

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

In the Matter of)
)
JAMES BARRETT) OAH No. 21-1018-PUA
) Agency No. P21-380
_____)

APPEAL DECISION

Docket Number: P21-380

Hearing Date: July 20, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

James Barrett

None

CASE HISTORY

The claimant, James Barrett appealed a July 29, 2020 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor registered Mr. Barrett's appeal on February 4, 2021 and referred the appeal to the Office of Administrative Hearings on June 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.

The matter was heard in a recorded hearing on July 20, 2021. Mr. Barrett appeared telephonically and testified under oath. The Division of Employment and Training Services (DETS) chose not to send a representative or to make one available by telephone; instead, it relies on the written record. The record remained open until Friday, July 23, 2021 to allow Mr. Barrett to file documents and closed at the end of the day.

The issues before the ALJ are whether the claimant filed a timely appeal and, if so, whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

James Barrett established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. The Division determined that the claimant was not eligible for PUA benefits because he was not impacted by COVID-19 in a manner that made him a covered individual under the program. The adjudicator noted Mr. Barrett's license to practice was suspended and he had no business license. He was denied benefits based on failure to establish an "attachment to the job market" in 2019 and 2020.

Mr. Barrett is an attorney living in Juneau, Alaska. He testified he was too ill to work until November 2019, when his physician released him to return to work. He signed

up with online self-employment services, (Freelancer.com and Fiver.com) but found these were untenable. He signed up as to work online for Amazon’s “Mechanical Turk”, a crowd-sourcing application for completing specific tasks, but it did not generate much income and he was only paid in Amazon gift cards. He stated he sought work doing real property work and criminal defense. By January 2020, he testified, he had five real property clients for evictions and two criminal defense clients. He testified he was unable to earn money on the evictions because the CDC moratorium limited the ability of property owners to evict tenants. He testified he could not earn money pursuing matters for criminal defense clients because the court system shut down and trials were not being held. Finally, he testified he lost about 10% of his volume of business because he was unable to be inside the state courthouse, where he would pick up clients or referrals.

The DETS issued a Notice of Non-Monetary Issue Determination COVID-19 Eligibility denying PUA benefits to Mr. Barrett on July 30, 2020. On August 13, 2020 and October 23, 2020, Mr. Barrett sent emails to the UI Appeals email address (appeals@alaska.gov) properly detailing his appeal, giving the claim number and the letter ID of the determination notice. Each time, the UI appeals clerk responded and instructed him to “Please email dol.pua@alaska.gov . . . They will be able to help you with all questions and any appeals that would be available to file.” The appeal letters were evidently not forwarded to the PUA address. On February 4, 2021, Mr. Barrett wrote again, this time to the dol.pua address. An alert technician forwarded the email to her supervisor with a note that said, “I don’t think that an appeal was ever filed for this claimant *even though he sent several emails in August.*” (Ex. 1, pg. 2).

EXCERPTS OF RELEVANT PROVISIONS OF LAW

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—

...

(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;

...

(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 No. 16-20, change 1, issued by the Secretary of Labor on April 27, 2020, added eligibility provisions under Section 2102(a)(3)(A)(ii)(I)(kk): An independent contractor may be eligible for PUA if he or she is unemployed, partially unemployed, or unable or unavailable to work because of the COVID-19 reasons listed above, including an independent contractor who experiences a “significant diminution” of work as a result of COVID-19.

8 Alaska Administrative Code 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.

APPLICATION

Timeliness.

I find that Mr. Barrett attempted to file an appeal of the adverse determination within 30 days from the determination by email on August 13, 2020. His emails were not acted upon, although evidently received by the PUA unit (Ex. 1, p. 2) in August, or they were not forwarded by the Unemployment Insurance (UI) Appeals staff to the PUA unit. In either case, this was outside his control. Although the time was lengthy, Mr. Barrett did attempt a follow-up in October before finally reaching a technician who recognized his attempt at appeal in February 2020. Therefore, the appeal is recognized as timely.

Merits.

Mr. Barrett failed to demonstrate that his ability to engage in self-employment was impacted by COVID-19; that is, that the lack of demand for his services was caused by COVID-19 and not other factors, such as technology problems and his lack of a current license to practice law. Mr. Barrett stated that he is able to provide freelance legal services without a current active license,¹ but that closure of the state law library impacted his ability to do legal research. However, online legal research programs are widely used by attorneys in the business of active practice of law. Mr. Barrett did not offer an explanation why he could not avail himself of this alternative, as attorneys everywhere in Alaska have done.

Mr. Barrett stated he was unable to pursue eviction cases for five real property clients because of the CDC moratorium on evictions so he could not get paid. In fact, filings were permitted – only hearings were suspended, and judges were permitted to find “good cause” to suspend them.² This order was later modified May 29, 2020 (Third Presiding Judges' Statewide COVID-19 Pandemic Administrative Order) and on October 29, 2020 by First Judicial District Presiding Judge Stephens adopted an eviction protocol that (1) was limited to proceedings based on non-payment of rent; (2) permitted continued filings and (3) only halted proceedings if the tenant filed a truthful Declaration consistent with the CDC’s declaration form. While an outcome that led to prompt eviction may have been diminished, there were still opportunities for paid legal work in making the filings by attorneys admitted to practice.

Mr. Barrett also complained that he couldn’t take his three criminal defense clients’ cases to trial, thus limiting his opportunity to earn fees. While it is true that criminal

¹ I note that Mr. Barrett, who admitted that his license to practice is suspended (for administrative reasons), claimed that he none the less sought to represent clients and he did, or sought to do, legal work on their behalf. The Bylaws of the Alaska Bar Association state at Art. III, Sec. 3 (b), Delinquent and Suspended Members, that “Members suspended for nonpayment may not engage in the practice of law while suspended, nor are they entitled to any of the privileges and benefits otherwise accorded to active or inactive members of the Alaska Bar in good standing. Suspended members who engage in the practice of law are subject to appropriate discipline under Part II of the Bar Rules.” As a member of the Alaska Bar, I am obliged to report this matter to the Bar for further investigation.

² Presiding Judge Statewide Administrative Order Governing Relaxation and Suspension of Various Court Rules Based on the COVID-19 Pandemic, issued March 23, 2020.

case jury trials were suspended (See, Presiding Judge Statewide Order, March 23, 2020), other proceedings that could be conducted by telephone or video conference in criminal cases were not. Mr. Barrett also testified that he had 27 criminal defense case “stacked up”, and that he now tells potential clients that he cannot take on new clients until the back-log is cleared. I conclude that his ability to obtain criminal defense clients was not been so impaired by the COVID-19 public health emergency that demand for legal services lessened. I find that his inability to obtain clients is closely related to his suspension for legal practice, which is not caused by COVID-19.


Mr. Barrett testified that the closure of the courthouse limited his ability to gain clients because he could not “pick-up” clients by sitting in the audience or talking to other attorneys. Loss of this opportunity, he claimed, resulted in a 10% loss in his business. I find this 10% is not a “significant diminution in demand” for his services.³

Mr. Barrett essentially claims that, but for the suspension of proceedings and closure of the courthouse, he could have made a living as an attorney, although he had not done so in years. However, Mr. Barrett’s attempts to re-enter the workforce do not constitute enough to establish the “job attachment” required by the CARES Act. The PUA eligibility determination requires that a person become unemployed or partially unemployed *because of* a COVID-19 related reason in Section 2102(a)(3)(A)(ii)(I)(aa)-(kk). Mr. Barrett did not establish that he had work, or any offer of work, that was actually disrupted by those reasons. While self-employed persons need not demonstrate loss of an actual job or job offered (as they are self-employed), they must demonstrate the existence of a legitimate self-employment business *before* the occurrence of the COVID-19 related reasons, and disruption (through lessened demand for their services, closure of a job site, inability to get to a job site, cancellation of a contract, decreased profits, etc.) because of a COVID-19 related reason. Mr. Barrett’s sign-ups on online services demonstrate he *attempted* to be self-employed, but they do not demonstrate remunerative self-employment that was disrupted by the closure of the courthouse or suspension of trials. This is consistent with U.S. Department of Labor’s interpretation in UIPL Change 2. The fact that the COVID-19 pandemic may have made it harder for Mr. Barrett to re-enter the workforce is not a basis for eligibility for PUA benefits. See, *In re Genitty*, P21 330 (June 21, 2021).

DECISION

The determination of July 29, 2020, issued July 30, 2020 (Letter ID: L0003468848), is AFFIRMED.

Dated: July 26, 2021.



Kris Knudsen
Administrative Law Judge

³ See, Unemployment Insurance Program Letter No. 16-20, change 1, issued by the Secretary of Labor on April 27, 2020.

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 July 26, 2021, the foregoing decision was served on James Barrett (by mail and email to [REDACTED]). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

[REDACTED]
Office of Administrative Hearings