

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

In the Matter of)
)
SHAYNE RICHARD DALZELL) OAH No. 21-1438-PUA
) Agency No. P21 650 03
_____)

APPEAL DECISION

Docket Number: P21 650 03

Hearing Date: August 11, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Shayne Richard Dalzell

None

CASE HISTORY

Mr. Dalzell appealed a January 7, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0007468809. When denying eligibility the Division determined that Mr. Dalzell was not a covered individual under Section 2102 of the CARES Act of 2020. The decision details reported that “You are self-employed and were affected by covid-19 on 04/04/2020 after losing clients however, you provided an incomplete Schedule C, your company address is in CA, you left the state and are not able and available for work.”

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings on July 1, 2021. Under the 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 11, 2021. Mr. Dalzell 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. Dalzell’s appeal disqualified him from challenging the determination of ineligibility, and, if not, whether Mr. Dalzell meets the eligibility requirements under the act.

FINDINGS OF FACT

Timeliness

The Division issued its Notice of Non-Monetary Issue Determination on January 7, 2021. Mr. Dalzell did not file his appeal until April 8, 2021. Thus, the notice of appeal was not timely when lodged. Mr. Dalzell credibly reports that he made numerous attempts to reach the Division to lodge an inquiry about the decision and ongoing, confusing correspondence from DETS. He reports being on hold for lengthy waits, and then being disconnected. He also reports that a recorded message would tell him to leave a message and that someone would get back to him, but, when he left a message, he still got no response. He credibly reports that the first time he was able to connect directly with an employee was on April 8, 2021. She advised him to file an appeal and she assisted him in lodging the appeal.

Merits

Mr. Dalzell is an independent contractor. He is the owner of Duz-All, a flooring installation company. He did interior flooring in residential and commercial buildings. That business has been licensed, and operational in Alaska since 2015. In 2019 he had business contracts throughout the year. All of the jobs were in Alaska. Mr. Dalzell lived in Alaska from at least 2015 until the end of December 2020. Throughout that time, he lived in Anchorage, but would travel in-state as needed for jobs.

Mr. Dalzell reports that in 2019 Duz-All had gross income exceeding \$150,000. After paying employees and other business costs, Mr. Dalzell testified that he, individually grossed at least \$50,000 in 2019. Mr. Dalzell testified that the business earned significantly less income in 2020 and that Mr. Dalzell's personal income was greatly reduced. His reduction in business and personal income was due to the impact of Covid-19 on his section of the construction market.

In January 2020, Mr. Dalzell installed flooring at the State Trooper headquarters in Sitka. That job was finished in January 2020. In February 2020 he began the first of a series of promised jobs with the Alaska Club. He was to install flooring in a number of their athletic clubs in 2020. He had begun one of the projects for the Alaska Club when Covid-19 restrictions began. The Alaska Club then suspended its' remodeling plans and cancelled the flooring projects that had been in place for 2020.

Mr. Dalzell also had a working relationship with Carpet World, and Floor Craft. These are two big carpet, linoleum and tile retailers who often hired him to do installation of their linoleum and other flooring. Both companies informed him that they had ceased contracting with third party installers because their business was also greatly reduced as a result of Covid-19 limitations. He credibly testified that he was looking for work and putting out feelers for who might be hiring for flooring installation projects throughout 2020.

Mr. Dalzell testified that in late summer 2020 some work returned to the general construction market in Alaska. However, this did not translate into opportunities for him. He testified that his business did not benefit from the increase in construction. He explained, that as the flooring contractor, all the other work had to be done by the other general or sub-contractors before he could put in the flooring. Thus, even in a 'normal year' a construction project that started in September might not be ready for the flooring for 1-2 months. In 2020 that pattern was compounded by the fact that many of the projects were very slow to proceed due to supply chain problems and shortages of lumber, sheetrock etc. His description of why there was still no flooring work going into the fall and winter is credible. He testified, for example, that he was in contact with Joe, the owner of Carpet World, in September and October but Joe reported to Mr. Dalzell that Carpet World was still not hiring for flooring.

In September 2020 Mr. Dalzell left Alaska for 2 weeks to escort his wife and children to California. Her family lived there, and her parents were having medical problems and needed her help. He flew her down, helped her get settled and then returned to Alaska. He testified that throughout the two weeks he was in California in September 2020 that he got no offers for business, but that he was prepared to return to Alaska immediately if offered work.

In mid-October he returned to California to live with his family. He reported that the plan was for him to continue to reach out to new and old clients for work in the Alaska market. He stated that he remained ready to work in the Alaska market. His crew remained in Alaska, his tools remained in Alaska, and he could be there within 48 hours if hired. He testified that he informed the division of his California address. He testified credibly that the practice in his field of construction is for flooring jobs to be bid out at least 2-3 weeks before the flooring installation begins. Thus, he could, always, return to Alaska to fulfill any contracts without delay and without the risk of losing that job. He testified that until the end of December 2020, he was looking for work only in the Alaska market. Alaska was where he had worked for years, and it was where he had his contact, his reputation, his work crew and his tools.

In 2021 Mr. Dalzell began to shift his work base to California. He also testified, that he remained available to come up to Alaska to work in early 2021, but, that as the year progresses he decided to begin to develop contacts, and clients in California to be able to stay with his wife, and help her family.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

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.

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

APPLICATION

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 that he made repeated and timely efforts to reach the division but that he was not able to reach an individual to assist him until April 8, 2021. The division’s caseload, and his ensuing difficulty in getting assistance was due to circumstances beyond his control. The claimant met his burden to show his delayed appeal was due to circumstances beyond his control.

Merits

The documentary and testimonial evidence from the August 11, 2021 hearing is consistent with the Division's finding that Mr. Dalzell was a self-employed worker who was financially affected by Covid-19. His income from 2019 was significantly reduced as a direct result of the impact that Covid-19 had on the construction market in general, and on his sector of that market in particular. His testimony is persuasive that throughout the remainder of 2020 he maintained a business presence in Alaska and was prepared to take advantage of job offerings when the market for flooring installation resumed. Not only were his tools in Alaska but, he also maintained a crew, or the ability to assemble a crew in a timely manner, if a job became available. He also maintained his professional relationship with his past clients so that he would hear of work when it became available. There is no evidence that being based in California beginning on mid-October contributed to the lack of available work in his field.

The division cites the fact that he provided an incomplete Schedule C as evidence that he was not available to work. DETS did not identify what was incomplete, nor how having the missing information would have affected their determination that he was not available for work.

It is the determination of this tribunal that Mr. Dalzell fits 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 was an independent worker, with a history of working as a flooring installer in the Alaska residential and commercial market. His income was significantly diminished as a result of Covid-19's impact on the construction market, and he remained available and able to work in his field at all times during 2020. The fact that he would need to fly to Alaska is not of itself a bar to being available in this instance given his credible testimony that the practice in his trade is to get job offers at least two weeks before the project had to begin. His intent to remain working in the Alaska market thought 2020 is further supported by the fact that all his tools remained in Alaska.

Possible Waiver of Repayment Benefits

If the division continues to seek recovery of previously paid benefits after this decision, Mr. Dalzell can apply for a waiver from repayment. No waiver will be granted if he does not seek it. If a waiver is sought but not granted, Mr. Dalzell must be given a separate appeal hearing on that issue if he requests. This decision will affect repayment of previously approved benefits. 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 Mr. Dalzell can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The claimant's appeal from the notice of determination issued on January 7, 2021 is **ACCEPTED** as timely filed. The DETS determination that Mr. Dalzell is ineligible for PUA benefits is **REVERSED**. Mr. Dalzell is eligible for PUA benefits beginning the week that ended on March 21, 2020. His eligibility is deemed to have continued until the week ending December 26, 2020.

Dated: August 20, 2021,




Karla F. Huntington
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 Mr. Dalzell (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