

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

In the Matter of)
)
Doug Neeley) OAH No. 21-1300-PUA
_____) Agency No. P21 506 03

APPEAL DECISION

Docket Number: P21 506 03

Hearing Date: July 28, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Doug Neeley

None

CASE HISTORY

The claimant, Doug Neeley appealed a September 4, 2020 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. His appeal was lodged by phone on March 5, 2021. The Department of Labor referred the appeal to the Office of Administrative Hearings on July 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 28, 2021. Mr. Neeley 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 two issues, in sequence: whether the lateness of Mr. Neeley's appeal disqualified him from challenging the determination of ineligibility, and, if not, whether Mr. Neeley meets the eligibility requirements under the act.

ISSUE: TIMELINESS OF APPEAL

EXCERPTS OF RELEVANT PROVISIONS OF LAW - TIMELINESS

AS 23.20.340 provides in part,

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last

address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

8 AAC 85.151 provides in part,

- (b) An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant'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 claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

FINDINGS OF FACT: TIMELINESS

Mr. Neeley reports that he did learn of the September 4, 2020 Notice of Non-Monetary Determination until March 5, 2021. He explained that his mailing address, is the home of a friend who lets him use that address for mail. That person allows other folks to do this too. Mr. Neeley reports that all mail is put in a group pouch and waits for the addressee to pick it up.

He testified that beginning in September he did not have money for gas to drive to check his mail and that he often did not have phone service to check email, or to call the maildrop to ask if there was mail. During this timeframe the library was closed, so he could not use it to check his email. Mr. Neeley reports that he eventually moved out of Anchorage to the Peter's Creek area where he found a place to park his vehicle without violating the street parking rules in Anchorage. Ne reported that the timeframe of this move was in mid-September to early October 2020. This move made it even harder to access his maildrop.

He credibly testified that he never actually saw the September 4, 2020 letter until he got the exhibit packet for the July 28, 2021 hearing. He states that he finally was able to go and get his mail in early March 2021, after he was out of the hospital from a January 2021 injury. He does not believe that the September 4, 2020 letter was in the waiting mail. He does not know if the September 4, 2020 letter arrived at his mailbox, or if it was taken or discarded by other people using the same mailing address. But, there as a different letter from the division and that is why he called. He described that letter as saying that he had been re-determined to qualify. So, he called the department to find out why he had not yet gotten any money. He reports that the person he talked to told him two things; first, that he had been denied PUA and

should appeal, and second, that the re-determination letter was a letter they sent everyone, and he should ignore it. The person on the phone then helped him do the appeal application that day.

CONCLUSION - TIMELINESS

The claimant has the burden to establish that some circumstance beyond his control prevented the timely filing of the appeal. The claimant met this burden by explaining he never received the determination, which is likely due to postal delivery problem that arose once he became homeless and had only limited access to mail email and his maildrop location. He appealed as soon as he became aware of the denial in his case. The claimant met his burden to show his delayed appeal was due to circumstances beyond his control.

DECISION - TIMELINESS

The claimant's appeal from the notice of determination issued on September 2, 2020 is **ACCEPTED** as timely filed.

ISSUE: ELIGIBILITY

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. *** 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.

FINDINGS OF FACT: Eligibility

Doug Neeley established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 22, 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.

Mr. Neeley’s pattern of work in 2019 was that he worked as an independent contractor on interior construction jobs and doing engine mechanics. He also did gig work plowing and shoveling in the winter and lawn work in the spring and summer. His pay

was sometimes in the form of room and board. He estimates that in 2019 his two biggest jobs were with M&S, a siding company in Wasilla and, in Anchorage, doing framing for a general contractor. Between those two jobs he earned about \$3,000. He estimates that he between cash payments, gas money and housing that he made additional funds when he wasn't working those two jobs. He does not recall exactly how much he received in addition to the \$3,000, but realistically he appears to have earned between \$5,000.00 and \$6,000.00 in cash or trade, from his contracting and gig work in 2019.

In January 2020 he had very little income due to an injury while shoveling and plowing at the Tikahtnu Common's shopping center. The injury was frost bite and, as a result, he had one finger amputated. In February 2020 he was back working at plowing and shoveling, and he did that for about 3 weeks. He reports getting paid about \$200-\$300 a week at that job. He reports that he was paid by check.

In late February and early March 2020, he began a gig working with Premier Lawn Care doing mechanical repairs. He reports that they were pleased with his work and had discussed having him work full time doing mechanical repairs during their busy season. Working part time with Premier he was getting about \$200-\$300 a week, cash.

His plan for 2020, pre-Covid-19, was to do the Premier full-time job as long as they wanted him, and then do other gig work over the summer until snow plowing and shoveling season returned. He estimates that he would have gotten \$500.00 a week if the Premier job for a few months had not been cancelled due to Covid-19. Instead, in 2020 before Covid-19 he earned approximately \$1,500.00, and afterwards he was only able to earn very little money.

He reports that as Covid-19 awareness and restrictions grew he immediately began to have trouble finding any work. During the first few weeks of 'lockdown' the owner of Premier "hunkered down" and used that time to catch up on the backlog of repairs that he would otherwise have hired Mr. Neeley to do. When Mr. Neeley called Premier to check about starting that work, he was told they no longer needed him. In March he also checked back about snow shoveling but was told that there was very little left to do, and they were not hiring.

His testimony is credible that his income was significantly reduced as a result of the impact of Covid-19 on his field of work.

Mr. Neeley also reports that until mid-June he was getting information about the Federal, State of Alaska, and Municipality health alerts on the radio. Based on the information in those alerts, and because he was 58 years old, with a history of respiratory problems {hospitalized in 2018} he followed the advice to isolate and distance.

Because none of his skills or pattern of work could be done from home, he did not have any income at that time. In late June, July and August, he found some work in

trade for housing, and did some work in exchange for gas money but he could not find other work; he was regularly told that no one was hiring because their work was slow, or closed, due to Covid-19.

He applied for PUA in March but still had not gotten any money by September. He reported getting letters during the summer about being determined eligible, so he assumed he was just waiting for them to process the funds. He reported calling in to check on the status. The small bit of income he got from gigs was not enough to cover basic expenses, including housing. Since he did not receive any PUA funds, he was unable to maintain housing, and over time became homeless. Other than food stamps and the stimulus checks he reports no income for September – December. In January 2021 he was injured in a fall and has been hospitalized. He is now in a respite care facility. While waiting for PUA funds to arrive he had lost his housing and began living in a vehicle.

APPLICATION

It appears that the denial of eligibility was the result of mis-understanding that Mr. Neeley was applying as a gig worker, not as an employee of Premier Lawn Services. The record establishes that in 2019 and 2020 he was attached to the workforce doing independent contracting in construction, mechanical repairs, odd jobs, and snow removal. The record is clear that Mr. Neeley worked in February 2020 shoveling. It is also clear that in early March 2020 he was doing contract work for Premier, and he reasonably expected his hours there to expand to longer hours since the company liked his work and told him that they would have more work as the lawn maintenance season opened.

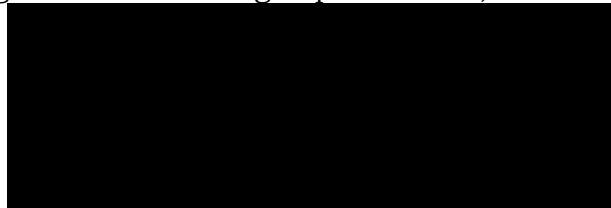
Like many applicants that summer he testified that he was getting confusing information about eligibility, and re-determinations and also, having problems getting through to the department. Mr. Neeley called the division on September 2 to check on the status of his benefits. As a result, a case worker contacted the Premier company and talked to Mike, the owner of Premier Lawn Service. Mike confirmed that he'd told Mr. Neeley that he would have enough mechanical work coming up and that Mr. Neeley could expect to be needed there, full time, starting in mid-March. The caseworker asked Mike if Mr. Neeley's employment was affected by Covid-19 and Mike said that it had not been. However, it should be noted that the caseworker did not provide Mike with the department or law's definition for whether a gig worker's income was affected by Covid-19. Similarly, Mike was not asked about Mr. Neeley's claim that the reason there was no work for Mr. Neeley, at Premier, was that Mike had gotten that work done himself during the time that he was 'hunkered down' at the shop. Mike did confirm that Mr. Neeley did not turn down any work offered. Mike reported that he had not actually closed his business, but that he no longer had work for Mr. Neeley to do.

Between Mr. Neeley's credible testimony, his gig work in February and early March 2020, and Mike confirming the fact that Mr. Neeley had a reasonable expectation of starting the long term gig at Premier, it would appear that Mr. Neeley was engaged in the workforce, and planning to remain in the workforce, before Covid-19 began to impact hiring opportunities for gig workers in his field of odd jobs, and mechanical repair. This supports a finding that Mr. Neeley was eligible for benefits beginning the last day of the week of March 22, 2020. The other issue is when did his eligibility end. The evidence from Mr. Neeley in regard to his inability to monitor mail, email and phone supports a finding that by mid-September he was no longer attached sufficiently to the workforce to be able to reasonably find or accept jobs.

DECISION

It is the determination of this tribunal that Mr. Neely fit the definition of a covered individual pursuant to The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance. He is eligible for benefits beginning the week ending March 22,2020 and through the week ending September 19, 2020.

Dated: August 5, 2021,



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 5, 2021, the foregoing decision was served on Doug Neeley (by mail). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.



Office of Administrative Hearings