date of the hearing, he was foreclosed from filing a new claim for PUA benefits, because the Continued Assistance Act, Pub. L. 116-260 enacted December 27, 2020, limited backdating of PUA claims filed after the date of enactment to December 1, 2020. Because Mr. Wyatt's claim to PUA benefits from March 10, 2020 could not otherwise have been heard, because Mr. Wyatt had a record of claiming impact from March 10, 2020 when the original determination was made in October 2020, because no explanation was offered why the Division chose July 26, 2020 (or June 27, 2020), and because the Division failed to object to the Tribunal taking up the issue when notified, we find that the Tribunal erred in failing to address the issue raised by Mr. Wyatt.

B. Backdating the PUA claim.

Enrolled HB 308[14] (enacted March 23, 2020) provided that the uncodified law of the State of Alaska is amended by adding a new section 5 dealing with unemployment insurance benefit

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[14] HB 308 provides:

> UNEMPLOYMENT INSURANCE: BENEFIT QUALIFICATION AND WAITING WEEK DURING NOVEL CORONAVIRUS DISEASE OUTBREAK.

qualification during the COVID-19 public health emergency. The bill assured that workers who are eligible to receive unemployment compensation under state law are not considered to be unavailable for work if, for example, they are unable to accept work because they must care for children whose schools or daycare are closed due to COVID-19.). However, the period of allowable "backdating" is only 120 days. Thus, if Mr. Wyatt's claim for UC benefits was filed October 3, 2021, the assurance period in HB 308 extends as far back as June 5, 2021.

In this case, Mr. Wyatt established that he had a colorable claim to PUA benefits beginning April 1, 2020, when he resumed seeking gigs and time slots through Door Dash after his short break from seeking deliveries. Thereafter, he began to experience the inability to get more profitable time slots due to the need to care for his children owing to COVID-19 school closures, which the Tribunal found to be the case, and the increase in competition for gigs associated with an influx of drivers. Thus, Mr. Wyatt's loss of work hours after March 31 and prior to the week ending July 4, 2020, was caused by the need to care for his children owing to school closures, as the tribunal found, and this finding was not contested by the Division.

However, HB 308 does not limit the backdating of PUA claims under the CARES Act. Here, the impact that Mr. Wyatt suffered extended from when he returned to work as a food delivery driver after his break around the same time as his children were on the school district's Spring Break. There is no evidence in the record that limits his eligibility for PUA benefits to

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(a) To the extent consistent with federal law, an insured worker who is otherwise qualified to receive a benefit under AS 23.20 (Alaska Employment Security Act) may not be disqualified for failure to comply with AS 23.20.378(a) because of conduct by the insured worker or the employer of the insured worker related to an outbreak of novel coronavirus disease (COVID-19), including conduct involving

(1) providing care, including medical care, to one or more persons;

(2) preventing or limiting the spread of COVID-19; or

(3) preventing or limiting economic loss or harm.

(b) The protection of an insured worker under (a) of this section applies for a period of 120 days beginning on the effective date of this section or the date the insured worker applies for a benefit under AS 23.20, whichever is later.

(c) For the duration of a state or national emergency for an outbreak of novel coronavirus disease (COVID-19), the limitations under AS 23.20.375(b) do not apply to benefits payable to an insured worker under AS 23.20 (Alaska Employment Security Act) who is otherwise entitled to receive waiting-week credit or benefits under AS 23.20.375(a).

(d) The provision of a benefit as permitted by this section is not a violation of AS 23.20.500.

(e) The commissioner of labor and workforce development shall administer this section as required under AS 23.20.005(b) and 23.20.095.

(f) In this section, "insured worker" has the meaning given in AS 23.20.520.

July 26, 2020, as claimed by the Division. The record supports that Mr. Wyatt was eligible for PUA benefits (subject to excess earnings rules) beginning the week ending April 11, 2020. Therefore, the Tribunal's decision must be modified to include eligibility for PUA benefits beginning the week ending April 11, 2020.

C. Redetermination of disqualification.

Mr. Wyatt initially applied for PUA benefits and was told he was not eligible for unemployment compensation. The record reflects that, at least as of October 2020, Mr. Wyatt had been determined to be ineligible for regular unemployment insurance benefits. That finding meant he was not disqualified from applying for PUA benefits and his eligibility could be considered. He was directed to apply for PUA benefits as an independent contractor. He supplied his tax records for 2019 to the Division as part of that application as well as his identification. Mr. Wyatt submitted a copy of a "notice of monetary redetermination" dated October 6, 2020, which states his claim for PUA benefits was filed October 3, 2020, and that he was eligible to file back to July 26, 2020. The *initial* determination that he was not eligible for regular unemployment compensation would have occurred prior to the notice of monetary redetermination.

Here, the record shows that a Division staff member recognized that Mr. Wyatt may be eligible for regular unemployment compensation as early as October 30, 2020 (Record Ex. 1, pg. 13) but no action followed until after the decision was issued in Mr. Wyatt's PUA appeal June 21, 2021. By then, Mr. Wyatt had been waiting for over a year without benefits of any kind. The Division evidently paid PUA benefits, and immediately demanded their return, based on a redetermination of eligibility for unemployment benefits documented August 17, 2021[15] and filed in this appeal August 18, 2021. In short, the evidence suggests, and was not disputed by Mr. Wyatt, that the redetermination of eligibility for regular unemployment benefits occurred within one year of the initial determination.[16] While the redetermination of eligibility for

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15 BB05, showing full program entitlement and BB10, showing benefit years.

16 AS 23.20.340 provides:

(a) An examiner designated by the department shall take the claim. The examiner shall take all evidence pertaining to the eligibility of the claimant and shall promptly transmit all evidence to the department. The department, or a representative designated by it for the purpose, shall, on the basis of the evidence submitted and any additional evidence it requires, make an initial determination of the claim as to whether the claimant is eligible for benefits under AS 23.20.350 and an initial determination of the weekly benefit amount and the maximum potential benefit amount.

unemployment compensation occurred within the statutory time frame, that does not mean that the Tribunal is obliged in these circumstances to uphold it.

The Division's late claim that Mr. Wyatt's activities through Door Dash are covered employment is troubling. We note there is no *evidence* in the record before the Tribunal on his activities as employment – simply the record that his income was reported on a Form 1099, that Door Dash considered him an independent contractor, and that Mr. Wyatt believed he was an independent contractor. The Division's claim that his activities were employment was not made until *after* the hearing on his PUA claim, at which the Division did not appear. There was no evidence in the record at the time that the Division made the assertion (June 17, 2021) that Mr. Wyatt was engaged in covered employment, contrary to his evidence that he was an independent contractor. There was no copy of a prior Coverage Determination that Door Dash (or a similar service, such as UberEATS or GrubHub) was a covered employer. Finally, the statute relied upon by the Division in its argument is directed to aid in coverage determinations against employers[17], and therefore shifts the burden of proof to employers (the employing unit) to

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(b) Within one year from the date of the initial determination of the weekly benefit amount and the maximum potential benefit amount established under AS 23.20.350, the department shall reconsider the determination or any subsequent determination under this chapter and shall issue a redetermination amending the determination if the department finds that

(1) an error in computation or identity has been made;

(2) additional wages or other facts pertinent to the claimant's insured status or eligibility for benefits have become available;

(3) the determination resulted from a nondisclosure or misrepresentation of a material fact; or

(4) the determination resulted from a misapplication of law by the department.

(c) The claimant shall be promptly notified of the initial determination or a subsequent redetermination and the reasons for it.

(d) Unless the claimant is determined to be disqualified for benefits under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 — 23.20.387, or 23.20.505, benefits shall be promptly paid in accordance with the initial determination or subsequent redetermination.

[17] AS 23.20.315 provides:

(a) On its own motion or on the application of an employing unit, the department shall, on the basis of facts found by it, determine whether the employing unit is an employer and whether service performed for it constitutes employment.

(b) Within one year or a longer time which the department for good cause allows, after a determination has been made under (a) of this section, the department may reconsider its determination in the light of additional evidence and make a redetermination.

(c) The department shall mail or deliver a notice of its determination made under (a) or (b) of this section to the last address of record of the employing unit affected. The notice must include a statement of the supporting facts found by the department.

(d) Within 30 days after a notice of a determination has been mailed or delivered to the last address of record of an employing unit, the employing unit may apply to the department to reconsider its

disprove employment[18] found and communicated to the employer by the department. Once the determination is made and not appealed by the employer, or a final determination is made on appeal, the record of the determination is admissible in subsequent proceedings. AS 23.20.320. Finally, the law requires that the employer be notified and *made a party* if an employment issue is raised in an unemployment appeal to the Tribunal so that such a determination is not made in the absence the employing unit.[19]

The failure of the Division to raise the issue before the hearing so that the employing unit could be made a party means that the Tribunal properly declined to address an issue to which neither the claimant, nor the employer, nor the Tribunal had notice prior to the hearing, that the Division had failed to raise in the more than five months between the original determination and the hearing, and for which no evidence or prior determination in support was produced. Lacking notice to the employing unit in this case, or a prior determination, this Commissioner's proceeding lacked authority to determine the employment issue raised by the Division.

D. Application of 15 U.S.C. § 9021(a)(3)(A)(i) to Mr. Wyatt's claim.

The CARES Act of 2020 bars those who are eligible for regular unemployment compensation or extended benefits under State or Federal law from receiving PUA benefits. 15 U.S.C. § 9021(a)(3)(A)(i). Mr. Wyatt claimed, based on his understanding of his contract with DoorDash, that he was an independent contractor – not an employee. This was also the position taken by DoorDash, which did not, for example, pay employment security tax or payroll taxes on

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> determination in the light of additional evidence and to issue a redetermination. The department shall, if the request is granted, mail or deliver to the last address of record of the employing unit affected a notice of the redetermination. The notice must include a statement of the supporting facts found by the department. If the department denies the request for redetermination, it shall furnish a notice of the denial of the application.
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> (e) Within 30 days after a notice of a determination made under (a), (b), or (d) of this section or a denial of the application under (d) of this section has been mailed or delivered to the last address of record of an employing unit, the employing unit may appeal from the determination to the department. The department shall give the parties a reasonable opportunity for a fair hearing as provided in the case of hearings before appeal tribunals in AS 23.20.410 — 23.20.470. The decision of the department is final unless, within 30 days after the decision is mailed or delivered to the last address of record of a party, the party initiates judicial review in accordance with AS 23.20.445.

18 *See, e.g., Tachick Freight Lines v. State, Dep't of Labor*, 773 P.2d 451 (Alaska 1989); *Alaska Contr. & Consulting, Inc. v. Alaska, Dep't of Labor*, 8 P.3d 340 (Alaska 2000).

19 AS 23.20.410(b) provides:

> If an appeal involves a question whether service constitutes employment, the tribunal shall give notice of the appeal and the issues involved to a properly designated representative of the department and to the employing unit for which the service was performed. The employing unit, if not already a party, shall then become a party to the appeal.

payments to Mr. Wyatt. Only if Mr. Wyatt's services were employment recognized under Alaska law, would he be eligible for UC benefits under state law, and thus ineligible for PUA benefits.

The Division asserts that Mr. Wyatt's activities are covered employment under AS 23.20 based on two arguments. First, the Division argues that Mr. Wyatt's activities through Door Dash are not excluded from the definition of employment by AS 28.23.080,[20] which provides that transportation network companies are not employers of transportation network company drivers subject to the Transportation Network Companies Act, S 28.23.010-.190. That Act does not apply to Mr. Wyatt's activities, the Division argues, because (a) Mr. Wyatt transports food, not riders, so he is not a "transportation network driver" as defined in AS 28.23.180(5)[21] and (b) DoorDash is not a "transportation network company" as defined in AS 28.23.180(4)[22] because it does not connect its drivers to individual *riders* (defined as "an individual or person" who

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20 AS 28.23.080 provides:

(a) Except as provided in (b) of this section, a transportation network company is not an employer of transportation network company drivers under AS 23.10.699, AS 23.20.520, or AS 23.30.395. A transportation network company driver is an independent contractor for all purposes and is not an employee of the transportation network company if the transportation network company

(1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the digital network of the transportation network company;

(2) does not impose restrictions on the ability of the driver to use the digital network of other transportation network companies;

(3) does not restrict a driver from engaging in any other occupation or business; and

(4) enters into a written agreement with the driver stating that the driver is an independent contractor for the transportation network company.

(b) This section does not apply to AS 23.20 if the transportation network company is owned or operated by the state, a municipality, a federally recognized tribe, or an entity that is exempt from federal taxation under 26 U.S.C. 501(c)(3) (Internal Revenue Code).

21 AS 28.23.180(5) provides:

"transportation network company driver" or "driver" means an individual who

(A) receives connections to potential passengers and related services from a transportation network company in exchange for payment of a fee to the transportation network company; and

(B) uses a personal vehicle to offer or provide a prearranged ride to riders upon connection through a digital network controlled by a transportation network company in return for compensation or payment of a fee;

22 AS 28.23.180(4) provides:

"transportation network company" means a corporation, partnership, sole proprietorship, or other entity that uses a digital network to connect transportation network company riders to transportation network company drivers who provide prearranged rides; a transportation network company may not be considered to control, direct, or manage the personal vehicles or transportation network company drivers that connect to the transportation network company's digital network, except where agreed to by written contract;

connects with the transportation network driver who provides a pre-arranged ride to the rider) in AS 28.23.180(6). Second, it assumes that Mr. Wyatt's activities through Door Dash are "services performed for remuneration" under AS 23.20.525(a)(8):

> AS 23.20.525. "Employment" defined.
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> (a) In this chapter, unless the context otherwise requires, "employment" means
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> * * *
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> (8) service performed by an individual whether or not the common-law relationship of master and servant exists, *unless and until it is shown to the satisfaction of the department* that
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> (A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;
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> (B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
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> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

The Division's reasoning is that Mr. Wyatt did not show that he is able to meet the standards of subparts A, B, and C, so that he is engaged in employment and therefore not eligible for PUA. For reasons set out above, this appeal is not the place to make the determination that persons engaged in app-based "gig" work like Mr. Wyatt are covered employees. However, to provide guidance for future coverage determinations, we address the first part of the Division's argument.

1. *The Transportation Network Companies Act does not cover food delivery.*

The Transportation Network Companies Act was intended to address passenger services provided through companies like Uber and Lyft when it was enacted in 2017. Section 1 of HB132, which established the Transportation Network Companies Act, stated the legislature's intent:

> It is the intent of the legislature to clarify the Alaska Workers' Compensation Act, ensure the safety, reliability, and cost-effectiveness of rides provided by transportation network company drivers in the state, and preserve and enhance access to these important transportation options for residents of and visitors to the state.

Food delivery companies, such as GrubHub, UberEATS, and Door Dash were large companies before 2017, when the Act was passed. According to Wikipedia, Door Dash was incorporated in 2013, UberEATS in 2014 (originally as UberFresh), and GrubHub in 2004. In short, the legislature's omission of food delivery drivers from the Transportation Network Companies Act was not a matter of overlooking or missing a new or unknown industry. We agree that the Act was not intended to include food delivery drivers in the exclusion of "transportation network drivers" from Alaska's Employment Security Act.

2. *Services through Door Dash as employment.*

We turn now to the question whether Mr. Wyatt's delivery services are employment for Door Dash.[23] As we stated above, the Appeal Tribunal correctly decided that it could not decide that Mr. Wyatt's activities were covered employment. Given the absence of evidence in the record regarding the terms of Mr. Wyatt's employment, Mr. Wyatt's and the employer's lack of notice of the issue, and the absence of a prior coverage determination, we agree that this PUA appeal was not the proper place to request an initial coverage determination. Coverage determinations are governed by AS 23.20.315. That statute requires notice to an employing unit of the supporting facts found by the department, AS 23.20.315(c), so that an employer may seek reconsideration or appeal, AS 23.20.315(d). If raised in another appeal, the employing unit must be given notice so that it can be made a party to the appeal. AS 23.20.410(b). We find that this appeal is not the place to announce a determination that food delivery drivers who use apps or platforms like Grub Hub or Door Dash are engaged in covered employment. This does not mean that such a coverage determination can or cannot be made. It means that the determination must be made in the proper forum on the basis of evidence presented with proper notice to the putative employer.

CONCLUSION

The Appeal Tribunal erred in not considering whether Mr. Wyatt was eligible for PUA benefits from the week ending April 11, 2020. Based on the evidence before the tribunal, he was not barred from eligibility when he returned to work after the Spring Break period, although he may not receive benefits for those weeks he had excess earnings. HB 308 did not bar Mr. Wyatt

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[23] The Division does not assert Mr. Wyatt is an employee of the restaurants whose food he delivers or the customers to whom he delivers the food.

from back-dating his claim, filed in July 2020, to at least April 1, 2020, so that he became eligible to receive benefits at the earliest the week ending April 11, 2020. Because there was no notice of an employment issue before the hearing in time to make the employer a party, and no prior coverage determination regarding the putative employer, the Tribunal correctly declined to consider the late-raised issue, notwithstanding the redetermination. Finally, while Alaska's Transportation Network Companies Act does not cover food delivery apps drivers, this appeal is not the proper forum to make the determination that such drivers are engaged in covered employment.

DECISION

The Appeal Tribunal's June 28, 2021 decision is MODIFIED to state:

The October 30, 2020 determination in Letter ID L0005915427 is REVERSED. The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning the week ending April 11, 2020 and ongoing.

NOTICE OF APPEAL RIGHT

FURTHER APPEAL may be had from this decision by filing a Notice of Appeal in Superior Court for the State of Alaska within 30 days from the date of mailing of this decision as provided in AS 23.20.445, AS 44.62.560-570, and the Rules of Appellate Procedure of the State of Alaska. Unless an appeal is filed within the 30-day period, this decision is final.

Recommended March 17, 2022:

[redacted]

Kris Knudsen
Administrative Law Judge

Adopted March 23, 2022:

[redacted]

Dr. Tamika L. Ledbetter
Commissioner

CERTIFICATE OF SERVICE. I certify that on March 23, 2022 the foregoing decision was served by mail and email on Russell Wyatt. A courtesy copy has been emailed to UI Technical Team; UI Support Team, and appeals@alaska.gov.

[redacted]

Office of Administrative Hearings