

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

In the Matter of)

BONG LEE)

OAH No. 21-0850-PUA

Agency No. P21-485

APPEAL DECISION

Docket Number: P21-485

Hearing Date: May 26, 2021

Claimant Appearances:

DETS Appearances:

Bong Lee

None

Young Lee

CASE HISTORY

The claimant established a claim for Pandemic Unemployment Assistance (PUA) benefits effective the week ending March 21, 2020. The Division of Employment and Training Services (DETS) determined the claimant was not a “covered individual” eligible for PUA benefits and issued a Notice of the determination to the claimant December 29, 2020 [REDACTED]. The determination was timely appealed January 14, 2021.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings on May 3, 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.

This appeal was heard in a recorded hearing on May 26, 2021. The DETS chose to not to appear and provided only written materials for the hearing. With assistance from an independent interpreter secured by the Office of Administrative Hearings,¹ Mr. Lee testified under oath and presented his wife, Young Lee, as a witness. The record remained open until close of business May 27, 2021 to allow Mr. Lee to submit copies of his 2019 and 2020 tax returns.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act from the week ending March 21, 2020.

¹ Language Link independent interpreter Mr. Jung, ID 4936 is commended for his patience.

FINDINGS OF FACT

Mr. Bong Lee owns the Twin Dragon Chinese Restaurant in Dillingham, Alaska. His wife works as a cashier and waitress at the restaurant. They have operated this restaurant, located in the old Grant Aviation building by the airport on Airport Rd., for more than 20 years. Every year, they close the restaurant for the winter holidays and reopen in spring, usually in March, after a month of cleaning, retrofitting, and preparing for business. Most of their business is in the summertime, from travelers and commercial fishermen.

The town of Dillingham (legally a first-class city) has only 2,327 people as year-round residents,² perhaps as many as 5,000 if surrounding communities are included. There is one hospital, 16-bed Kakanak Hospital, an Alaska Native community hospital operated by Bristol Bay Area Health Corporation with a helipad for transporting patients to Anchorage. It has only one critical care bed.

Ms. Lee receives wages and tips for her work as cashier and waitress as well as helping with other tasks of the business. Mr. Lee does the cooking and owns the restaurant. His business earned \$60,237 in profit in 2019. In 2020, he had no sales, and lost over \$51,000 because he had to pay taxes, utilities, for goods, and the cost of his space, even if he could not use it.

Mr. Lee and his wife worked at the restaurant in February and March getting it ready to open. They followed the news about the coronavirus on their Korean new outlets. Then, on March 17, 2020 the Governor issued COVID-19 Health Mandate 3 closing all restaurants and bars with dine in service. March 27, 2020, he issued COVID-19 Health Mandate 11, requiring non-essential businesses to remain closed except for the minimum necessary to maintain the value of the business, and Mandate 12, limiting travel within the state.

On March 19, 2020, the Dillingham City Council approved the closure of certain public facilities through April 5, 2020 and adopted Resolution 2020-11 Declaring a Public Health Disaster Emergency per AS 26.23.140 and Dillingham Municipal Code Section 2.64.0020(B) to exist in Dillingham. This was followed on April 2, 2020, by an emergency ordinance creating an essential air travel district including on Airport Rd. where Mr. Lee's restaurant was located inside the Grant Aviation building (City of Dillingham EO No. 2020-06(A)). According to the ordinance, "all property and structures within the Essential Air Travel District may only be used for purposes of providing Essential Air Travel Services and accessory uses for Essential Air Travel Services. All other uses within the Essential Air Travel District

² Alaska Dept. of Commerce, Community & Economic Development, Division of Community & Regional Affairs, Community Database Information Portal, <https://dced.maps.arcgis.com/apps/MapJournal/index.html?appid=f9a56dbfc7c9444d813694cd52a74c15#>.

are prohibited.”³ A person could apply to the City Manager for a permit to use property within the District, and it could be granted if the person showed the need to use the property was “sufficiently similar to a Permitted Use.”⁴ Persons entering the District without a permit were subject to a \$1,000 fine and a 14-day quarantine.⁵

Mr. Lee testified he personally was very frightened of catching the coronavirus because he is diabetic and over 55 years old. It was very difficult to close, but he was afraid of catching the coronavirus. They had no masks and cleaning materials were difficult to come by. The town’s supplies of goods were disrupted because air freight, the source of most goods, was disrupted. Other restaurants in Dillingham also closed. Now, he has reopened his restaurant, but only the hotel restaurant and a coffee shop are also open.

Mr. Lee does not listen to the Dillingham public radio or read English-Language news. His children do not live with him in Dillingham. Mr. Lee relies almost exclusively on You-tube streaming services of Korean-language stations for news. He learned about the pandemic unemployment assistance program through an interview of a Korean C.P.A. who is based in Los Angeles. He said he didn’t know that he could operate a takeout business, he did not have the supplies to do so, and he couldn’t get them.⁶ His restaurant is not set up as a to go business.

EXCERPTS OF RELEVANT 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

³ City of Dillingham EO No. 2020-06(A), section 5 (eff. date Apr. 6, 2020).

⁴ City of Dillingham EO No. 2020-06(A), section 7.

⁵ City of Dillingham EO No. 2020-06(A), sections 12, 15.

⁶ He explained he could not do the “sanitation” for takeout, but what he meant precisely by this was not explained. He may have meant that he doesn’t have the physical set up, like a take-away window, or that he couldn’t get the sterile containers he would need to do takeout.

(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—

. . .

(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);

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 DETS denied Mr. Lee’s claim for pandemic unemployment assistance because “Restaurants were not forced to close, and claimant did not state why he refused to do carry out or open with reduced capacity.” (Ex. 1, pg 6). This statement ignores the Governor’s Health Mandate 3.1 closing all dine-in restaurants from March 18 at 5:00 pm through April 1, at 5:00 pm, Health Mandate 11 *closing* all non-essential businesses from March 28, 2020, and focuses only on the Governor’s Health Mandate 16 issued April 22, 2020 permitting restaurants to open dine in services at 50 % capacity, with tables 10 feet apart among other restrictions.

The DETS determination also completely ignored the City of Dillingham’s legal imposition of a local emergency order closing the Essential Air Travel District to all but “permitted uses” on Airport Rd. on April 2, 2020.⁷ Mr. Lee stated he did not know that he could operate a take-out business, and, given the City of Dillingham’s local emergency order, that is not an unreasonable interpretation of the local law. Thus, until expiration of the local emergency ordinance on August 9, 2020, Mr. Lee’s business was effectively closed by the City of Dillingham’s emergency order because it was not a “permitted use” within the district.

Finally, the City of Dillingham’s EO No. 2020-20, section 6.C continued the requirement that “all customers, employees and visitors of businesses and organizations that are open must wear face masks covering their nose and mouth . . . when entering and when inside those premises.”⁸ No exception was made for eating. Thus, it was effectively impossible for Mr. Lee to have operated his restaurant *as designed* through October 9, 2020 due to local ordinance.

The standard applied by the DETS to Mr. Lee’s self-employment is that he must be “forced to close.” However, the Secretary of Labor does not require that a self-employed person be “forced to close”, only that there be a “significant diminution” of demand for services. In this case, Mr. Lee operated a dine-in restaurant in an old building on Airport Road. His wife, Ms. Lee, testified that it could seat from 40 to 50 persons. Operating at even half capacity after October 9, 2020 would have reduced his already diminished ability to provide services, especially as persons would have to be seated 10 feet apart. Passage of travelers was significantly diminished, first by requirement of a travel permit, and then because of continuing local 14-day quarantine rules, which prevented many travelers from using local businesses, and finally by the end of the fishing season in Bristol Bay.

The DETS argues he could have operated a “take-out” and thus avoided complete closure. Again, the standard set forth by the Secretary of Labor does not require complete suspension of services. Nor is a self-employed person required to act unreasonably to demonstrate significant diminution of demand. Here, Mr. Lee’s business was not set up for take-out and Mr. Lee did not have necessary supplies or “sanitation” for such a business; instituting such a change, and complying with hygiene and capacity limits (such as no more than 5 persons allowed in the room to collect food) would not have resulted in recovery of his already significant losses

⁷ The Dillingham City Council later extended limits on activity in the Essential Travel District to June 29, 2020 (City of Dillingham EO No. 2020-07, passed April 30, 2020) and again to August 8, 2020 (City of Dillingham EO No. 2020-15, passed June 9, 2020). The Dillingham City Council declined to require permits for use at that point, although it still imposed quarantines on travelers.

⁸ City of Dillingham EO No. 2020-20 (eff. date Aug. 3, 2020 through Oct. 2, 2020).


as of August 9, 2020 due to impact of the local emergency orders, the reduced number of travelers, local quarantine rules, and the end of the fishing season.

I conclude that Mr. Lee was a covered individual eligible for pandemic unemployment assistance from the week ending March 21, 2020 through the week ending October 10, 2020 under Section 2102(a)(3)(A)(ii)(I)(jj) because of local emergency orders addressing the COVID-19 public health emergency. I conclude that Mr. Lee was a covered individual eligible for pandemic unemployment assistance under Section 2102(a)(3)(A)(ii)(I)(kk) from the week ending October 17, 2020 through the week ending November 21, 2020, when the business would have closed for the winter holidays.

DECISION

The determination of December 29, 2020 (Letter ID: L0007403096) is REVERSED and remanded for payment of pandemic unemployment assistance from the week ending March 21, 2020 through the week ending November 21, 2020.

Dated: May 31, 2020.



Kristin Knudsen
Administrative Law Judge

APPEAL PROCEDURE

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 1, 2021 the foregoing decision was served on Bong Lee (by mail and by email). A courtesy copy was emailed to the UI Support Team and the UI Appeals Office.


Office of Administrative Hearings