

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

In the Matter of )  
 )  
JOB POLLY ) OAH No. 21-1034-PUA  
 ) Agency No. P21-349

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**APPEAL DECISION**

**Docket Number:** P21-349

**Hearing Date:** June 16, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Job Polly  
Karl Childs

None

**CASE HISTORY**

The claimant in this case, Job Polly, appealed a February 5, 2021 determination which denied him Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0009667021, issued on February 8, 2021.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in May 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 matter was heard in a recorded hearing on June 16, 2021. Mr. Polly and Mr. Karl Childs testified under oath. At its own election, the Division of Employment and Training Services (DETS) provided only written materials for the hearing, and was not a live participant.

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

**FINDINGS OF FACT ON ELIGIBILITY**

Mr. Polly established a claim for Pandemic Unemployment Assistance benefits that was effective beginning the week ending February 15, 2020. The Division ultimately found that, beginning the week ending July 4, 2020, he was not impacted by COVID-19 in a manner that made him a covered individual under the program, believing that he quit work with APEX Construction due to a lack of transportation and did not make reasonable attempts to adjust prior to quitting.

Mr. Polly is self-employed doing a variety of odd jobs including painting houses, dry wall repair, mowing lawns and other construction work. In 2019, Mr. Polly worked as an independent contractor for Karl Childs, who owns a business known as A Clear Carbon Restore. Mr. Polly did paint and drywall repair work for Mr. Childs in 2019. Mr. Polly testified that he did work for Mr. Childs in early 2020 but Mr. Childs was equivocal on that point. Both agreed, however, that Mr. Polly has done work for Mr. Childs on and off since 2014. Mr. Polly earned \$4,440 from April 10 to December 30, 2019 working for Mr. Childs. Mr. Childs would have retained Mr. Polly for work in 2020, but those jobs did not materialize after the onset of the pandemic because homeowners did not want contractors coming into their homes as a result of health concerns about COVID-19.

Mr. Polly was unable to secure work until July 2020 because the COVID-19 pandemic made people concerned about allowing contractors in their homes to do work. Homeowners started doing the odd jobs themselves because of concerns about exposure to COVID-19 and increased costs involved in sanitizing tools. In July 2020, Mr. Polly obtained work with APEX Construction doing work in the basement of a house in Palmer. He worked two days on that job: July 6 and 7. He testified that the workers were not social distancing from each other or sanitizing tools. The workers were social distancing from the homeowners. Mr. Polly was replaced by APEX on July 8 when he could not get to Palmer for work. He testified that he made arrangements to use his parents' car to drive to Palmer on Wednesday, July 8, but when he went to purchase gasoline for the car he learned that he had not received his expected PUA payment in his bank account. As a result, he could not purchase fuel to make the trip to Palmer and back to Anchorage. When he called APEX about not being able to get to the job site, he was told he would be replaced.

Mr. Polly testified that he contacted the Commissioner of Labor's Office and DETS subsequently began paying him PUA benefits although such a re-determination does not exist in the record provided to OAH. Mr. Polly apparently started receiving PUA benefits again in July but the benefits ended again in November 2020.

### **RELEVANT STATUTORY PROVISIONS**

#### **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).

### **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.

### **UIPL 16-20, Change 5 Issued by USDOL February 25, 2021**

In addition to the current COVID-19 related reasons identified in items (aa)-(jj) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act and the one reason previously approved under the Secretary’s authority provided in Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act (see Section 4.b. of UIPL No. 16-20, Change 2, and Section C.1.kk. of Attachment I to UIPL No. 16-20, Change 4), the Department hereby establishes additional COVID-19 related reasons under which an individual may self-certify to establish eligibility for PUA. These additional COVID-19 related reasons are described below.

i. Individuals who refuse to return to work that is unsafe or accept an offer of new work that is unsafe. The Department approves the following COVID-19 related reason for an individual to self-certify for PUA eligibility: “The individual has been denied continued unemployment benefits because the individual refused to return to work or

accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes, but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.”

For purposes of this COVID-19 related reason, unemployment benefits include regular UC, Unemployment Compensation for Federal Employees (UCFE), Unemployment Compensation for Ex-Servicemembers (UCX), PUA, PEUC, EB, Short-Time Compensation (STC), Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and payments under the Self-Employment Assistance (SEA) program.

An individual is generally denied unemployment benefits if the state determines that the work is suitable and the individual did not have good cause for refusing such work. This new COVID-19 related reason applies only to individuals who had already been receiving unemployment benefits but were determined to be ineligible or disqualified under state law because they refused an offer of work at a worksite that was not in compliance with local, state, or national health and safety standards directly related to COVID-19. This is a separate COVID-19 related reason from item (ii) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act, which provides eligibility to an individual who quits their job as a direct result of COVID-19.

For example, an individual may self-certify under this new COVID-19 related reason who has previously been denied because the state law does not consider health and safety standards when assessing suitability or good cause, or who has previously been denied because the health and safety standards considered under state law are more restrictive than the local, state, or national COVID-19 health standards.

## **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 other State or Federal program and who is unemployed or unable to work because of one or more listed reasons related to the COVID-19 pandemic.

As a self-employed person, Mr. Polly is not eligible for unemployment benefits under any other state or federal program.

As to the second part of the “covered person” test for PUA benefits, the preponderance of the evidence shows that Mr. Polly suffered “a significant diminution of services as a result of COVID-19” and significant diminished income compared to 2019.

Mr. Polly's long history of this kind of work puts him squarely within the independent contractor category recognized in Change 2. Consequently, the tribunal finds that Mr. Polly meets the second prong of eligibility as a "covered person." Mr. Polly's handyman business was an established concern that he had traditionally engaged in since 2014. He has shown that he has suffered "a significant diminution of services as a result of COVID-19" and significant diminished income.

DETS determined that Mr. Polly "quit work with APEX on 7/7/2020 due to lack of transportation and did not make reasonable attempts to adjust prior to quitting." The tribunal finds that Mr. Polly did not voluntarily quit his work with APEX but rather he was replaced by APEX when his unforeseen last-minute inability to get to the job site occurred. Mr. Polly was "otherwise able to work and available for work" but because his PUA benefits were not deposited in his bank account that Wednesday, he could not purchase gasoline to make the round-trip to Palmer. There is no evidence otherwise in the record from APEX. The record supports Mr. Polly's statements that he did not receive PUA benefits on July 7.<sup>1</sup> The tribunal finds Mr. Polly continued to be eligible as a "covered individual" by virtue of the greatly diminished services and diminished income as a result of the COVID-19 pandemic. He continued to be "unemployed [and] partially unemployed" as a result of the COVID-19 pandemic.<sup>2</sup>


The Tribunal finds the claimant meets the definition of a covered individual – under Change 2 having suffered "a significant diminution of services as a result of COVID-19" -- effective the week ending July 4, 2020.

### **DECISION**

The determination issued on February 8, 2021 (Letter ID L0009667021) is **REVERSED**.

*The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program from the week ending July 4, 2020 and continuing.*

Dated: June 21, 2021

  
Breck C. Tostevin  
Administrative Law Judge

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<sup>1</sup> Exhibit 1 at 20. (PUA payment "received date" 28 June 2020 and 13 July 2020).

<sup>2</sup> Mr. Polly testified that the APEX Construction worksite in Palmer was not in compliance with COVID-19 safety mandates. The tribunal does not find, however, that Mr. Polly refused to return to work because of those alleged violations of safety mandates. Consequently, Mr. Polly is not a "covered individual" by virtue of UIPL 16-20, Change 5.

### **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 Job Polly (by mail and by email to [REDACTED]). A courtesy copy was emailed to the DETS UI Technical Team, UI Appeals Team & UI Support Team.

[REDACTED]  
Office of Administrative Hearings