

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

In the Matter of)
)
THOMAS PERKINS) OAH No. 21-1395-PUA
) Agency No. P21 608
_____)

APPEAL DECISION

Docket Number: P21 608

Hearing Date: August 19, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Thomas Perkins

None

CASE HISTORY

The claimant, Thomas Perkins timely appealed a March 29, 2021 re-determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor referred the appeal to the Office of Administrative Hearings. 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 August 19, 2021.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

Thomas Perkins established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 28, 2020. The Division originally approved his claim and paid benefits. On March 29, 2021 the Division issued a re-determination 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.

Thomas Perkins has been a commercial fisherman in Alaska for more than 20 years. He owns salmon, miscellaneous fin fish, cod, and shrimp permits. In the past he owned halibut IFQs. He fishes southeast Alaska between Ketchikan and Sitka aboard his 47-foot trawler, the F/V Eileen Jay. The Eileen Jay has an onboard freezer which permits Mr. Perkins to store his catch as FAS- frozen at sea- which increases its value.

In 2013 Mr. Perkins received a complicated health diagnosis. Recognizing the life-long impact of that diagnosis, Mr. Perkins decided to expand his fishing enterprise in a way that could, in the long run, reduce the physical toll on his body. He conceived a plan

to market a portion of his wild FAS salmon directly to a restaurant group. To do so he had to first get approval from the Alaska Seafood Institute and the federal and state Departments of Environmental Conservation. This took time, but by 2017 Mr. Perkins had received the required permits and approval.

In 2017 Mr. Perkins met with an eight restaurant chain. Ultimately, the chain agreed to a one time purchase to serve Mr. Perkins wild salmon as part of a “sea to table” or “know your fish” dinner event. The trial was successful. The parties agreed in principle to a deal, but no contracts were signed. Contracts would be signed after Mr. Perkins had enough fish stock to establish a reliable supply chain. The parties agreed it would take a minimum of two additional salmon seasons to get enough fish in stock because only a portion of Mr. Perkins’s fish would be dedicated to direct market for the restaurant chain; the rest of his catch would be sold to other processors. Over time, if the program was successful, Mr. Perkins would dedicate a larger portion of his catch to direct market.

Mr. Perkins hoped to eventually sell all his salmon directly to the restaurant chain and stop fishing other species. Mr. Perkins named this upcoming business enterprise Perkins’s Wild Seafood.

Mr. Perkins fished several species in 2019. He put a portion of his FAS salmon in cold storage per the agreement with the restaurant group. He sold the rest per past practice. That year, Mr. Perkins made approximately \$55,000.00 as a commercial fisherman, excluding the catch he set aside for Perkins’s Wild Salmon. That income is consistent with prior years.

Mr. Perkins planned to commercially fish several species in 2020. During salmon season, he would set aside a portion of his catch for the restaurant project and sell the rest to local processors.

Mr. Perkins lives aboard the Eileen Jay. In January 2020 he was moored in Ketchikan, fishing the winter king season. That season ended for trolling on March 15, 2020.

In a typical year Mr. Perkins would next have fished the Pacific cod season in Ketchikan waters. The Pacific cod fleet is usually 20-30 boats which sell to Alaska Glacier Seafood Processors. However, the processor announced it would not fully open for Pacific cod because its overseas buyers had cancelled all orders due to the pandemic. That decision effectively ended the local Pacific cod fishery.

Mr. Perkins took the Eileen Jay to Sitka, hoping to participate in the ling cod season beginning May 2020. By that time the Alaska Department of Fish and Game (ADF&G) and the State of Alaska Health Department had issued a series of governmental mandates impacting commercial fishermen. The government mandates included sanitation orders and 6-feet of social distancing aboard fishing vessels.

To fish ling cod, Mr. Perkins has two crewmembers run gear, one on each side of the boat, while he pilots the Eileen Jay. Due to the size of his boat, he could not have two crew members without violating those government mandates. In addition, other government health mandates imposing quarantines on out of state workers coming to Alaska for seasonal work meant his anticipated crew could not timely make it to Sitka. As a consequence, Mr. Perkins did not have a successful ling cod season and was able to fish only the last few weeks of salmon season which ended September 30, 2020.

Mr. Perkins's shrimp permit allows him to shrimp October to December. Income from this season constitutes approximately 5% of Mr. Perkins's annual commercial fishing income. Mr. Perkins was unable to fish the 2020 shrimp season for reasons unrelated to COVID-19.

Mr. Perkins had a net loss for the 2020 commercial fishing season after paying for fuel and other standard operating costs. He was unable to make his boat payments and was forced to negotiate an extension with the bank.

Mr. Perkins filed a claim for PUA benefits effective the week ending March 28, 2020. The Division originally approved his claim and paid benefits. On March 29, 2021, the Division issued a redetermination 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. Review of the documents submitted on appeal by the Division indicate that decision was based on the Division's conclusion that the self-employment business Perkins's Wild Seafood did not have a history of existence prior to the pandemic, a history of reliable income, and could not demonstrate that its income had been substantially diminished due to COVID-19. The redetermination did not address Mr. Perkins's separate, established commercial fishing self-employment.

The Division's re-determination was based on an interview with Mr. Perkins. It is clear to this Tribunal that when asked to describe his self-employment in that interview, that Mr. Perkins focused on Perkins's Wild Seafood and probably did not mention his other fishing. The Tribunal reaches this conclusion because that is exactly what Mr. Perkins initially did in his testimony before the ALJ: Mr. Perkins did not make it immediately clear that he continued to commercially fish separate from his planned future direct sales business as Perkins's Wild Seafood.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law.¹ The CARES Act creates three new unemployment insurance assistance (UI) programs: Pandemic Unemployment Compensation (PUC), Pandemic

¹ CARES Act, S. 3548, 116th Cong. (2002).

Emergency Unemployment Compensation, (PEUC) and Pandemic Unemployment Assistance (PUA). PUA provides emergency unemployment assistance to workers who are left out of regular state UI or who have exhausted their state UI benefits(including any Extended Benefits that might become available in the future).²

To be eligible, PUA applicants must establish that they are a covered individual under the ACT. CARES Act, Pub. L .No. 116-136 § 2102(a)(3)(A)(i) defines “covered individual.”

The term “covered individual”—

(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;

² *Id.*

(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).

APPLICATION

Mr. Perkins was a covered individual under § 2102(a)(3)(A)(ii)(kk) for the period the week ending March 28, 2020 through the week ending April 3, 2021, the week the Division issued its re-determination: he was able to demonstrate that he was a self-employed commercial fisherman and that business suffered a significant diminution of income or services as a direct result of the COVID-19 pandemic.

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 State or Federal program and who is unemployed because one of a list of reasons related to the COVID 19 pandemic. The claimant did not qualify to claim regular unemployment benefits.

Whether a self-employed person is a covered individual under the Act is determined by reference to § 2102(a)(3)(A)(ii)(I)(kk). That section applies when the applicant is

unemployed, partially unemployed, or unable or unavailable to work because he meets “additional criteria established by the Secretary for unemployment assistance under this section.” The U.S. Department of Labor (USDOL) issued two Unemployment Insurance Program Letters (UIPL) outlining eligibility criteria for self employed people seeking state PUA relief. Under those standards the claimant must prove that he was 1) self employed and 2) suffered a *significant diminution* of business as a direct result of the COVID-19 pandemic.³ For purposes of this section, it does not matter whether the self employed person works out of their home or an office.

Mr. Perkins meets the criteria set by § 2102(a)(3)(A)(ii)(I)(kk). He has been a self-employed commercial fisherman for over twenty years. He is licensed and permitted. This business is documented on his taxes. He has a history of reliable income from multi-species commercial fishing throughout the year.

The Southeast Alaska Commercial fishing industry was deeply impacted by the COVID 19 pandemic: fewer buyers resulted in processors closing or reducing purchase; prices were low due to lack of buyers; governmental rules reduced the efficiency of catching fish and availability of crew; and disrupted supply chains delayed or eliminated fuel, parts, and other supplies. Those impacts occurred in direct response to the COVID 19 pandemic.

³ UIPL 16-20, Issued by USDOL April 5, 2020 item (kk): The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor *with reportable income* may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities and has thereby forced the individual to suspend such activities. . . . [italics added].

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.

As a result, Mr. Perkins suffered a dramatic diminution of income. This marked loss of income due to the pandemic is within the scope of Covid-19 impacts PUA was intended to address. Given these circumstances, Mr. Perkins is eligible for PUA assistance under § 2102(a)(3)(A)(ii)(I)(kk) for his commercial fishing self-employment.

Mr. Perkins would not be eligible for PUA for the not-yet-established Perkins's Wild Seafood business. The Division correctly concluded that business was not established prior to the pandemic, did not have a history of reportable income, and could not demonstrate significant loss of income due to the pandemic.

NOTICE REGARDING POSSIBLE WAIVER OF REPAYMENT OF BENEFITS

This decision will affect repayment of previously approved benefits.

Mr. Perkins was told he would have to repay at least a portion of the benefits previously provided to him.

If the Division continues to seek recovery of previously paid benefits after this decision, Mr. Perkins can apply for a waiver from repayment. If a waiver is not granted, the claimant must be given a separate appeal hearing on that issue.

The Division has advised the OAH that its Benefit Payment Control (BPC) office handles waiver requests for overpayments and recoupments. For questions and information regarding options that may be available, the claimant can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.


DECISION

The decision by DETS is **REVERSED**.

The re-determination issued March 29, 2021 is **REVERSED** with respect to the period effective the week ending March 28, 2020 through the week ending April 3, 2021, the week the Division issued its redetermination. The claimant is eligible for benefit from the Pandemic Unemployment Assistance (PUA) program during that period.

This decision does not address Mr. Perkins's eligibility after the week ending April 3, 2021. Subsequent eligibility should be determined by DETS, and the claimant provided a separate right to appeal if required.

Dated: August 20, 2021,



Carmen E. Clark
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 20, 2021, the foregoing decision was served on Thomas Perkins (by mail and email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.



Office of Administrative Hearings