

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

In the Matter of)
)
GRETA LEWANSKI) OAH No. 21-1238-PUA
) Agency No. P21 437

PRELIMINARY APPEAL DECISION AND ORDER OF REMAND

Docket Number: P21 437

Hearing Date: July 27, 2021 (record closed
Aug. 2, 2021)

CLAIMANT APPEARANCES:

Greta Lewanski

DETS APPEARANCES:

None

CASE HISTORY

Greta Lewanski initially appealed a February 23, 2021 determination (Letter ID L0010000045) which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136 for the entirety of her claim. On April 20, 2021, that adverse determination was re-determined in her favor (Letter ID 0012633110). This did not end the matter, however, because the Division of Employment and Training Services (DETS) reported that there would still be an overpayment balance of \$4,947.00 “based on adjusted earnings reported by the claimant.”¹ The record does not contain a formal letter making this determination, but both parties have consented to review of the monetary calculation in the context of this appeal of the prior, nonmonetary determination.

The Department of Labor and Workforce Development referred this matter 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 July 27, 2021. Ms. Lewanski testified under oath. At its own election, DETS provided only written materials for the hearing, and was not a live participant. However, DETS has participated in email correspondence surrounding the hearing, the scope of the hearing, and supplementation of the record.

The issue before the ALJ is whether the overpayment balance attributed to the claimant is correct.

¹ Email from Journey T. Walls-Nitschke, June 25, 2021.

FINDINGS OF FACT

Ms. Lewanski established a claim for Pandemic Unemployment Assistance benefits that was effective the week ending March 14, 2020. The history of the claim is summarized in “Case History” above.

Ms. Lewanski is an independent businessperson who had two businesses at the time COVID-19 arrived in Alaska. The first, and largest in terms of net profit, was a daycare for preschoolers. Ms. Lewanski closed the daycare on March 16, 2020 in response to COVID-19. The daycare remained closed through the end of 2020, and during the winter Ms. Lewanski came to the conclusion that she should make the closure permanent and concentrate on her other business. It is now undisputed that the closure of the daycare, and its continued closure, occurred as a direct result of COVID-19.²

The focus of this case is Ms. Lewanski’s second business, which is a flower farm. On a year-round basis, this business had net earnings of less than a quarter of those of the daycare. The farm was not substantially affected by COVID-19. Ms. Lewanski keeps superb business records for the farm.

The farm is a year-round, part-time endeavor. A particularly notable feature of this business is that expenses, cash intake, work, and revenue accrual all occur on cycles that are largely disconnected from one another. In the first four months of the year, there are high expenses—mostly involved with getting a crop in the ground—and small revenues. This does not mean the farm is operating at a loss, of course. It is just the nature of farming. In April through mid-August (tapering off steeply thereafter), there is a period when the great majority of cash intake occurs. Much of this, however, is prepayment on orders rather than true revenue; Ms. Lewanski is not entitled to keep it until she delivers. The pattern for *accrual* of revenue is different, with order fulfillment continuing at a high level through mid-September, and then picking up again for Thanksgiving and Christmas. There is a spike of high cash intake right before Christmas, as customers prepay gift subscriptions for the next year.

Ms. Lewanski reported her net income of \$5,550.34 for 2020 to DETS. In an effort to allocate it to particular weeks, she provided a spreadsheet that reported no income until all prior expenses for the year had been amortized, and then reported cash intake as income (even though much of it was prepayments/deposits). Then, as further expenses accrued, she went back to amortizing the expenses until the net became positive again. The month of December showed a positive net amount because she included in revenue \$2,000 of prepayments on 2021 sales, which offset a

² The daycare closed initially because Ms. Lewanski followed Anchorage School District school closure policies, and ASD schools were closed to stop the spread of COVID-19. But it later became impractical to reopen because Ms. Lewanski has her own kindergartener who attends a charter school that remained closed to in-person learning until mid-March of 2021. Ms. Lewanski cannot simultaneously run a daycare for multiple infants and supervise her son in his attendance of “virtual” kindergarten.

large number of accrued 2020 expenses. All of this was done in good faith, but it results in a cycle of weekly earnings that—on a weekly basis—is not particularly close to economic reality. It allocates almost 80% of net “income” for the year to a span of eight weeks in June and July, whereas the percentage of annual cash intake in that period was only 30%, and the percentage of accrued revenues (corresponding to product deliveries) was likely also quite low. As it happens, the eight weeks with the greatly inflated “earnings” under this methodology are weeks for which a high “income” disqualifies a claimant from relatively large PUA benefits. Thus, the distorted methodology probably operates to the claimant’s disadvantage.

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 defines a “covered individual” as a person who is who is unemployed because one of a list of reasons related to the COVID-19 pandemic and is not eligible for unemployment benefits under any State or Federal program. It is undisputed that Ms. Lewanski, an independent contractor, was not eligible for unemployment benefits. It is also undisputed that her primary business was effectively shut down by the pandemic and that she is eligible for PUA benefits under US Department of Labor UIPL 16-20 Change 2, quoted above (*see* Letter ID 0012633110). The only issue in this case is not underlying eligibility, but rather a factual accounting issue of how the limited earnings from Ms. Lewanski’s secondary, smaller business should be allocated for purposes of calculating weekly benefit amounts.

In approaching this task, we must bear in mind that Ms. Lewanski is not claiming PUA eligibility based on lost farming income. Farming income is just a background fact affecting the benefit amount due her for PUA eligibility based on a different work activity.

From an accounting standpoint, allocating the income from farming on a weekly basis is extremely challenging. True income, of course, is net income, not gross receipts. Thus, to simply look at cash arrivals is highly misleading because the cash is payment for goods for which there is a “cost of goods sold,” which needs to be deducted to arrive at a net income amount. And to calculate the cost of goods sold correctly, one would need to take the prior expenses and allocate to the goods sold in a given week the portion of those expenses attributable to those goods. This might be relatively easy for merchandise, where goods are purchased from a wholesaler for a cost that can be traced. For crops grown from seed, it is far more complex. The whole process is further complicated by the existence of prepayment contracts. In Ms. Lewanski’s business, much of the money comes in ahead of time, coupled with an obligation to deliver a product later on. But the money is not fully hers until the product is delivered.

If this were a farming business generating a million dollars in income a year, a business accountant could likely devise a good mechanism for allocating income to weeks. But Ms. Lewanski’s secondary farming business generated only \$5,540.34 in net income in 2020, and this kind of analysis is not practical.

There is no law directly controlling the allocation of farming income on a weekly basis in the context of PUA. There is, however, guidance to be drawn from the wage-based unemployment system. Regulation 8 AAC 85.075(a) says that if “wages in the base period of an individual are not paid at least once a calendar month, the wages will be allocated in equal proportion to all weeks during which the services were actually performed.”

Ms. Lewanski did not receive net farming income (analogous to wages) at least once a calendar month. Therefore, applying the principle of 8 AAC 85.075(a), her net farming income would need to be “allocated in equal proportion to all weeks during which the services were actually performed.” Significant services in her farming work are performed throughout the year, with much winter and spring work devoted to getting the crops in the ground (or greenhouse), extensive harvesting and delivery over the summer and fall and around the holidays, and marketing activity interspersed throughout.

If the net income reported for 2020—\$5550.34—is allocated “in equal proportion to all weeks in which services were actually performed,” the weekly income amount for all weeks of 2020 is:

$$\$5550.34 \div 52 = \mathbf{\$106.74}$$

This figure should be used for Ms. Lewanski’s reportable “wages” for all weeks of 2020.

The matter will be remanded to DETS for one week to enter this number into her benefit calculation for all weeks of 2020. Benefits for some weeks will go up, and for others will go down, but with the benefit of DETS software, the calculation will be straightforward.

Ms. Lewanski had not filed for any PUA weeks in 2021 as of the date of hearing and did not expect to do so. In the unlikely event that she has since done so, this decision does not apply to weeks after the week ending January 2, 2021.

ORDER OF REMAND

The overpayment amount previously calculated for Ms. Lewanski will be vacated upon issuance of a final decision in this case. *This matter is remanded to DETS to calculate an overpayment amount using \$106.74 as Ms. Lewanski’s weekly income in each week for which PUA benefits were claimed in 2020.* The recalculation shall be filed with OAH and served on Ms. Lewanski by email no later than September 14, 2021. By supplying the recalculation, DETS does not waive its right to appeal the underlying reasoning of this order, upon issuance of a final decision.

Dated: September 7, 2021



Christopher Kennedy
Administrative Law Judge

APPEAL RIGHTS

This is not a final decision. Once the remand period is complete, OAH will issue a final decision containing the above holdings and incorporating the overpayment amount calculated by DETS for the weekly income as revised. Appeal rights will then be available to both parties.

CERTIFICATE OF SERVICE

I certify that on September 7, 2021 the foregoing decision was served on Greta Lewanski (by mail and by email). A copy was emailed to the UI Support Team, UI Technical Team, and UI Appeals Office.

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Office of Administrative Hearings