

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

In the Matter of)	
)	
OWEN KELLEY)	OAH No. 21-1132-PUA
_____)	Agency No. P21-354-03

APPEAL DECISION

Docket Number: P21-354-03

Hearing Date: August 24, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Owen Kelley

None

CASE HISTORY

The claimant, Owen Kelley, appealed a February 2, 2021 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. That decision was recorded in Letter ID L0009450509. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in June 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 August 24, 2021. Mr. Kelley testified under oath. At its own election, the Division of Employment and Training Services (Division) 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

Mr. Kelley established a claim for Pandemic Unemployment Assistance benefits effective February 8, 2020. Initially the Division approved benefits, then subsequently issued a redetermination deeming him ineligible because he was not impacted by COVID-19 in a manner that made him a covered individual under the program. The Division ultimately believed that his loss of income in 2020 was not directly related to the pandemic.

Owen Kelley lives and works out of Juneau, Alaska. For approximately the last 15 years leading up the pandemic, including 2019, his profession was serving as a deckhand on fishing boats. In 2019, he made his usual income of approximately \$50,000 in this profession.

Deckhands are typically hired as gig workers and are paid a percentage of the earnings of the boat at a rate set by each individual skipper. While generally hiring is informal and skippers and deckhands find each other by word of mouth, Mr. Kelley has consistently been hired by the same skippers for multiple consecutive years. Due to his long-standing relationships with them, he is given a favorable share rate.

The claimant generally works the same fishing schedule every year. February through March he works on a boat harvesting Tanner crabs. From March through October Mr. Kelley works as a deckhand on different boats that are specifically dedicated to either longlining, gillnetting or seining. He finishes the year on a Dungeness crab boat from October to December.

In 2020 Mr. Kelley began crabbing in February, as per his typical work season. At the time, COVID-19 had not yet begun to appear in Alaska. He was hired by the same skipper he worked for in 2019, and he reported earning good wages from the harvest.

It wasn't until the beginning of March 2020 that the pandemic began noticeably disrupting the fishing industry. The US and global foodservice sector suffered a marked drop as casinos, restaurants, hotels and cruises had far fewer patrons. Cuts in the number of airline flights hampered transportation of fresh fish to the lower 48, and created difficulties getting sufficient numbers of processing workers. Operating costs rose as measures were implemented to prevent the spread of Covid-19 among workers and communities. Clearly, the pandemic had a significant and direct impact on many aspects of the Alaskan fishing industry.

Following the Tanner crab season Mr. Kelley would have worked on a longline boat fishing for halibut, as he has done for years. Due to the pandemic, however, halibut prices fell, and deckhand positions were eliminated as boat captains tried to cut costs by sharing a boat. Mr. Kelley's usual position on a longline boat was not available.

From June through September Mr. Kelley habitually worked on gillnet and seiner boats fishing for salmon. In 2020 he was hired by the usual skippers, but that year the salmon had a very weak run.¹ Mr. Kelley's earnings during these months were nominal compared to years prior.

From October to December Mr. Kelley planned to work his usual position as a deckhand on a Dungeness crab boat. Due to the low price of Dungeness crab during the pandemic, however, the skipper Mr. Kelley habitually worked with cancelled his scheduled stint crabbing and withdrew Mr. Kelley's deckhand job offer right before the

¹ The poor run was widely recognized and well documented. One of many articles covering this topic was, Laine Welch, *2020 Salmon Returns Have Been So Poor That Alaska Communities Already Are Claiming Fishery Disasters*, Anchorage Daily News (August 11, 2020), <https://www.adn.com/business-economy/2020/08/11/2020-salmon-returns-have-been-so-poor-that-alaska-communities-already-are-claiming-fishery-disasters/>.

start of the season. Mr. Kelley was forced to take a far less lucrative job on a shrimping boat.

In December 2020 and January 2021 Mr. Kelley did not work, adhering to his usual deckhand work schedule. During these months there are few fisheries operating in Alaska due to poor weather.

In 2020 Mr. Kelley earned approximately \$28,000, or around half of his usual annual income of \$50,000.

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—

* * *

(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 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 listed reasons related to the COVID-19 pandemic. The claimant’s history of independent contractor employment did not represent employment that would qualify him for a claim for regular or emergency unemployment benefits in 2020.

Guidance from the US Department of Labor in UIPL 16-20 Change 2, above, holds that independent contractor who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual. Mr. Kelley has a very strong and established history of securing and working deckhand jobs in the local fisheries.

From February through the end of March 2020 Mr. Kelley worked as a deckhand on a Tanner crab boat, and the season was very good. He clarified that he is not seeking PUA benefits during this period.

For the weeks ending April 4 through June 6, 2020 Mr. Kelley would have worked on a longline boat fishing for halibut, as he had done for years. He had a reasonable expectation of returning to the same boat he worked on in 2019. However, due to the pandemic, deckhand positions were eliminated. During this period Mr. Kelley was a “covered individual” under the Cares Act, as he suffered a significant diminution of work as an independent contractor due to COVID-19.

For the weeks ending June 13 through September 5, 2020 Mr. Kelley worked as a deckhand on gillnet and seine boats, which predominantly harvest salmon. The Alaskan salmon run for 2020 was very weak, which had a negative financial impact on the industry that was unrelated to the pandemic. Therefore, for the weeks Mr. Kelley was working on boats harvesting salmon he is not a “covered individual” under the Cares Act. The fluctuations in the salmon market were not related to COVID-19.

For the weeks ending October 3 through December 5, 2020, Mr. Kelley’s job offer as a deckhand on a Dungeness crabbing boat was withdrawn. The skipper opted not to take his boat out due to the direct impact of the pandemic on the Dungeness fishery.

During these weeks Mr. Kelley qualifies as a “covered individual” under the Cares Act, as he experienced a significant diminution of work as a deckhand for the Dungeness crabbing season.

For the periods during which Mr. Kelley is determined to be a “covered individual,” the PUA benefits to which he is entitled under the CARES Act may be adjusted due to income he earned as a deckhand.

This decision may leave Mr. Kelley with an overpayment balance. *The Division has advised that claimants with an overpayment can request a waiver of recoupment by calling Benefit Payment Control at 907-465-2863, 1-888-810-6789, or emailing jnu.bpc@alaska.gov. If a waiver is not granted, separate appeal rights apply from the denial of a waiver.*

DECISION

The determination in Letter ID L0009450509 is **AFFIRMED** for the weeks ending February 8, 2020 through March 28, 2020, and the weeks ending June 13, 2020 through September 5, 2020. It is **REVERSED** for the weeks ending April 4, 2020 through June 6, 2020 and the weeks ending October 3, 2020 through December 5, 2020. This case is REMANDED for recalculation of an overpayment, if any, based on this decision.

Dated: August 26, 2021

A black rectangular box redacting the signature of Danika B. Swanson.

Danika B. Swanson
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 August 27, 2021, the foregoing decision was served on Owen Kelley (by 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