

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

In the Matter of )  
 )  
MARISA VANDYKE ) OAH No. 21-1079-PUA  
 ) Agency No. P21-367

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**APPEAL DECISION**

**Docket Number:** P21-367

**Hearing Date:** June 22, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Marisa VanDyke

None

**CASE HISTORY**

The claimant in this case, Marisa VanDyke, appealed a January 11, 2021 determination which denied her Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0009032424, issued on January 12, 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 22, 2021. Ms. VanDyke 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 matter was referred to the ALJ to consider whether Ms. VanDyke meets the eligibility requirements of the Act.

**FINDINGS OF FACT ON ELIGIBILITY**

Ms. VanDyke established a claim for Pandemic Unemployment Assistance benefits that was effective beginning the week ending February 8, 2020. The Division ultimately found that she was not impacted by COVID-19 in a manner that made her a covered individual under the program, believing that she did not return to Alaska because of a fear of contracting the virus.

Ms. VanDyke is an occupational therapist who performs manual therapy. She has been self-employed in the business since January 2016. She works with older clients out of a space that she rents from a gym in Anchorage known as BFit & Well. Most of

her clients are over 50 and many are over 70 years of age. In August 2019, she moved to Virginia on a temporary basis to open a second office. Her plan was to work in Virginia during the winter to be closer to her parents who were having health problems, and to return to Alaska in May 2020.

She did not work in Virginia as an occupational therapist. When she arrived, she learned that the licensing of her business is very different than in Alaska. She could not directly market to individuals but would have to have clients referred to her through a physician. She learned that she needed a massage license in Virginia and began a licensing training program with a graduation date of April 24, 2020. Because of the March 12 shutdown in Virginia due to COVID-19, she could not complete her hands-on work for her license. She was not allowed back in to complete the program until June 2020. Testing centers were not accepting applicants so she did not get her license in Virginia until July.

Ms. VanDyke did not return to Alaska to continue her self-employment because the Bfit & Well Gym had been shut down by the COVID-19 pandemic, and later only opened with limited occupancy. As a result of these limitations, the gym owner took over Ms. VanDyke's workspace. She contacted her clients and the owner of the gym and learned that the demand for in-person services was non-existent because of the elderly clients' concern about COVID-19. As a result, she did not return to Alaska and focused on completing her licensing in Virginia.

Ms. VanDyke earned \$22,547 from her business in 2019. In contrast, she only earned \$8,407 working as an online instructor for a Virginia Massage business in late 2020. She testified that the online instruction work was not in her field of occupational therapy, but that her medical training allowed her to do the online training work. Ms. VanDyke did not earn any money in Alaska in 2020 because of the COVID-19 pandemic.

Ms. VanDyke first applied in the State of Virginia for PUA benefits but was denied. She then applied in Alaska. She was paid benefits effective the week ending May 9, 2020 through September 19, 2020. After the Division's redetermination of January 12, 2021, Ms. VanDyke received a notice of overpayment in the amount of some \$9,400.

## **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.

### **DLWD’s FAQ Page on PUA**

Q: If I performed self-employment in more than one state, in which state should I file my PUA application?

A: A self-employed individual must file with the state where the individual was working at the time of becoming unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in section 2102(a)(3)(A)(ii)(I) of the CARES Act. This is true even if the individual is living in one state and is self-employed in another state. If an individual worked in more than one state at this time, the individual may file in any of those states.

## 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.

The claimant in this case is an independent business owner who does not qualify for regular unemployment benefits. Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, cited above, holds that a self-employed individual who experiences a significant diminution in services as a direct result of the pandemic may be considered a covered individual. That is the situation in this case. Ms. VanDyke’s Alaska occupational therapy work was disrupted by the COVID-19 pandemic. Her clients were elderly and were very fearful of in-person services. The gym space that she utilized closed for a period and when it re-opened, the occupancy limitations resulted in her losing her rental space.

Ms. VanDyke did not have the necessary massage license in Virginia for her to open her second office and conduct her business. Consequently, she was not self-employed in May 2020 in multiple states. As the DLWD’s Frequently Asked Question cited above explains, “a self-employed individual must file with the state where the individual was working at the time of becoming unemployed, partially employed, or unable or unavailable to work because of a COVID-19 related reason. This is true even if the individual is living in one state, and self-employed in another state.” (emphasis added).

Here, Ms. VanDyke was living in Virginia but was only self-employed in the State of Alaska. Her Alaska self-employment was first affected by the COVID-19 pandemic in May 2020 when her client base was lost because of their fears of exposure to COVID-19. Consequently, she did not return to Alaska to resume work in May as she had planned. The reason she did not return was not health concerns about air travel, but rather the lack of clients and the disruption to her workspace as a result of the COVID-19 pandemic. Ms. VanDyke has shown that she was “unemployed” and that she has suffered “a significant diminution of services as a result of COVID-19.” She has also demonstrated significant diminished income as a result of the COVID-19 pandemic when compared to her 2019 income working as an occupational therapist.

This tribunal finds the claimant meets the definition of a covered individual beginning the week ending May 9, 2020 and continuing thereafter.

## DECISION

The determination issued on January 28, 2021 (Letter ID L0009032424) is **AFFIRMED** as to the week ending February 8, 2020 until the week ending May 2, 2020 and **REVERSED** beginning the week ending May 9, 2020. *The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program from the week ending May 9, 2020 and ongoing.*

Dated: June 25, 2021

  
Breck C. Tostevin  
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 25, 2021 the foregoing decision was served on Marisa VanDyke (by mail and by email to ). A copy was emailed to the DETS UI Technical Team, UI Appeals Team & UI Support Team.

  
Office of Administrative Hearings