

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

In the Matter of)
)
NATHAN SWEARINGEN) OAH No. 21-1024-PUA
) Agency No. P21 337

APPEAL DECISION

Docket Number: P21 337

Hearing Date: June 17, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Nathan Swearingen

None

CASE HISTORY

The claimant, Nathan Swearingen, timely appealed a January 5, 2021 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in June 2021. Under the 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.

A recorded hearing took place on June 17, 2021. Mr. Swearingen testified under oath. The Division of Employment and Training Services (DETS) provided written materials but 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. Swearingen established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 15, 2020. After initially approving and issuing benefits on the claim, DETS determined Mr. Swearingen was not eligible for PUA because he was not impacted by COVID-19 in a manner that made him a covered individual. It issued two denial letters. One denied eligibility for the week ending February 15, 2020, through the week ending May 30, 2020 (Letter ID L0007467170). Mr. Swearingen appeals that determination. The other denied eligibility for the week ending July 25, 2020 and ongoing (Letter ID L0007440546). Mr. Swearingen was able to commercial fish starting in mid-July and does not appeal the second determination.

DETS agreed he was eligible for PUA during weeks in which he would have been salmon fishing if COVID-19 had not disrupted his season. This was from the week ending June 6, 2020 through July 18, 2020.

The claimant is the owner and captain of a commercial fishing boat. He lives in Southeast Alaska but fishes for salmon in the Southcentral region. The salmon fishery is typically the third week of June through August 1. For weeks prior to the season, the claimant is actively working to prepare his boat.

For 15 years prior to 2020, the claimant additionally worked as a deckhand during the snow crab fishery from January through March or April. He typically earned about \$50,000 annually from that work. He decided not to return to it in 2020, before the pandemic was an issue. Instead, he decided to take his boat and fish for cod in the Kodiak area. This was a new venture that he hoped would replace some of his snow crab income while being less physically demanding.

Mr. Swearingen made plans to start preparing his boat for cod fishing in early February 2020. Due to COVID-19, the boatyard where the claimant's boat was stored restricted access in February. He could not begin working on his boat that month. He soon discovered that COVID-19 quarantines on certain imports meant he could not get all the fishing supplies he needed, including pre-ordered nets from Japan. The quarantine requirements for crew members further limited his options. This combination of COVID-related restrictions ultimately meant he could not participate in the cod fishery at all. He earned no income from spring fisheries.

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—

(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;

(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;

(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;

(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;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of 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); and

(B) does not include—

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

Unemployment Insurance Program Letter (UIPL) 16-20, Change 2 Issued by U.S. Department of Labor on 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 defines a “covered individual” as a person who is not eligible for unemployment benefits under any state or federal program and who is unemployed or underemployed because of one or more listed reasons. There is no dispute the claimant is not eligible for benefits from other unemployment programs.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that a self-employed individual who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual.

In processing this claim, DETS determined that the claimant’s self-employment was impacted by COVID only during the weeks in which he was unable to prepare for and participate in the summer commercial salmon fishery. Though that is his primary occupation, this overlooked the impact to his self-employment income from other fisheries. The claimant has a long history of winter/spring self-employment that has generated a significant component of his annual income. In 2020, he was transitioning from snow crab work to cod. The change of fishery and the later-starting season do not negate his tradition of working and earning income from other fisheries before the salmon season.

Mr. Swearingen could not fish the cod season as a direct result of COVID-19-related restrictions and delays. He experienced a significant diminution of his income from mid-February through late May, which was a direct result of the pandemic. This brings him within the definition of a covered individual.

The claimant meets the definition of a covered individual beginning the week ending February 15, 2020 through the week ending May 30, 2020. Combined with DETS' earlier approval, his eligibility continued through the week ending July 18, 2020, when he began actively fishing for salmon.

DECISION

The determination dated January 5, 2021 (Letter ID L0007467170) is **REVERSED**. The claimant is eligible for benefits from the Pandemic Unemployment Assistance program, effective the week ending February 15, 2020 through the week ending May 30, 2020. DETS previously found that Mr. Swearingen is a covered individual for the week ending June 6, 2020 through the week ending July 18, 2020, and that determination remains in effect. He is not eligible starting the week ending July 25, 2020.

Dated: June 21, 2021

[REDACTED]

For: Kathryn Swiderski
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 June 21, 2021 the foregoing decision was served on Nathan Swearingen (by mail and email to: [REDACTED]). A courtesy copy has been emailed to the DETS UI Technical Team, UI Appeals Team, & UI Support Team.

[REDACTED] _____
Office of Administrative Hearings