

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

In the Matter of)
)
AARYN RICHARD) OAH No. 21-1443-PUA
) Agency No. P21 651
_____)

APPEAL DECISION

Docket Number: P21 651

Hearing Date: August 16, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Aaryn Richard

None

CASE HISTORY

Aaryn Richard appealed a March 11, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0010184636. When denying eligibility the Division stated “You reported that on 4/22/20 you were impacted by COVID-19 as you were unable to delivered (sic) groceries. However, grocery deliveries are an essential service and you do not have health concern.”

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings on August 2, 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 issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

The matter was heard in a recorded hearing on August 16, 2021. Mr. Rickard 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 issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

Mr. Rickard was engaged in the workforce through independent contracting with Lyft and Instacart in 2020. Of these two, the Lyft work was his primary enterprise, and had been his sole source of income since December 2019¹. Mr. Rickard began driving as a contractor with Lyft in December 2019. He earned \$500.00 a month driving Lyft in January and in February 2020. This was his primary income. In March 2020 he continued driving Lyft. During that month he also earned about \$500.00 but, most of

¹ The factual findings stated herein are based on the information in Exhibit 1 and Mr. Rickard’s sworn testimony.

that was in the first 2 weeks of March. After Anchorage's March 16, 2020 closure his revenue dropped significantly. He kept driving in April and into May, taking any jobs that were available, but his income from Lyft driving dropped to \$60.00 a month. He did not have any Lyft work in June 2020. In August, when the city closed down again, he had no revenue. He hoped rider demand would increase over the summer, but the Emergency Orders continued to restrict access to restaurants, bars, and other activities to which riders had been seeking transportation. In September he determined that even if Lyft business resumed, that he needed to stop being a Lyft driver because he was using his grandmother's car and he did not want to expose her to the virus. He planned to resume Lyft driving when she got vaccinated. Ultimately, it was Instacart work that he resumed when work picked up in that field in May 2021.

Mr. Rickard's involvement with Instacart began March 27, 2020. Mr. Rickard began contracting with Instacart as a 'shopper' on March 27, 2020. His hope was that this income would supplant the declining Lyft income but that did not happen. He testified that his income as an Instacart shopper diminished almost immediately and work slowed down to the point that there was no revenue. He filled his last contract as an Instacart shopper on April 22, 2020. He suspended his connection with Instacart on May 3, 2020 because there were no patrons. While people were using Instacart to get their groceries delivered to their homes, there was a glut of people trying to make a living as Instacart shoppers and there was not enough work to go around. His brief period of work with Instacart did not prevent him from being able and available to work as a Lyft driver.

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—

(II) (kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or 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)...

Unemployment Insurance Program Letter (UIPL) 16-20, Change 2 Issued by the U.S. Department of Labor on 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.

Attachment I to UIPL No. 16-20, Change 4 Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions Revised January 8, 2021

Section 2102 of the CARES Act provides for payment of PUA to “covered individuals.” A “covered individual” is someone who meets each of the following three conditions:

Condition #1: The individual is not eligible for regular UC, EB, or PEUC. This includes an individual who has exhausted all rights to such benefits, as well as an individual who is self-employed, seeking part-time employment, lacking sufficient work history, or who is otherwise not qualified for regular UC, EB, or PEUC. Self-employed individuals include independent contractors and gig economy workers.

.....

Under Condition #1, an individual “lacking sufficient work history” means an individual: 1) with a recent attachment to the labor force (meaning that he or she worked at some point from the start of the applicable tax year to the date of filing...

Attachment to UIPL#16-20 Change 1:

11.Question: To be eligible for PUA, is an individual required to meet a minimum monetary requirement in the base period, similar to the monetary requirements for regular UC?

Answer: No. There is no minimum monetary requirement for an individual to be eligible for PUA. However, base period wages are considered when calculating the individual's WBA.

APPLICATION

The Division improperly interprets the impact of the designation as an essential worker on eligibility for PUA benefits. It is not accurate that an independent contractor working as a grocery delivery agent can only qualify for PUA benefits if he shows a loss of income and also proves that he is unable to work for medical reasons. Each state defined its own rules for who were essential workers, and whether a person in a field designated as essential was obligated to keep working. Alaska issued its rules in a document titled: *Alaska Essential Services and Critical Workforce Infrastructure Orders*. This was issued March 27, 2020 and amended on April 10, 2020 and May 5, 2020. While that document did identify both taxi and groceries service as essential ², the document did not make it mandatory for businesses in those fields to remain open, or active. The document was clear that participation was voluntary but encouraged. It stated: "Businesses exempted from Section I are strongly encouraged to remain in operation. Such businesses shall, to the extent reasonably feasible, comply with social distancing requirements by maintaining six-foot social distancing for both employees and members of the public, including, but not limited to, when any customers are standing in line." Thus, there was no basis to summarily deny Mr. Rickard's PUA application based on the fact that he worked in an essential industry and was not claiming Covid-19 related medical concerns. ³ However, like any other independent contractor, what he had to prove was that his business experienced a "significant diminution of work as a result of COVID-19".

Mr. Rickard's earnings as a Lyft driver clearly diminished significantly due to the closures of local business in Anchorage during the initial shutdowns in the summer of 2020. He was gainfully engaged in the business of being a Lyft driver prior to Covid-19 beginning. It was his main source of income in December 2019, and January, February and March of 2020. While he only earned approximately \$500.00 a month in that endeavor it was sufficient to qualify him for PUA benefits as established by the UIPL response to Question 11, above.

He had been earning \$500.00 a month driving Lyft and that income rapidly disappeared after the March 16, 2020 closure. Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that independent contractors and gig workers who experience a significant reduction in work as a direct result of the pandemic may be considered covered individuals. That is the case here. Though the claimant was not ordered to stop working under a government mandate, business demand dropped significantly as a direct result of the pandemic. This was because many other businesses closed, travel slowed dramatically, and people stayed home as much as possible to avoid infection. The result was a significant loss of income to the

² *Alaska Essential Services and Critical Workforce Infrastructure Orders*; May 5, 2020; Section II E(ii)(2), (6).

³ The Division would also be inaccurate to decline Mr. Rickard PUA benefits as a Lyft driver under the theory that driving taxi is an essential business.

claimant, which brings him within the scope of Covid-19 impacts that PUA was intended to address.

The Tribunal finds that Mr. Rickard experienced a significant diminution of services while performing self-employment as a Lyft driver as of the week ending March 14, 2020 and continuing until the week ending September 5, 2020 when he voluntarily stopped being available to preform Lyft work.

Mr. Rickard is possibly also a covered individual based on his declining income as an Instacart Shopper. That claim is less strong than his Lyft work due to the fact that he had no connection with Instacart before the pandemic closures, and worked for such a short period before realizing that there was no income to be made in this area at the time. Regardless, the timeframe overlaps the time when Mr. Rickard was a covered individual because of his status as a Lyft driver and the time at Instacart was of too short and insubstantial duration to supplant the Lyft eligibility.

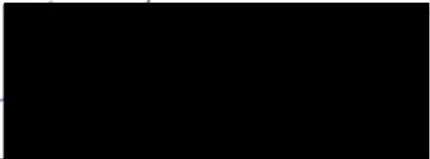
NOTICE REGARDING POSSIBLE WAIVER OF REPAYMENT BENEFITS

If the division continues to seek recovery of previously paid benefits after this decision Mr. Rickard 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. Rickard must be given a separate appeal hearing on that issue if he requests. 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. Rickard can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The decision of the Division is **Reversed in part**. It is the determination of this tribunal that Mr. Rickard's situation 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 beginning the week ending March 14, 2020 and continuing until the week ending September 5, 2020.

Dated: August 30, 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 31, 2021, the foregoing decision was served on Aaryn Rickard (by mail). A copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

Office of Administrative Hearings