

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

In the Matter of )  
 )  
RICHARD HUDSON ) OAH No. 21-1571-PUA  
 ) Agency No. P21 802  
\_\_\_\_\_ )

**APPEAL DECISION**

**Docket Number:** P21 802

**Hearing Date:** August 30, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Richard Hudson

None

**CASE HISTORY**

Mr. Hudson appealed the May 18, 2021 determinations denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decisions were recorded in Notification ID No. L0013045623, Notification ID No. L001315649 and Notification ID No. L0013053815.

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 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 30, 2021. On August 30 a bench order was issued holding the record open for Mr. Hudson to mail in a written statement that he had prepared for the hearing. Mr. Hudson, and his wife, Cynthia Hudson testified telephonically and under oath. Mr. Hudson filed Exhibit A prior to the hearing. Mr. Hudson filed Exhibit B on September 2, 2021. Exhibit A and B are hereby admitted into evidence.

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 materials are identified as Exhibit 1. Exhibit 1 was originally 31 pages. On August 27, 2021 Mr. Varela of DETS provided an email regarding DETS record. That email was added to Exhibit 1 as page 32. Exhibit 1 is hereby admitted into evidence.

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

**FINDINGS OF FACT**

Mr. Hudson is a commercial fisherman. He lives in Metlakatla, Alaska. Mr. Hudson's business has 5 separate state permits for commercial fishing. Mr. Hudson owns the

fishing vessel, Lady Lisa. He uses Lady Lisa for all of his commercial fishing activities. He has fished commercially as a small business owner since 1974.

In 2020 Mr. Hudson was 71 years old. He had long term, chronic and severe medical conditions that placed him at a high risk of incurring significant health problems, or death, if he contracted Covid-19.<sup>1</sup> He received warnings and medical advice to self-quarantine from his primary doctor, Doctor Robert R. Gibson, from his wife, a nurse, and through the news media covering C.D.C alerts and local tribal council alerts. Dr. Gibson's primary advice, which guided Mr. Hudson's decision to severely limit his fishing in 2020 and 2021, was to "lay low"; "not travel", and "do not expose yourself to Covid-19".<sup>2</sup>

DETS confirmed that they did not have a copy of Dr. Gibson's letter, or any medical information in their documentation at the time that the May 18, 2021 Notifications were issued.<sup>3</sup>

Mr. Hudson testified credibly that his income from commercial fishing was significantly diminished due to his medical need to self-quarantine from Covid-19. Fishing has been his major source of income for years<sup>4</sup>

Mr. Hudson had five permits that he had planned to fish in 2020 and 2021. Four of those he has held for years. These are permits for IFQ halibut, winter and summer troll salmon, state gillnet and commercial shrimp. The season to fish these various permits are not all the same and combined they encompass the entire year.<sup>5</sup> In 2019 he paid \$350.00 for a True Cod permit for the upcoming 2020 season. The True Cod permit was for a yearlong fishery. Mr. Hudson is also eligible to fish the Annette Islands Reserve, a federally regulated fishery adjacent to Metlakatla.<sup>6</sup>

DETS has already determined that Mr. Hudson was available for PUA benefits, related to his fishing enterprises for three different time frames. He was determined to be a covered individual from February 29, 2000 through June 20, 2020.<sup>7</sup> He was also determined to be a covered individual from September 12, 2020 through to October 3, 2020.<sup>8</sup> Lastly, he was determined to be a covered individual from February 27, 2021 through May 8, 2021.<sup>9</sup>

DETS issued three related Notice of Non-Monetary Issue Determinations.<sup>10</sup> Each Notice identified a period during the 2020 and 2021 fishing seasons when DETS

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<sup>1</sup>. Exhibit A; Page 2. This letter is dated May 2021, but credible testimony establishes that Dr. Gibson had been advising Mr. Hudson to self-quarantine throughout the pandemic.

<sup>2</sup>. This finding is based on Dr. Gibson's letter, Exhibit A, and the credible testimony of Mr. Hudson and his wife, Cynthia Hudson.

<sup>3</sup>. Exhibit 1; Page 32. However, in Exhibit 1; Page 17 Mr. Hudson did identify himself as both old, and at high risk of Covid-19.

<sup>4</sup>. His other source of income is a \$1,400.00 a month retirement benefit. Exhibit 1; Page 17.

<sup>5</sup>. Halibut IFQ March 1-November 15; Area 1 Commercial Shrimp October 1-February 28; Area 1 summer trolling June 1-Sept 30; Area 1 winter trolling Oct 1-April 14; and Area 1, gillnet June 8-September 30.

<https://www.alaskafishingjobsnetwork.com/getting-a-job/alaska-fisheries-calendar-and-seasons/>

<sup>6</sup>. 25 C.F.R Sec. 241.1-3.

<sup>7</sup>. Exhibit 1; Page 18 'Adjudication Notes'.

<sup>8</sup>. *Id.*

<sup>9</sup>. *Id.*

<sup>10</sup>. Notifications ID No. L0013045623, ID No. L001315649 and ID No. L0013053815 Exhibit 1: Pages 3-5.

determined that Mr. Hudson was not a covered individual. All three letters were issued on May 18, 2021. Notice ID No. L0013045623 stated that Mr. Hudson was not eligible from the week ending June 27, 2020 through the week ending September 5, 2020 because he partially fished that season.<sup>11</sup> Notice ID No. L001315649 stated that Mr. Hudson was not impacted by covid from the week ending October 10, 2020 through the week ending February 20, 2021 but did not state the basis of that determination. Notice ID No. L0013053815 stated that Mr. Hudson was not impacted from the week ending May 15, 2021 but did not state the basis of that determination.

Mr. Hudson agrees that he fished part of the year, but he also established that due to Covid-19 his income from commercial fishing in both 2020 and 2021 was significantly diminished. His income was diminished for the permits he could not fish, and for the permits he partially fished. In prior years his highest earnings were obtained fishing the Area 1 troll salmon fishery, and the gillnet permit.

In 2020 and 2021 Mr. Hudson fished these permits, but he was not able to fish the whole season, or the prime locations due to the need to self-quarantine due to his medical conditions. To the extent that he fished he fished primarily in the Annette Island Reserve and not in Area 1.

For example, for gillnetting, he previously fished primarily his permits in Area 1, state permitted areas. He fished out of the Juneau, Lynn Canal area. He has fished this season since 1974. In 2020 and 2021 he could not fish that area due to his medical conditions. He testified that he would have been exposed to COVID-19 on the docks and at the processors. Also, to do this fishery in Area 1 he needed a crew member to help with fish transfers at the docks and processors, and he could not be on the boat with a crew member and effectively maintain proper isolation.

Mr. Hudson's need to limit his fishing in order to properly isolate continued throughout the 2021 season. Cynthia Hudson testified that Mr. Hudson received his second Covid vaccine on May 18, 2021. She also confirmed that the vaccine was not fully operational until Tuesday June 2, 2021; 4 days after the second shot was administered. Even after Mr. Hudson had the vaccine in 2021 he continued to get medical advice to isolate to avoid a breakthrough infection. Moreover, he still needed to follow the 6' feet of isolation guidelines. Following the 6 feet of isolation guidelines was not possible on the boat if he had crew, or at all at the docks. Luckily, he was eligible to fish the Annette Islands Reserve which allowed him to earn some income in 2020 and 2021. He could fish the Annette Islands Reserve and still isolate since infrastructure and protocol at the Annette Islands Reserve meant that he did not need crew. Also, there were not crowding issues at the dock or local processor. The tradeoff was that he fished a much smaller area and a limited range of species.

In a normal season Mr. Hudson earned about \$60,000 Gillnet fishing in Area 1. In 2020 he had to limit his gillnet fishing to the Annette Islands Reserve, and he earned only \$10,000.

## **EXCERPTS OF RELEVANT PROVISIONS OF LAW**

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<sup>11</sup> See, Also Exhibit 1; Page 30 showing suspension of PUA benefits for full-time employment denial.

**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—

(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;

(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

(iii) provides documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment not later than 21 days after the later of the date on which the individual submits an application for pandemic unemployment assistance under this section or the date on which an individual is directed by the State Agency to submit such documentation in accordance with section 625.6(e) of title 20, Code of Federal Regulations, or any successor thereto, except that such deadline may be extended if the individual has shown good cause under applicable State law for failing to submit such documentation; . . .

**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\_\_\_\_,

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

#### **4. Guidance**

a. Expanded list of COVID-19 related reasons approved by the Department---

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iii. Individuals experiencing a reduction of hours or a temporary or permanent layoff. The Department approves the following COVID-19 related reason for an individual to self-certify for PUA eligibility: “An individual is an employee and their hours have been reduced or the individual was laid off as a direct result of the COVID-19 public health emergency.”

This new COVID-19 related reason expands eligibility beyond the current provision of item (jj) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act, which is limited to situations where the individual’s place of employment is closed. Under this new COVID-19 related reason, if an individual is laid off because the place of employment is partially closed (either permanently or temporarily) or the individual has experienced a reduction in hours, the individual may now self-certify eligibility.

Generally, individuals in covered employment who are laid off, are experiencing a reduction in hours, or are working part-time as a result of partial business closure would qualify for regular UC (or PEUC or EB) and therefore would not be eligible for PUA. However, such individuals may not be eligible for regular UC (or PEUC or EB) because, for example, they lack sufficient wages to qualify, have a previous disqualification, or have exhausted regular UC, PEUC, and EB. This expanded COVID-19 related reason establishes a circumstance under which they may self-certify eligibility for PUA.

### **APPLICATION**

DETS has already determined that Mr. Hudson had a history of being engaged in the business of commercial fishing. The Division also verified his income information.<sup>12</sup>

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<sup>12</sup>. Exhibit 1: Page 27 5-18-2020 income verified and determined.

Because DETS did not have the benefit of Dr. Gibson's letter, it did not give sufficient weight to his claim that his ability to earn income was impacted by COVID-19 even though he fished part of the season.

Taking into account the timeframes approved by DETS, the openings for each permit, and Mr. Hudson's and Cynthia Hudson's testimony it is determined that Mr. Hudson was a covered individual eligible for PUA benefits under The CARES Act Section 2102(a)(3)(A)(ff) and (kk). His eligibility is from February 29, 2020 through October 31, 2020; and from February 27, 2021 through September 4, 2021.

Mr. Hudson has established that his commercial fishing activities and income were limited because of his medical need to self-quarantine and limit his exposure. While he was able to fish near to home in the Annette Islands Reserve, he could not participate in the larger, more profitable fishery based in the Juneau, Lynn Canal and Taku regions of Area 1. His income for gillnet fishing alone was \$50,000 less than his average income from gillnetting in past years. I find that this is a significant diminution in his income.

Mr. Hudson claimed that he should be covered for November, December 2020 and January 2021 as well, since, he had yearlong permits and could have fished yearlong but for the Covid-19 limitations. However, he did not offer persuasive evidence that he traditionally fished later than the end of October.

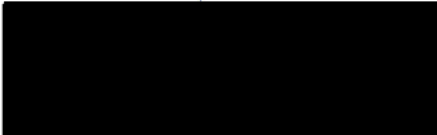
As to the 2021 season, Mr. Hudson was persuasive that he could not resume normal fishing activity or earn normal income even after he was fully vaccinated. He was unable to fish the profitable Area 1 fisheries until he could have crew on board and avoid the crowded docks at those harbors and processors.

### **DECISION**

The decisions set out in Notifications Notification ID No. L0013045623, Notification ID No. L001315649 and Notification ID No. L0013053815 are **REVERSED**.

It is the determination of this tribunal that Mr. Hudson 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. Mr. Hudson is eligible for PUA benefits beginning the week ending February 29, 2020 through the week ending October 31, 2020; and, from the week ending February 27, 2021 through September 4, 2021.

Dated: November 15, 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. Hudson can apply for a waiver from repayment. No waiver will be granted if she does not seek it. If a waiver is sought but not granted, Mr. Hudson must be given a separate appeal hearing on that issue if he requests. This decision may 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. Hudson can call the BPC at 907-465-2863, 1-888-810-6789, or email to [jnu.bpc@alaska.gov](mailto:jnu.bpc@alaska.gov).

### **CERTIFICATE OF SERVICE**

I certify that on November 15, 2021 the foregoing decision was served on Richard Hudson (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