

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

In the Matter of)
)
) OAH No. 21-1574-PUA
DANIEL J. CASHEN) Agency No. P21 801

APPEAL DECISION

Docket Number: P21 801

Hearing Date: September 8, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Daniel J. Cashen

None

CASE HISTORY

Daniel Cashen appealed a May 24, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID L0013148251. When denying eligibility, the Division of Employment and Training Services (DETS) noted that Mr. Cashen was not eligible for PUA benefits beginning the week ending October 24, 2020. The DETS also determined that he was eligible for PUA benefits beginning the week ending June 20, 2020.¹

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in August 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 September 8, 2021. Mr. Cashen testified under oath. He also provided documents identified as Exhibit A. At its own election, the 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. Cashen has worked as a crew member on the gillnet fishing vessel Betty Ann since 2018 ². He has an established practice of crewing on the Betty Ann during openings. He also has an established practice of working on boat repairs and maintenance before and after each season. The Betty Ann is moored in Harris Harbor, Juneau and usually

¹ Exhibit 1; Page 13.

² The factual findings are based on Exhibit 1; Exhibit A and the testimony of Mr. Cashen. The tribunal determined that Mr. Cashen was a credible witness.

fishes the gillnet season throughout Southeast Alaska depending on where there are fish. He received \$4,000 in wages from crewing the 2019 season.³ In 2020 he earned much less; he estimates he earned only \$2,000. The reduction in income was directly related to Covid-19. Because of his age and medical vulnerabilities⁴ and quarantine requirements throughout the various ports, the Betty Ann could not fish as many locations. The Betty Ann ended up fishing almost exclusively in the Taku River. Because of Covid-19 social distancing issues the Betty Ann could not carry 3 crew and still maintain safe distances. Social distancing requirements also limited access to fish processors. With only two crew members⁵ the boat could not catch fish as fast as other years and could not fish as long a day as other years.

The Division approved Mr. Cashen for PUA benefits for dates to match the ‘on the water’ part of the fishing year.⁶ Mr. Cashen also worked on the boat during the off season. Mr. Cashen did not get paid hourly for the off-season work. Doing that work was part of the job of crewing and a way to ensure that he would have a crew slot next season.

Mr. Cashen reported that work for the 2020 season began in January 2020 with getting the net fixed. This process took at least 6 weeks. Pre-season work was part time and continued until fishing started. When Covid-19 erupted he was already working getting the Betty Ann ready for the 2020 season. The work he was doing had to be done and was part of his crew duties to fish the 2020 season. If that work had not been done in the months before the opening, the boat would not have been ready and available to fish. If Mr. Cashen had not been working on the boat during January – June 2020, he would not have been selected to crew.

After the fishing season ended in late October 2020 there was still work to do. Part of Mr. Cashen’s arrangement is that he will do the after-fishing work as part of his crew duties. After-season work is part time and includes getting the nets off and stored, getting the hull scraped, getting the boat into storage, and assessing what damage may have occurred to the motor, nets etc. In 2020 the after-season work lasted through December and also included Mr. Cashen working on the foot pedal hydraulics and repairing the motor for the lead slinger. There was also the need to regularly check the boat for leaks, cleaning up the deck, and shoveling snow off the boat. Mr. Cashen did this work as part of his crew duties from the 2020 season. Mr. Cashen was out of state for one week in November, but he had done more of the work before going so that they did not get behind in maintenance and repair while he was gone.

In January 2021 work shifted to preparing the boat for the upcoming 2021 gillnet season. Mr. Cashen was actively involved in the usual pre-season repairs. Mr. Cashen worked as crew on the Betty Ann during the 2021 gillnet season and is still crewing. The 2021 season was not yet over at the time of the September 8, 2021 hearing. Therefore Mr. Cashen could not yet provide evidence that his 2021 crew earnings were impacted due to Covid related factors. In the 2021 season he continued to have the medical issues that limited his ability to be on a 3-crew boat. Additionally, the rise of

³ Exhibit A: Page 5.

⁴ Exhibit A; Page 6.

⁵ The crew in 2020 was limited to Daniel Cashen and the Betty Ann’s owner, who is Mr. Cashen’s brother.

⁶ Exhibit 1;Pages 3,14.

the Covid-19 Delta variant may cause closures or create some of the same limitations of where they can reasonably fish.

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—(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).

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...

APPLICATION

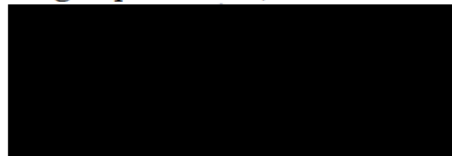
The documentary and testimonial evidence from the September 8, 2021 hearing establishes that for the 2020 gillnet fishing season, Mr. Cashen was eligible for PUA benefits beginning the week ending March 21, 2020 through the week ending January 2, 2021. The DETS's assessment that his eligibility was limited to the June to October 2020 opening dates misses the reality that work has to be done before and after the actual fishing season and that it was part of his job description as a crew member. Mr. Cashen has established that he was actively working to prepare the boat to fish the 2020 season from January 2020 and continuing until the season opened. Mr. Cashen also established that he was actively involved in the after-season repairs and maintenance at the end of the 2020 season. It is the determination of this tribunal that effective March 21, 2020 Mr. Cashen's situation fit the definition of a covered individual pursuant to The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance. Mr. Cashen remained a covered individual until the week ending January 2, 2021. As of January 2021, work being done shifted to preparing for the upcoming 2021 season. Work done after January 1, 2021 was connected to crew duties for that season. Mr. Cashen is still fishing the 2021 season. It is premature to determine whether Mr. Cashen is a covered individual for the 2021 fishing season.

DECISION

The DETS determination that Mr. Cashen is ineligible for PUA benefits prior to June 20, 2020 is **Reversed**. The decision that his eligibility ended the week ending October 24, 2020 is **Reversed**.

Furthermore, the issue of whether Covid-19 factors negatively impacted Mr. Cashen's income from his crew activities for the 2021 season is **Remanded** to the DETS. If Mr. Cashen establishes that his ability to earn income crewing the 2021 season was related to Covid-19 factors, then he would be eligible for PUA benefits beginning the week ending January 9, 2021 through the week ending September 4, 2021.

Dated: October 1, 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.

NOTICE REGARDING POSSIBLE WAIVER OF REPAYMENT BENEFITS

If the division continues to seek recovery of previously paid benefits after this decision, Mr. Cashen 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. Cashen must be given a separate appeal hearing on that issue if he so 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. Cashen can review AS.23.20.390, or call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

CERTIFICATE OF SERVICE

I certify that on October 4, 2021, the foregoing decision was served on Daniel Cashen (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