

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

In the Matter of)
)
NASSER SAYYED) OAH No. 21-0671-PUA
) Agency No. P20 561
_____)

APPEAL DECISION

Docket Number: P20 561

Hearing Date: October 8, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Nasser Sayyed
Attorney David Baranow

Tristan Varela

CASE HISTORY

The claimant, Nasser Sayyed, timely appealed a December 11, 2020 redetermination (Letter ID L0007037209) by the Division of Employment and Training Services (DETS or Division) which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136 (the Act). The redetermination was issued by DETS after it had already paid a significant sum of PUA benefits to the claimant. The Department of Labor referred the appeal to the Office of Administrative Hearings (OAH) on or about 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 hearing was originally scheduled for May 12, 2021 but was rescheduled several times on request of the claimant and his counsel. The hearing was eventually held on October 8, 2021. The claimant appeared with his attorney and testified on his own behalf. Division manager Tristan Varela appeared and testified on behalf of the Division.

After the hearing, a decision was issued on January 21, 2022 finding the claimant eligible for PUA benefits for specified periods in 2020 and 2021, with the Tribunal retaining jurisdiction and remanding the case to the Division to address an issue concerning the claimant's eligibility for California Pandemic Emergency Unemployment Compensation (PEUC) benefits. The Division having fully addressed that issue, this final Decision is issued to resolve the claimant's PUA eligibility.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

Nasser Sayyed established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 14, 2020. After paying him some PUA benefits, the Division determined that the claimant was not eligible for PUA because he was not impacted by COVID-19 in a manner that made him a covered individual under the program. As further discussed below, the Division's rationale for denying the claimant's eligibility in this case apparently evolved over time; the existence of alternating bases of denial complicated the analysis in this case.

The claimant testified that he has resided in Anchorage, Alaska since July 2018 after moving here with his family from California. In late 2018 and early 2019 he had an active California unemployment (UI) claim based on his employment predating his move to Alaska. He apparently exhausted his California UI benefits in April 2019. At about that time he became self-employed as an Uber driver in Anchorage, and he also cared for his two young children (ages 11 years old and 6 years old) while his wife worked a full-time job. Prior to the COVID-19 pandemic, he managed his Uber driving work schedule around his wife's work and children's school schedules. The claimant's wife's income is apparently the primary source of income for the family, and the claimant is the primary caregiver for the children.

The COVID-19 pandemic arrived in Anchorage in mid-March of 2020. At that time the claimant had been driving for Uber in January and February of 2020, under his normal routine of working when his kids were in school, or his wife was not at work. On or about March 15, 2020, the school attended by the claimant's children closed to in-person attendance. The immediate impact of this closure was that the claimant had to stay home to watch and care for his children during daytime hours when they normally would have been in school. This had a significant impact on his ability to work as an Uber driver. In addition, demand for Uber services dropped precipitously during the first six months of the pandemic, as Anchorage residents were subject to "hunker-down" orders issued by the Municipality, and people generally were staying home as much as possible and very cautious about getting into Uber cars, taxicabs, and other public transport. The resultant impact on the claimant was that his income from Uber driving was reduced to essentially zero for the balance of calendar year 2020.

The claimant testified that his children continued to attend school from home via online access until school recessed for summer on May 21, 2020. They continued online schooling in the fall of 2020 and winter of 2020-2021, until Anchorage schools went back to in-person instruction in February 2021.

The claimant applied for PUA benefits on or about April 28, 2020. The Division apparently made an initial determination that the claimant was eligible for PUA and paid him a significant sum of benefits for the weeks ending March 21, 2020 through

May 23, 2020, and the weeks ending June 6, 2020 through October 24, 2020.¹ On December 11, 2020, however, the Division issued a notice of determination denying the claimant's eligibility, as follows:

It has been determined that you have not been impacted by COVID-19 reasons as of the week ending March 14, 2020 and are therefore not a covered individual. You do not meet the eligibility requirements to qualify for benefits under the [PUA] program. ... You have 2 children who were sent home from school due to COVID mandates in March of 2020. However, you had already voluntarily stopped working with Uber in February as you had previously planned. You were not working at the time COVID mandates were issued. (Exhibit 1, p. 2.)

The net effect of this determination was that the PUA benefits the claimant had previously received became an overpayment liability that he would have to repay to the State of Alaska. At some point, DETS apparently told the claimant he would have to repay this significant sum of overpaid benefits (over \$18,000). Documents in the record show that much later, in June 2021, the Division sent the claimant a formal written notice advising him of the liability, of his right to seek a waiver of the repayment obligation, and of the opportunity for a hearing regarding the overpayment liability and repayment obligation. (See Exhibit A, p.49.)

Subsequent to issuance of the December 11, 2020 notice, in March of 2021 the Division advised the claimant of another issue pertaining to his PUA eligibility.² Division staff told him he should contact the California unemployment agency and file a claim for Pandemic Emergency Unemployment Compensation (PEUC) benefits. According to testimony from Division manager Tristan Varela, the Division had determined that the claimant should qualify for PEUC based on his earlier, 2018-2019 California UI claim. Mr. Varela testified that PEUC eligibility was available to claimants with active UI claims as early as July 2019, and that even though Mr. Sayyed's UI benefits may have been exhausted in April 2019, his active claim period extended to September 2019, thus placing him within the window of potential PEUC eligibility.

The claimant testified that he did as he was instructed. In March 2021, he called the California unemployment agency, explained what the Division had told him, and applied for PEUC benefits over the phone. He subsequently received a letter from the

¹ See Exhibit 1, pp. 31-33. The week ending May 30, 2020 was apparently excluded from the claimant's eligibility because he had undergone hernia surgery and therefore was not "able and available" to work that week.

² It is noted that both before and after issuing the December 11, 2020 notice, DETS sent the claimant several notices referencing a PUA eligibility issue and stating "[o]ur records indicate that you have not tested your eligibility for UI Benefits for the most recent calendar quarter or that you have an active State or Federal UI claim." See, e.g., Exhibit A, p. 3 (May 12, 2020 notice); Exhibit A, p. 10 (July 7, 2020 notice). Until his March 2021 conversation with DETS staff, however, the claimant had no idea what these notices meant.

California agency, asking him to contact them. He called them, as requested, and was told over the phone that he did not qualify for PEUC benefits. The claimant never received a written notice from the California agency confirming the denial of his PEUC eligibility.

The claimant timely appealed the December 11, 2020 denial notice. Prior to the hearing, the Division submitted a 33-page packet of documents labeled Exhibit 1; this set of documents was admitted into evidence at the hearing. After the hearing, the claimant submitted an additional 55-page exhibit, labeled Exhibit A, which consists primarily of correspondence from the Division that was not included in Exhibit 1. Exhibit A is hereby admitted into evidence. A copy of the letter from the California agency referenced above was not submitted for the record. In addition, Mr. Varela testified that the Division issued a notice dated March 18, 2021, which partially reversed the December 11, 2020 denial and allowed the claimant two weeks of PUA eligibility, for the weeks ending March 21 and March 28, 2020. That notice has not been provided for the record.

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—

...

(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;

...

(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.

APPLICATION

The CARES Act, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance (PUA) 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 reasons related to the COVID-19 pandemic. It is undisputed in this case that the claimant’s work history did not qualify him for a claim for regular unemployment benefits. Whether he was eligible for PEUC benefits has not yet been determined.

The Division’s stated December 11, 2020 rationale for denying Mr. Sayyed’s claim was predicated on an apparent misunderstanding of his employment situation in March of 2020. The Division’s statement that he “had already voluntarily stopped working with Uber in February” and therefore he was “not working at the time COVID mandates were issued” is simply incorrect. The claimant testified credibly, consistently, and emphatically that he was still doing his Uber driving work when the pandemic arrived, that he stopped driving because he had to care for his children while they attended school from home, and that his Uber income was drastically impacted as a result of the pandemic.

The claimant has met his burden of establishing that the rationale for the Division’s December 11, 2020 denial was based on a faulty understanding of the facts. Further,

he has more than adequately established facts that support his eligibility for PUA benefits during the months when his children's school was closed, as well as over the summer when his income from Uber driving continued to be impacted by the pandemic. These facts fully support his eligibility under subsection (dd) and UIPL 16-20, change 2, quoted above.

As to the issue of the claimant's potential eligibility for PEUC benefits from California, the claimant testified credibly that he was told by staff of the California unemployment agency that he did not qualify. The Division's representative Mr. Varela testified that he should have been eligible, because his California UI claim was still active until September 2019, which should have placed him within the window for potential PEUC eligibility. During the hearing, Mr. Varela offered to reach out to the California unemployment agency to find out "if they are able to backdate the PEUC application to when Alaska first started paying on Mr. Sayyed's claim."

Mr. Varela was directed to make that inquiry and to be prepared to submit written documentation, and possibly testimony, regarding the results of the inquiry.

POST-REMAND PROCEEDINGS

As discussed above, the January 21, 2022 decision in this matter found the claimant eligible for PUA benefits for specified periods in 2020 and 2021, with the exception of his possible (but then undetermined) eligibility for California Pandemic Emergency Unemployment Compensation (PEUC) benefits impacting his Alaska PUA eligibility.

The Tribunal retained jurisdiction, and the matter was remanded to the Division for the following purposes:

1. Mr. Varela was directed to make the above-referenced inquiry to the State of California unemployment agency.
2. Mr. Varela was to submit to OAH a short, written report describing the results of his inquiry;
3. Mr. Varela's report was to include his analysis of the claimant's California PEUC eligibility, including the availability of backdating PEUC in California; the impact, if any, on claimant's eligibility for Alaska PUA benefits; and the impact on claimant's overpayment liability.

In response to the remand, Division representative Tristan Varela made inquiries with the State of California and submitted a short report regarding his findings on January 25, 2022. A status conference was held to discuss the PEUC issue on February 3, 2022, and the claimant was directed to apply to California for PEUC benefits.

Another status conference was held on April 25, 2022 to discuss the results of the claimant's application to California. His counsel reported that the claimant had received from California a debit card representing a substantial payment of PEUC and other unemployment benefits. The claimant's counsel and Mr. Varela were tasked

with conferring about those results and reporting back to the Tribunal regarding any issues remaining to be decided by the Tribunal.

On April 29, 2022, claimant's counsel submitted a report via email, reading as follows:

... The parties, through Mr. Varela at DOL, met and conversed over the impact of the latest California remittance. The amount claimed by the State of Alaska for alleged overpayment was clarified. The DOL also communicated with Mr. Sayyed directly and advised him of the opportunity to apply for waiver of any claimed overpayments. Mr. Sayyed will do so, likely in writing, and the parties will meet again when a result is received as to the waiver application. The parties reserve the right, as previously noted, to request status of additional hearing before this tribunal.[³]


Based on counsel's report, the Tribunal found that there did not appear to be any issues remaining to be decided within this appeal; any issues concerning a possible grant to the claimant of a waiver of overpayment liability could give rise to separate appeal rights, but those did not fall within the parameters of this appeal. Therefore, the Tribunal gave notice of its intent to issue a final decision in this case, comprised of the January 21, 2022 decision and an additional short recitation of the post-remand proceedings. A deadline was set for May 17, 2022 for the parties to submit objections to this procedure, and neither party submitted any such objection. This final decision, therefore, is hereby issued.

DECISION

The Division's December 11, 2020 determination is hereby **REVERSED**.

With the exception of the impact of the California PEUC eligibility question, the claimant was eligible for PUA benefits for the weeks ending March 21, 2020 through May 23, 2020, the weeks ending June 6, 2020 through October 24, 2020, and then after that period while his children's school remained closed: the weeks ending October 31, 2020 through December 15, 2020, and the weeks ending January 9, 2021 through February 6, 2021. To the extent that California found the claimant eligible for PEUC benefits for any weeks during the relevant timeframe, as discussed above, he was not eligible for PUA benefits during those weeks.

Dated: May 18, 2022,



Andrew M. Lebo
Administrative Law Judge

³ D. Baranow email to OAH, April 29, 2022 (not received by the undersigned until May 2, 2022 due to email being misaddressed).

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 19, 2022, the foregoing decision was served on attorney David Baranow (by U.S. mail & email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

Office of Administrative Hearings



*Alaska Department of Labor and Workforce Development
Appeals to the Commissioner*

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

**ALASKA DEPARTMENT OF LABOR
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