

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

In the Matter of)
)
ROSS WILLNER) OAH No. 21-1586-PUA
) Agency No. P21 810

APPEAL DECISION

Docket Number: P21 810

Hearing Date: September 3, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Ross Willner

None

CASE HISTORY

The claimant, Ross Willner, timely appealed a June 1, 2021 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. 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 recorded hearing took place on September 3, 2021. Mr. Willner testified under oath. The Division of Employment and Training Services (DETS) provided written materials but was not a live participant.

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

FINDINGS OF FACT

On February 22, 2021, Mr. Willner filed a claim for Pandemic Unemployment Assistance benefits. He claimed eligibility starting in early 2020, asserting that COVID-19 was impacting fisheries early in the year and foreclosing work opportunities for deckhands. He has worked off and on as a deckhand in Kodiak since the 1970s, though he took a break from that work for several years prior to 2018.

The claimant moved back to Kodiak in late summer 2018 but was not able to fish. He had no fishing income that year. He tried to get work on a trawler for bottom fish during the January 2019 season but was not successful. In 2019, he started a job for a salmon operation in the summer but was injured on the job and suffered fish poisoning. His doctor advised him not to return for the rest of the season. By mid-

October 2019, when he may have been able to work again, boats fishing IFQs for halibut and black cod were already set for crew. He earned \$600 from fishing in 2019.

In 2020, the claimant again tried to find work in January on a trawler but was not successful. He planned to fish halibut and black cod starting in mid-March, salmon from June into August, then more halibut and black cod until the season closure in mid-November.

About February or March 2020, Mr. Willner worked a shore job for Ocean Beauty. He earned about \$1,000. He left the job when he got sick with what likely was COVID-19. Testing was not widely available at the time, and his diagnosis was never confirmed. Deeming that workplace unsafe because it was not possible to physically distance during the pandemic, he opted not to return to the job.

He fished for halibut in April 2020 on a boat that fishes IFQs owned by third parties. As a direct result of the pandemic, demand for halibut fell substantially and the price per pound similarly dropped. Mr. Willner earned \$1,311, about half of what he would have earned at halibut prices prior to COVID-19. From late June to early August 2020, he was a deckhand on a boat fishing for salmon in Bristol Bay. He earned about \$6,000. He asserts that COVID-19 also directly reduced prices for salmon, so his income was less than it would have been prior to the pandemic.

The claimant planned to fish other people's IFQs in the fall for halibut and black cod, but no one was hiring. Because of the low price, IFQ holders who formerly allowed others to fish their permits opted to fish themselves. Pandemic restrictions at canneries and fuel docks also limited the claimant's ability to approach boats and ask if crew was needed. His 2020 fishing income was roughly \$7,311.

As of the hearing date in 2021, the claimant had not been able to find a deckhand job in 2021 for any fisheries. He tried to get January trawling work and spring halibut work, but no one was hiring. In the summer, he also could not get work fishing for salmon. For reasons unrelated to the pandemic, the two boats he fished on in 2020 did not go out. He hopes to find a deckhand job for halibut and black cod this fall.

The claimant did not learn about the PUA program until sometime in early 2021. He filed his claim on February 22, 2021. On June 1, 2021, the Department determined that he was not eligible for PUA benefits because he was not impacted by a covered reason as of the week ending December 12, 2020 or later.

EXCERPTS OF 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—

(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;

(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;

Unemployment Insurance Program Letter (UIPL) 16-20, Change 2 Issued by 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.

Unemployment Insurance Program Letter (UIPL) 16-20 Change 2, Issued by U.S. Department of Labor on July 21, 2020:

14. Question: If an individual becomes unemployed for reasons unrelated to COVID-19, and now is unable to find work because businesses have closed or are not hiring due to COVID-19, is he or she eligible for PUA?

Answer: No. An individual is only eligible for PUA if the individual is otherwise able to work and available to work but is unemployed, partially unemployed, or unable or unavailable for work for a listed COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I) of the CARES Act. Not being able to find a job because some businesses have closed and/or may not be hiring due to COVID-19 is not an identified reason.

UIPL 16-20, Change 4 Issued by U.S. Department of Labor on January 8, 2021:

C.15. Backdating Requirements and Limitations (Section 201(f) of the Continued Assistance Act) (new). As discussed in Question 4 of Attachment I to UIPL No. 16-20, Change 1, individuals filing for PUA must have their claim backdated to the first week during the Pandemic Assistance Period (PAP) in which the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related

reason listed in Section 2102(a)(3)(A)(ii)(I) of the CARES Act. Section 201(f) of the Continued Assistance Act provides a limitation on backdating for claims filed after December 27, 2020 (the enactment date of the Continued Assistance Act).

- *PUA initial claims filed on or before December 27, 2020 (the enactment date of the Continued Assistance Act).* Initial PUA claims filed on or before this date may be backdated no earlier than the week that begins on or after February 2, 2020, the first week of the PAP.
- *PUA initial claims filed after December 27, 2020 (the enactment date of the Continued Assistance Act).* Initial PUA claims filed after this date may be backdated no earlier than December 1, 2020 (a claim effective date of December 6, 2020 for states with a Saturday week ending date and a claim effective date of December 7, 2020, for states with a Sunday week ending date). [Emphasis in original.]

APPLICATION

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 or partially unemployed because of one or more listed reasons related to the COVID-19 pandemic. The claimant is not eligible for regular unemployment compensation benefits.

Mr. Willner filed his PUA claim on February 22, 2021. Legal guidance issued by the U.S. Department of Labor on January 8, 2021 provides that, for claims filed after December 27, 2020, the Continued Assistance Act precludes PUA eligibility prior to the week ending December 5, 2020. Because of his filing date, the week ending December 12, 2020 is the first week in which Mr. Willner could be eligible for PUA, if he meets the eligibility criteria. For that reason, the Department's notice only assessed eligibility as of the week ending December 12, 2020. This decision does likewise.

Mr. Willner has worked off and on as a deckhand for many years. However, due to a gap in his fishing work prior to 2019 and very limited fishing in 2019, he cannot show that the pandemic caused a significant diminution of services in 2020 or 2021. He also cannot show that his limited recent fishing history created a reasonable expectation of continuing seasonal work in 2021. The two boats he worked with in 2020 did not fish in 2021, one because the owner sold his boat and retired, the other because the captain was injured in an accident and unable to fish.

The claimant did not have a job offer that was withdrawn because of COVID-19. His point that halibut boat captains were not hiring in 2020 because of the pandemic's impact on prices is well taken. However, it is not clear that was the case in 2021 for


either the salmon or halibut/black cod fisheries. As noted above, federal Department of Labor guidance states that being unable to find a job because businesses are not hiring due to COVID-19 is not a qualifying reason within the scope of the PUA program.

Regrettably, the undersigned cannot find that the claimant is a covered individual for purposes of the PUA program as of the week ending December 12, 2020 or later.

DECISION

The determination dated June 1, 2021 is **AFFIRMED**. The claimant is not eligible for benefits from the Pandemic Unemployment Assistance (PUA) program effective the week ending December 12, 2020 or thereafter.


Dated: September 6, 2021



For: Kathryn Swiderski
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 7, 2021 the foregoing decision was served on Ross Willner (by mail and email to: ). A courtesy copy was emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.


Office of Administrative Hearings