

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

In the Matter of)
)
JUDITH MILLER) OAH No. 21-1073-PUA
) Agency No. P21 629

APPEAL DECISION

DLWD Docket Number: P21 629

Hearing Date: June 17, 2021
RC June 29, 2021

CLAIMANT APPEARANCES:

Judith Miller

DETS APPEARANCES:

None

CASE HISTORY

Judith Miller timely appealed an October 6, 2020 determination denying her Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. That decision was formally recorded in Letter ID L0005303388, dated October 7, 2020. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in May 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 June 17, 2021 with the record held open thereafter for additional documentation. Ms. Miller 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. Ms. Miller submitted a large volume of exhibits.

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

FINDINGS OF FACT

Judith Miller established a claim for Pandemic Unemployment Assistance benefits that was effective the week ending March 28, 2020. Although it initially approved the application and paid some benefits, the Division ultimately found that Ms. Miller was not impacted by COVID-19 in a manner that made her a covered individual under the program. It disallowed the amounts already paid and denied further benefits.

Judith Miller, who is at retirement age, ended her wage-based employment in 2018. Since then, she has operated an apartment rental business that rents a total of eight

units in two buildings. The business is not profitable on paper, although it is possible to determine from business records that it had positive cash flow in 2019, generating funds to cover Ms. Miller's mortgages. Ms. Miller did a considerable amount of hands-on work in the business, including interaction with tenants, making repairs, and preparing units for turnover.

Just before the advent of COVID-19, Ms. Miller was diagnosed with stage IV follicular lymphoma. While this form of cancer is not completely debilitating, the treatment results in a compromised immune system. Ms. Miller was expressly advised by her physician to "quit work" insofar as it entailed Covid exposure. This advice is well documented in the record. It amounts to advice not to go to the place of employment unless safety from exposure could be maintained.

In accordance with this advice, Ms. Miller stopped her day-to-day property management role. In order to do this, she had to raise the percentage paid to her other property managers from 10% to 20% of the rental gross. She also stopped buying supplies and doing the apartment repairs and turnover cleanings herself, instead paying contractors to do this. It is difficult to quantify the cost of making this change, because Ms. Miller's business records are not systematic.¹ However, in April of 2020 she hired a contractor at a cost of about \$25,000 to do a unit rehabilitation that, prior to Covid, she would have handled herself. Some of this cost was for materials, but one can surmise that about \$10,000 of this was labor cost that Ms. Miller would not have incurred had she done the work herself.

Ms. Miller also reports that a variety of Covid issues slowed down the process of refilling apartments, so that units stayed unrented for more weeks that would have been normal. The details of this vacancy rate issue are not well documented. In particular, without good records it is not possible to compare the vacancy rate to pre-Covid rates. Ms. Miller does not report undue problems collecting rent for occupied apartments.

With what is now known about COVID-19, it is likely that Ms. Miller could have devised a way to work on renovations and cleanings without much Covid risk. However, in the early days it was reasonable for someone who had just been advised to avoid exposure to stay away from a working role at an apartment building, where people would be encountered in the common spaces, viruses might be thought to be lingering in the apartments, and complete isolation could not be guaranteed. It took some time for the world to develop the knowledge that fleeting encounters while masked present little risk, and that going into spaces previously occupied by others is likewise not particularly risky.

¹ Because she has elected to get a filing extension, Ms. Miller is also unable to supply 2020 tax materials, from which expenses and revenues could be compared with 2019.

In sum, Ms. Miller had an active business that she made a reasonable decision to step away from due to medical advice. This led to added expenses for property management and for unit maintenance and renovation. The result was lower net income. The reasonable extra expenses probably exceeded 20 percent of the rental gross in the March-June period, comprised of one extended vacancy, significant extra contractor expenses, and an extra 10% of gross paid to property managers. After that, the lack of systematic business records, coupled with the fact that Ms. Miller could likely have adapted a safe way to resume some hands-on work, render the amount of impact unproven.

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—

* * *

(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;

* * *

(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, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance defines a “covered individual” as a person who is unemployed because one of a list of reasons related to the COVID-19 pandemic and who is not eligible for unemployment benefits under any State or Federal program. It is undisputed that Ms. Miller was ineligible for regular or emergency unemployment benefits in 2020.

Guidance from the US Department of Labor in UIPL 16-20 Change 2, above, holds that independent contractor who experiences a “significant” reduction in work as a direct result of the pandemic may be considered a covered individual. In the context of regular unemployment, the similar adjective “substantial” has been equated to a reduction of about 20 percent.² It seems appropriate to apply a similar cutoff here; if the demonstrated diminution is less than about 20 percent, it cannot be viewed as significant enough to justify benefits from a disaster response program.

In this case, the combination of Ms. Miller’s reasonable application of her medical advice, coupled with an extended vacancy due to Covid-19, resulted in an income reduction meeting this threshold for about three months. After that, the extent of the losses and their relationship to COVID-19 have not been demonstrated, and benefits cannot be sustained.

Since benefits were disbursed over a longer span than three months, this decision may leave Ms. Miller with an overpayment. *She can seek a waiver of recoupment by calling*


² The caselaw behind this is reviewed in *In re Warner*, No. 06 1869 (DLWD Appeal Tribunal 2006).

Benefit Payment Control at 907-465-2863, 1-888-810-6789, or emailing jnu.bpc@alaska.gov. If a waiver is denied, new appeal rights accrue from that decision.

DECISION

The determinations in Letter ID L0005303388 is **MODIFIED**. *The claimant is eligible for benefits from the Pandemic Unemployment Assistance (PUA) program beginning the week ending March 28, 2020 and continuing through the week ending June 27, 2020.*

Dated: June 29, 2021



Christopher Kennedy
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 June 29, 2021 the foregoing decision was served on Judith Miller (by email). A copy was emailed to the UI Support Team, UI Technical Team, and UI Appeals Office.


Office of Administrative Hearings