

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

In the Matter of)
)
MATTHEW R. BYNUM) OAH No. 21-1484-PUA
) Agency No. P21 701
_____)

APPEAL DECISION

Docket Number: P21 701

Hearing Date: August 25, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Matthew R. Bynum
Heather Foley

None

CASE HISTORY

Mr. Bynum appealed a March 29, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0012177233. When denying eligibility the Division stated in its Decision Details: "You have been self-employed with Auto Master LLC and impacted by Covid-19 on 3/1/20 when the local auctions closed; however, you have transitioned to buying and selling equipment through online platforms such as Amazon."

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 matter was heard in a recorded hearing on August 25, 2021. Mr. Bynum testified under oath. Heather Foley, Mr. Bynum's girlfriend also testified. 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 met the eligibility requirements of the Act beginning the week ending December 12, 2020.

This case was heard by Administrative Law Judge Karla Huntington, who held a temporary appointment. She drafted a decision during September of 2021, but never issued it. After her appointment expired, the oversight was noted and the case was transferred to the undersigned, who is a more experienced judge. Because Judge Huntington is the one who heard the evidence, all findings of fact have been left exactly

as she made them. However, Judge Huntington's draft decision contained errors of law, which the undersigned has corrected.

FINDINGS OF FACT

Mr. Bynum incorporated Auto Master on February 19, 2020.¹ This business was set up to purchase, refurbish and sell heavy equipment and construction vehicles. The business plan was to bid on heavy construction equipment at Richie Brothers in-person auctions held three times a year in Wasilla. In furtherance of this plan, Mr. Bynum had obtained financing, rented a two-bay shop, and begun researching and monitoring vehicles that were coming up for auction. Mr. Bynum has a background in vehicle repair and maintenance. He is a certified ASE² Master Technician and has worked for 20 years in auto repair. Based on his research he estimated that he would gross approximately \$100,000 - \$130,000 a year in this new buying and selling business.³

Because of Covid-19, Richie Brothers did not hold the June or August auctions in 2020. They also moved their October auction to November 2020. Mr. Bynum checked with heavy equipment auction houses in Fairbanks and they had also cancelled their summer and fall auctions. Richie Brothers held one in-person auction of heavy equipment resumed in 2020. That was in November 2020. By that time the price of heavy equipment had greatly increased since all interested buyers had been waiting for an auction. Mr. Bynum looked at the inventory for that auction both on-line and in person. Given the competition, Mr. Bynum could not outbid competitors to obtain inventory. The next scheduled auction was set for June 2021. Prior to the June 2021 auction, Mr. Bynum had to close up Auto Master. He testified that he gave up his lease on the warehouse in "late February or early March 2021." He has not been able to revive that business.

In addition to Auto Master, Mr. Bynum and Heather Foley started a business buying foreclosed storage units and reselling those items at auction or online. The item they sold online were books they got from storage units. They also attended estate sales and buying items to fix and re-sell. Neither of these activities netted them much money in part due to restrictions of Covid-19. For example, it was hard to get into client's homes to assess and buy estate items. These enterprises were started in October 2020 and continued into May 2021.

¹ Exhibit 1, page 20.

² Auto Service Excellence.

³ Judge Huntington indicated that the factual findings made here are based on a combination of the information in Exhibit 1, the testimony of the witnesses, and Matanuska School District information.

Mr. Bynum and Ms. Foley have five children. In March 2020 their ages were 15, 14, 11, 10 and 4. In March 2020 four of the children were school age and attended either Colony High School or Larson Elementary School.

Ms. Foley is employed and works out of the home during the week. Mr. Bynum was the parent responsible for supervising the children when they were home due to school closures for both the 2019-2020 and 2020-2021 school year. Taking care of the children during school closures reduced his ability to earn money from the storage unit and estate sales business because he had less time to commit to the business.

The children were on remote schooling from March 13, 2020 until the end of the 2019-2020 school year. For the 2020-2021 school year both schools were on remote learning every Friday, and, whenever their Covid exposures caused a closure. A chart from the Mat-Su School District shows multiple closures, in addition to the weekly Friday closures, in September, October, and November 2020, and in February 2021. Other than being closed every Friday, there were no more school closures for the children's Mat-Su schools after February 12, 2021.

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—

(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.

* * *

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

UIPL 16-20, Issued by USDOL April 5, 2020

k. 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. [italics added]

UIPL 16-20, Change 5 Issued by USDOL February 25, 2021

[I]ndividuals who did not file an initial PUA claim on or before December 27, 2020 are limited to weeks of unemployment beginning on or after December 6, 2020.

* * *

For example, if an individual files a new PUA claim after the publication of this UIPL because of circumstances occurring in July 2020, absent a PUA claim already being on file and consistent with the Continued Assistance Act, the claim effective date may not be any earlier than December 1, 2020 . . . and retroactive benefits may not be awarded prior to that date.

APPLICATION

This is a case where the claimant applied for PUA belatedly—in 2021—based on a purported impact from very early in the pandemic. The late application could not generate benefits earlier than the week ending December 12, 2020 (*see* Change 5, quoted above), and this influenced the way DETS looked at the claim. The Division *assumed* that Mr. Bynum had been a covered individual leading up to the effective date of his belated PUA claim, and then simply addressed whether he could still be eligible under that theory in December of 2020 and later.

The Division’s stated reasoning for Mr. Bynum being ineligible from the week ending December 12, 2020 forward is not supported by the evidence. The Division’s ruling was based on a misunderstanding of Mr. Bynum’s use of the Internet to conduct sales for the storage unit enterprise.⁴ In October 2020 Mr. Bynum started the other auction-based business of buying storage unit contents and auctioning them off. In that capacity he tried to sell some of the books online. The use of the Internet was not connected to the buying or selling of heavy equipment central to Auto Master’s business plan, and it was Auto Master that was the main basis for Mr. Bynum’s claim.

It is nonetheless plain that Mr. Bynum was never eligible for PUA based on the Auto Master business, neither during the pre-December 2020 period for which he did not apply nor for the December and later period for which he did apply. Auto Master was brand new in March of 2020. This means that with respect to Auto Master, Mr. Bynum was not a gig worker within the meaning of the first two UIPLs quoted above, because his new business had never operated. It did not create a pattern of “customary work” and there was no substantial income to suffer “significant diminution.”

The next issue is whether the storage unit enterprise would separately qualify Mr. Bynum for PUA benefits. That business was opened in October 2020 and closed in May 2021. The same lack of “customary work” and “significant diminution” prevents this from being a viable PUA claim. Moreover, while some of the income production issues were Covid-related, none of them were unanticipated at the time that they opened the business. Limits on going into homes and the resulting slump in those markets had been in effect since March 2020.

The intermittent school closures in the fall and early winter of 2020-2021 could be a separate basis for a finding PUA eligibility insofar as taking care of the children during each closure reduced the claimant’s ability to work and could be shown to have depressed income. However, nearly all periods of school closure were either pre-set before the storage unit business started or occurred before Mr. Bynum’s PUA application became effective (the week ending December 12, 2020), or both. No link

⁴ Exhibit 1, page 17.

was established between the brief early February 2021 closure and a reduction in income.

DECISION

The DETS determination that Mr. Bynum is ineligible for PUA benefits beginning the week ending December 12, 2020 is **AFFIRMED** based on the modified reasoning stated above.

Dated: December 3, 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 December 6, 2021, the foregoing decision was served on Matthew Bynum (by mail and email). A copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.



Office of Administrative Hearings