

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

In the Matter of)

TRAICIE SIMIEN)
_____)

OAH No. 21-0666-PUA
Agency No. P21-012

APPEAL DECISION

Docket Number: P21-012

Hearing Date: May 5, 2021

Claimant Appearances:

DETS Appearances:

Tracie Simien

None

CASE HISTORY

The claimant, Tracie Simien, established a claim for Pandemic Unemployment Assistance (PUA) benefits effective the week ending March 21, 2020. The Division of Employment and Training Services (DETS) determined the claimant was not a “covered individual” eligible for PUA benefits and issued a Notice of the determination to the claimant December 23, 2020 (Letter ID: L0007248604). The determination was timely appealed December 23, 2020.

The Department of Labor and Workforce Development 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.

This appeal was heard in a recorded hearing on May 5, 2021. The DETS chose to not to appear and provided only written materials for the hearing. Ms. Simien testified under oath but presented no other witnesses.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act from the week ending March 21, 2020.

FINDINGS OF FACT

Ms. Simien was a taxi driver for Yellow Cab in Anchorage, Alaska, operating as an independent contractor and leasing a cab. When news of the pandemic began to circulate, Ms. Simien grew very nervous about collecting passengers at the airport and asked to reduce her hours. She states that “Kim” (the dispatcher for Yellow Cab) wanted her to continue to work 12-hour shifts, six days a week. Ms. Simien, who had to move in with her children’s father because she was unable to keep her own place, finally told Kim to “come get the cab”. The cab was collected on March 3, 2020.

However, Ms. Simien had secured other employment. She worked in the Dimond Mall at a pull tab kiosk operated by the Anchorage Glacier Pilots. This was essentially a retail position, and she was an “on-call” substitute for the regular employees. She would work from 2 hours to a full day, or even a week, if another employee was absent due to vacation or illness. Ms. Simien said that the business was closed due to Covid-19, and she was not getting any hours. Her last paycheck was April 1, 2020.

Ms. Simien was particularly nervous about being exposed to Covid-19 because she suffers from hypercholesterolemia, hypertension, and anxiety. She did not have a health care provider and the last time she saw a physician was in January 2020.¹ She did provide the names of medications prescribed to treat these conditions as a form of verification of their existence, but she concedes she was not advised by a health care provider to avoid exposure to Covid-19.

Ms. Simien has not found other employment. She lost her truck when it was towed for street cleaning and she was unable to pay to retrieve it.² She depends on an adult daughter to drive her to appointments and shopping. She has a high-school aged son who lives with her and who will graduate from high school this month. She also has a daughter in New York. This daughter, with her young child, came to visit Ms. Simien in September 2020. Two weeks after she arrived, Ms. Simien, her visiting daughter, and her grand-child were all diagnosed with Covid-19 (September 12, 2020). Ms. Simien did not recover until the week before Halloween. Although Ms. Simien’s memory for dates was not very clear, she recalled being too ill to leave her bed when her daughter left to return to New York at the end of September 2020.

EXCERPTS OF RELEVANT LAW

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

(a) DEFINITIONS.—In this section:

...

(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

¹ Ms. Simien states she cannot afford to see a doctor, that she applied for Medicaid but has not heard anything further, and that she has not tried to see a provider at the Anchorage Neighborhood Health Clinic because she “can’t pay the minimum.”

² Ms. Simien states the tow yard sold her truck to recover the towing and storage fees.

(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;

...

(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;

...

(jj) the individual’s place of employment is closed as a direct result of the COVID- 19 public health emergency;

COVID-19 HEALTH MANDATE issued March 27, 2020 by Governor Mike Dunleavy

...

Health Mandate 011 – Social Distancing

Effective 5:00 pm March 28, 2020

All Persons in Alaska, except for those engaged in essential health care services, public government services and essential business activities, are mandated to remain at their place of residence and practice social distancing. . . .

III. The Governor orders the closure of non-essential businesses:

All businesses within Alaska, except those listed in Alaska Essential Services and Critical Workforce Infrastructure Order, are required to cease all activities at facilities located within the state except Minimum Basic Operations,

APPLICATION

Ms. Simien's anxiety about exposure to the coronavirus led her to try to limit her cab-driving hours. Her anxiety had a rational basis, given her health status,³ but she was not advised by a health provider to self-quarantine. Therefore, she is not eligible for PUA benefits as a covered individual under Section 2102(a)(3)(ii)(A)(I)(ff) when she ceased driving due to the potential exposure to Covid-19 while driving a cab.

However, on March 28, 2020, the Governor ordered that non-essential businesses (including pull-tab kiosks) be closed. Ms. Simien testified that she had taken another job as a part-time, on-call substitute at a pull-tab kiosk at the Dimond Center Mall and that her hours diminished in March. With the closure of the pull-tab kiosk pursuant to the Governor's order, she would have had no hours. Although the October 2020 response from the kiosk manager states she "resigned" the timing of the last payment and the closure convincingly corroborate Ms. Simien's statement that her job ended with the closure by the Governor of non-essential businesses. The tribunal finds that she was eligible as a covered individual under Section 2102(a)(3)(ii)(A)(I)(ee) from the week ending March 28, 2020 through the week ending May 9, 2020, when the Governor's Health Mandate 011 was lifted as to non-essential retail businesses (with conditions).

On September 12, 2020, Ms. Simien tested positive for the coronavirus, requiring her to self-isolate. The tribunal finds that she was unable to work due to the diagnosis of Covid-19 and her subsequent obligation to self-quarantine for 14 days following the last day of exposure to her grand-daughter and sister while they were infectious, at a minimum from the week ending September 12, 2020 through the week ending October 3, 2020. Ms. Simien credibly testified she did not fully recover until the week before Hallowe'en; therefore, the tribunal finds she remained an eligible covered individual from the week ending September 12, 2020 through the week ending October 24, 2020, pursuant to Section 2102(a)(3)(ii)(A)(I)(aa) and Section 2102(a)(3)(ii)(A)(I)(bb).

Finally, the tribunal notes that Ms. Simien *may* have been paid some benefits before being notified that she was ineligible on December 23, 2020 (Letter ID: L0007248604). There is no clear record in exhibit 1 that was the case, or that if it was, that she was notified of any right to seek a waiver from further recoupment or, if a waiver were not granted, that she must be afforded an appeal hearing in which such matters as

³ The United States Center for Disease Control and Prevention issued guidelines informing persons with hypertension and hyperlipidemia can make them more likely to get severely ill from COVID-19. Health care providers continue to be advised to "Encourage patients with underlying medical conditions [inc. the above] to continue practicing preventive measures, such as wearing a mask and physical distancing, to avoid infection with the virus that causes COVID-19. This becomes even more important with increasing age and number and severity of underlying conditions." <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html> (updated April 30, 2021).

estoppel could be explored. The present referral does not encompass these issues, and the present decision does not decide them for or against Ms. Simien.

The DETS has advised this Office 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.

DECISION

The determination of December 23, 2020 is REVERSED in part, specifically that Ms. Simien was eligible for pandemic unemployment assistance for the following periods: from the week ending March 28, 2020 through the week ending May 9, 2020 and from the week ending September 12, 2020 through the week ending October 24, 2020.

Dated: May 10, 2021.



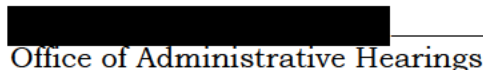
For: Kristin Knudsen
Administrative Law Judge

APPEAL PROCEDURE

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 Tracie Simien (by mail and by email). A courtesy copy was emailed to the UI Support Team and the UI Appeals Office.



Office of Administrative Hearings