

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

In the Matter of)	
)	
MARK GORDON)	OAH No. 21-1345-PUA
_____)	Agency No. P21 690 03

APPEAL DECISION

Docket Number: P21 690 03

Hearing Date: September 1, 2021

Record held open to September 20,
2021

CLAIMANT APPEARANCES:

Mark Gordon

DETS APPEARANCES:

None

CASE HISTORY

The claimant, Mark Gordon, timely appealed a September 25, 2020 redetermination 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 September 2, 2021. The record was held open until September 20, 2021 for Mr. Gordon to submit additional documentations of his self-employment business. Copies of his taxes and information on his marine repair business were received on September 2, 2021.

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

FINDINGS OF FACT

Mark Gordon established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 21, 2020. The Division originally approved his claim and paid approximately \$17,360.00 in benefits. On September 25, 2020 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.

Mark Gordon has lived in Homer, Alaska since 2014. He worked as a commercial fishing deckhand for several years. In 2016 he started working not simply as a

deckhand, but as a relief captain or full captain on boats owned by others. As captain, he is paid a daily rate. He does not receive a crew share.

For the past few years Mr. Gordon has captained the F/V Cornerstone during the Prince William Bay salmon season. The F/V Cornerstone operates as a tender, accepting fish from active fishermen and transporting them to processing. Mr. Gordon skippers the Cornerstone for the “high season” meaning June and July.

In 2020 Mr. Gordon expected he would captain a boat for tendering. Mr. Gordon did so. He was paid his standard daily rate. That portion of Mr. Gordon’s employment and income was not affected directly by COVID-19 except for fourteen days. Mr. Gordon’s contract was terminated early because the salmon season was disrupted due to artificially low prices and partial closure of processing plants caused by lack of demand due to COVID-19.¹

Mr. Gordon also runs his own marine repair business in addition to being available for hire as a daily captain. Mr. Gordon has a lifetime of on-the-job repair experience, but he also attended aviation mechanics’ school. He performs mechanical and electrical repairs; installs glass; applies and repairs fiberglass; and rebuilds engines and transmissions. Mr. Gordon performs this work at a shop on his property. Mr. Gordon reports this income on his taxes and deducts the shop area as a home business.

Mr. Gordon does not have a business license or insurance for his repair shop. According to Mr. Gordon this is because until he spoke with the ALJ at the hearing, he considered all his income to be “commercial fishing related.” As will be seen later, the fact that Mr. Gordon did not articulate a difference in his two sources of income to the Division caused confusion regarding his claim.

¹ The price of salmon remained artificially low because processors were forced to work at lower capacities to comply with CDC and ADF&G sanitation orders and they had no buyers. There were no demands from exporters, grocery stores, restaurant suppliers, or other typical purchasers due to COVID-19. See, https://media.fisheries.noaa.gov/2021-01/Alaska_COVID-19_Impact_Snapshot.pdf The National Oceanic & Atmospheric Administration (NOAA) originally estimated that commercial fishing revenue in Alaska from January through August 2020 was 30% below 2019 levels and 35% below the 2015-2019 baseline due to lower prices from lack of demand. *Id.* In January 2021 NOAA updated its impact assessment of the pandemic on commercial seafood fishermen to a 45% decline in revenue, resulting in a state-wide loss of a nearly half a billion dollars. See, <https://www.fisheries.noaa.gov/resource/document/updated-impact-assessment-covid-19-crisis-us-commercial-seafood-and-recreational>

In 2020 Mr. Gordon was running his repair shop. He had the opportunity to work with a local non-profit group finding and refurbishing a vessel. By March 2020 Mr. Gordon had identified two boats for inspection by the non-profit. Both boats were older and would need significant work before they were completely seaworthy.

Doing those repairs was part of Mr. Gordon's agreement with the non-profit. The parties had an anticipated budget of \$10,000.00 to \$20,000.00 for repairs on top of the boat purchase price. However, when the March 2020 Governor's Disaster Declaration and local Homer pandemic restrictions were announced, the non-profit decided to delay the project. Mr. Gordon was told the non-profit did not want him to pursue his search any further: it would not buy a boat or pay for repairs.

COVID-19 had other impacts on Mr. Gordon's repair business. First, he could not get masks or other protective gear to do his fiber-glassing and metal grinding work. Second, he could not get parts to conduct repairs. Third, replacement electronics could not be acquired. Disruptions in the supply chain meant that unless he or the boatowner had supplies on hand, there were no resources available. Mr. Gordon testified he turned down call after call for work.

Mr. Gordon was able to do a few small jobs. Mr. Gordon remembers only one larger job for the year: a local boat owner got stuck in the bay. He and the owner pulled the boat out and because the owner had the part needed, Mr. Gordon was able to do the patching on site and make the other needed repairs.

Mr. Gordon filed a claim for Pandemic Unemployment Assistance benefits effective the week ending March 21, 2020. The Division originally approved his claim and paid approximately \$17,360.00 in benefits. On September 25, 2020 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.

The re-determination rested on the Division's conclusion that Mr. Gordon was a self-employed commercial fisherman whose boat was not seaworthy prior to March 2020, so he could not have fished the 2020 season. Accordingly, the Division concluded that while Mr. Gordon lost income, that loss was not directly caused by COVID-19.

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.² The CARES Act creates three new unemployment insurance assistance (UI) programs: Pandemic Unemployment Compensation (PUC), Pandemic

² CARES Act, S. 3548, 116th Cong. (2020).

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).³

To be eligible, PUA applicants must establish that they are a “covered individual” as defined by the Act. Sec. 2102(3) defines “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—

(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;

³ *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

The Division approved benefits the week ending February 8, 2020 through the week ending April 4, 2020. Mr. Gordon did not appeal that decision. Claimant is eligible for PUA benefits for that period.

Mr. Gordon is a covered individual under the criteria set forth in § 2102(a)(3)(A)(1)(I)(kk) of the CARES Act from the week ending March 28, 2020 through the week ending August 29, 2020, the week the Division issued the re-determination: he was able to demonstrate he is a covered individual under the self-employment section of the Act because he suffered a significant diminution of business 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 due

to one of the listed reasons related to the COVID-19 pandemic. Mr. Gordon's self-employment did not qualify him to claim regular unemployment benefits.

Whether a self-employed person is a covered individual under the Act is determined by reference to § 2101(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.⁴

Mr. Gordon meets the criteria set by § 2101(a)(3)(A)(ii)(I)(kk). His marine repair business was established prior to the pandemic. His marine repair business provided him reliable and reportable income. Mr. Gordon reported that income on his taxes prior to the pandemic. He works the business as year-round self-employment. He credibly testified that disruptions in the supply and shipping chains caused by COVID-19 substantially impacted and diminished his marine repair business.

The Division's re-determination appears to rest on a misunderstanding caused by Mr. Gordon's mash-up of his work as a day-hire skipper with the anticipated job repairing

⁴ 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.

the boat for the non-profit. Mr. Gordon is not and has never been a year-round self-employed commercial fisherman. Mr. Gordon is a seasonal worker for tendering. Mr. Gordon is also, however, a year-round self-employed marine mechanic.

Mr. Gordon incorrectly described these two separate sources of income as a single “commercial fishing” enterprise to the Division and did not clearly articulate the distinctions in his work. The unseaworthy boat that could not be fished in 2020 identified in the Division’s determination was not a boat Mr. Gordon planned to commercially fish: it was a boat he planned to repair. The hearing provided more time for Mr. Gordon to explain his employment circumstances. Once the distinction is understood, Mr. Gordon’s self-employment as a marine repairman makes him a covered individual under the Act.

NOTICE REGARDING POSSIBLE WAIVER OF REPAYMENT OF BENEFITS

This decision will affect repayment of previously approved benefits.

Mr. Gordon 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. Gordon can apply for a waiver from repayment. If a waiver is not granted, Mr. Gordon 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 September 25, 2020 re-determination by the Division is **REVERSED**.

The Division's September 25, 2020 re-determination for the period beginning the week ending March 28, 2020 through the week ending August 29, 2021, the week the Division issued its redetermination, is **Reversed**. Mr. Gordon is eligible for PUA benefits for the period beginning the week ending March 28, 2020 through the week ending August 29, 2021.

This decision does not address Mr. Gordon's eligibility after the week ending August 29, 2020. Subsequent eligibility should be determined by DETS, and Mr. Gordon provided a separate right to appeal if required.

Dated: September 14, 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 September 14, 2021, the foregoing decision was served on Mark Gordon (by mail/email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.


Office of Administrative Hearings