

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

In the Matter of)

DERICK BAISCH)
_____)

OAH No. 21-0688-PUA
Agency No. P21-086-03

APPEAL DECISION

Docket Number: P21-086-03

Hearing Date: May 12, 2021

Claimant Appearances:

DETS Appearances:

Derick Baisch

None

CASE HISTORY

The claimant¹ established a claim for Pandemic Unemployment Assistance (PUA) benefits effective the week ending May 9, 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 October 13, 2020 [REDACTED]. The determination was appealed by the claimant on December 28, 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 12, 2021. The DETS chose to not to appear and provided only written materials for the hearing. Mr. Baisch testified under oath but presented no other witnesses. The record remained open until May 17, 2021 to allow Mr. Baisch to submit additional supporting documents.

The ALJ must consider two issues in sequence: whether the lateness of Mr. Baisch’s appeal disqualified him from challenging the October 13, 2020 determination, and if not, whether Mr. Baisch meets the eligibility requirements of the Act from the week ending May 8, 2020.

FINDINGS OF FACT

Mr. Baisch worked as an agricultural laborer for Jacobson’s Greenhouse in Wasilla. He described a season beginning in February and stretching through the end of July or beginning of August, then beginning again the day before Thanksgiving for

¹ The claimant’s name is properly spelled BAISCH, pronounced “Baysh”. The caption is changed to show the correct spelling of the claimant’s name.

Christmas trees, ending the day before Christmas. He worked only half days, reporting about 4.5 hours a day, five days a week on average in 2019. Mr. Baisch began working in February 2020 for Jacobson's Greenhouse, but the impact of the pandemic on the business resulted in fewer hours in March and April. Mr. Baisch described how supplies of seedlings from the vendor in Colorado could not be timely delivered, and people were not shopping as much due to pandemic restrictions. Mr. Baisch conceded he had a fight with the owner's son, but it was over personal problems, and not related to the greenhouse. He decided, he said, to leave the state in early May to see his grandmother in Detroit, Michigan, who had been hospitalized April 29, 2020 and very sick. He did not submit proof of a diagnosis of COVID-19, and in the hearing, he said the hospital allowed him to visit her. He stayed at her house until about a week after she came home from the hospital, then returned to Alaska in early June 2020. He said Jacobson's had no hours for him after he returned.

Mr. Baisch was also going through the process of a divorce. He had difficulty obtaining some records because his wife had them, and she was the person who always prepared their taxes. Mr. Baisch stated he had called the "unemployment" several times to express disagreement and then to inquire about progress on his appeal after the October 13, 2020 letter and getting a notice about overpayment. He said he supplied requested documents, but the people he spoke to did not tell him about the appeal process until the end of December.

EXCERPTS OF RELEVANT LAW

Alaska Regulation 8 AAC 85.151

Filing of appeals

(a) An interested party may file an oral or written appeal from a determination or redetermination issued under AS 23.20 and this chapter. The appeal may be filed in person, by mail, or by telephone. An oral or written protest indicating a desire to appeal is an appeal to a referee or the commissioner.

(b) An appeal from a determination or redetermination on a claim for benefits may be filed with a referee or at any office of the division. An appeal must be filed no later than 30 days after the determination or redetermination is personally delivered to the appellant or no later than 30 days after the date the determination or redetermination is mailed to the appellant's last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. *However, the 30-day period may be extended for a reasonable time if the appellant shows that the failure to file within this period was the result of circumstances beyond the appellant's control.* [italics added]

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

(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—

...

(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;

...

(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);

Unemployment Insurance Program Letter No. 16-20, Change 2, issued July 21, 2020, U.S. Department of Labor

...

4. Guidance

...

b. Clarification on item (kk) of acceptable COVID-19 related causes. . . . 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. . . . 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

Timeliness of the Appeal

The record contains several documents provided by the DETS that corroborate Mr. Baisch's account. The DETS statement of reasons for the October determination that Mr. Baisch was not eligible stated "your genuine attachment to the labor market in Alaska has not been established." (Ex. 9, pg. 29). In addition, four boxes were checked:

- The claimant did not prove that they were providing care for a family or household member who was diagnosed with Covid-19.
- The claimant did not prove that they are self-employed, an independent contractor, or a gig worker and COVID-19 has severely limited their ability to perform their normal work.
- The claimant did not prove that they had to quit their job, was laid off, or had their hours reduced as a result of COVID-19.
- The claimant was required to and did not prove that they resided or worked in Alaska during the 2019-2020 calendar year.

The DETS account notes indicated Mr. Baisch called on October 14, 2020. The call taker did not file an appeal. Instead, he was told he needed to supply tax returns and bank statements. (Ex. 1, pg. 11). He did so by October 27, 2020. On November 5, still within the appeal period, he called again. The staff member's note states it was a call "for status" and "possible OP [over payment] in PUA gave BPC contact information. Noted in D82." (Id.) There is no note that Mr. Baisch was informed that the appeal period was running on the October 13, 2020 determination. No appeal was registered.

Mr. Baisch phoned the UI Claim Center after receiving the Notice of Non-Monetary Issue Determination, as the Notice instructed: "If you disagree with the determination you have the right to file an appeal. An appeal may be filed by mail or *by telephone*." Unfortunately, an appeal was not registered by the person he called to disagree with the determination. Instead he was told to supply more information, which he did. He continued to follow up by telephone through November 5, 2020. The information he was given suggested that he was supplying information that would lead to a reversal of the decision against him – proof that he lived and worked in Alaska in 2019. I find that the ambiguous information conveyed by DETS when he called to register his disagreement with the determination, and staff failures to register an appeal, were circumstances not in Mr. Basich's control.

In short, a phone appeal should have been taken on November 5, 2020, when it was clear the claimant disagreed with the DETS determination, that the DETS had

documentation of his genuine attachment to the Alaska labor force in 2019, that he was a resident of Alaska in 2019 and 2020, and that the DETS was not acting on the information the claimant supplied in response to its requests. I find that the claimant attempted to file a telephone appeal no later than November 5, 2020, and that his appeal was therefore timely. *See, In re: Rachel A. Thomas*, OAH No. 21-0170-PUA (March 11, 2021).

Merits of the Appeal

Mr. Baisch produced documentary evidence of his genuine attachment to the Alaska labor force in 2019, as well as his Alaska residency. The owner gave a statement that was qualified by not having the personnel file to refer to. He reported he didn't think Mr. Baisch had worked for him in 2020 and that "it's been awhile since he worked for me." This statement was given April 17, 2021. Mr. Baisch established, through his testimony and records, that he was regularly employed as a seasonal worker by Jacobson's Greenhouse in 2019, that he was paid his regular hours in February 2020. Therefore, three of the five DETS reasons for denial of PUA benefits, including that stated in the October 13, 2020 Notice, lack a basis in fact.

Mr. Baisch testified that his hours were reduced in beginning in March as a result of the impact of the pandemic. He stated that he was working no more than three days a week as the vendors in Colorado were not able to supply seedlings in a timely fashion due to supply chain disruptions and non-essential businesses were closed. However, Mr. Baisch's appeal concerns only payments from the week ending May 9, 2020, so this period is not pertinent to his appeal.

Mr. Baisch was frank about his departure from the state in early May 2020, to visit his grandmother in Detroit who was hospitalized and ill. He believed she was sick with COVID-19. While the COVID-19 pandemic may have lent urgency to his desire to see her, he has not submitted proof that she was hospitalized with symptoms of COVID-19 or that she was diagnosed with COVID-19. His choice to go to Detroit interrupted his availability for work in Alaska, so he is not eligible for PUA benefits during that time under Section 2102(a)(3)(A)(ii)(I)(cc) or Section 2102(a)(3)(A)(ii)(I)(ii).

Mr. Baisch testified that when he returned to Alaska around June 2, 2020, he was told that Jacobson's had no hours for him or didn't need him. The season would ordinarily end the last week of August or first week of September. He said the owner told him "when next season came around, he'd be giving him a call". He conceded he had a big argument with the owner's son, but he said that was about personal matters not related to the greenhouse. He was not called back to work in February 2021. The owner stated that he told Mr. Baisch "I'm done and he (Mr. Baisch) left" after "he blew up on everyone a couple years ago".

The record demonstrates that Mr. Baisch did work for Jacobson's Greenhouse throughout the 2019 season, so the "blow up" was not a *couple* years ago when the statement was given. I find Mr. Baisch's testimony is credible, and the owner's statement, made without benefit of the personnel file, is less than exact. I find it more

likely than not that Mr. Baisch's employment was terminated due to lack of work on his return from Detroit, but he was not recalled to work at Jacobson's Greenhouse for reasons unrelated to the COVID-19 employment upon his return after September 5, 2020. Therefore, he was eligible for PUA benefits beginning the week ending June 6, 2020, but he is not eligible for PUA benefits under Section 2102(a)(3)(A)(ii)(I)(ii)-(kk) beginning the week ending September 12, 2020.

Notice Regarding Possible Waiver of Repayment of Benefits

Mr. Baisch testified he was told that he would have to repay paid benefits. It is not clear whether received a formal notice or was simply told this information over the telephone on November 5, 2020 when told to call the BPC. Mr. Baisch was legitimately concerned about the impact repayment would have on him. It was clear the claimant did not understand they could request repayment be waived.²

It is possible that, if he applies, Mr. Baisch will qualify for a waiver from recoupment. If a waiver is not granted, he must be given a separate appeal hearing on that issue. The present referral does not encompass these issues, and the present decision does not decide them for or against Mr. Baisch.

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

DECISION

The determination reflected in the Notice of Non-monetary Determination issued October 13, 2020, [REDACTED] is REVERSED in part and AFFIRMED in part. The claimant is not eligible for Pandemic Unemployment Assistance benefits beginning the week ending May 9, 2020 through the week ending May 30, 2020. The claimant is eligible for Pandemic Unemployment Assistance benefits beginning the week ending June 6, 2020, but he is not eligible for Pandemic Unemployment Assistance benefits beginning the week ending September 12, 2020.

Dated: May 18, 2021.

[REDACTED]

Kristin Knudsen
Administrative Law Judge

² When DETS seeks repayment, the claimant must be informed of the opportunity to seek a waiver excusing him from repayment, the opportunity for a hearing on that issue, and any other matters covered in UIPL 16-20 Change 4, Sec. 4(d) & Att. I sec. C.21.b.

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 18, 2021 the foregoing decision was served on Derick Baisch by mail and by email to: [REDACTED]. A courtesy copy was emailed to the UI Support Team and the UI Appeals Office.

[REDACTED] _____
Office of Administrative Hearings