

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

In the Matter of)
)
JAMES SCUDERO) OAH No. 21-1580-PUA
) Agency No. P21 813
_____)

APPEAL DECISION

Docket Number: P21 813

Hearing Date: September 29, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

James Scudero

None

CASE HISTORY

The claimant, James Scudero, timely appealed two April 30, 2021 determinations by the Division of Employment and Training Services (DETS) 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 on August 2, 2021. 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 29, 2021 after being rescheduled following the claimant's failure to appear at an earlier hearing. The claimant appeared telephonically (by a very poor connection) from Annette Island, Alaska. The record remained open to allow the claimant to submit additional information, but despite several extensions, he never succeeded in submitting the information, despite reportedly trying to do so by his cell phone. The DETS chose not to appear at the hearing, or to make a representative available by telephone. The record finally was closed October 22, 2021.

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

FINDINGS OF FACT

James Scudero, a resident of Metlakatla, Alaska, filed a claim for PUA benefits on May 28, 2020. The DETS determined that the claimant was not eligible for PUA benefits from May 9, 2020 through September 26, 2020 because he was not impacted by COVID-19 in a manner that made him a covered individual under the program (Letter ID: L0012833391) and from the week ending December 12, 2020 through the week ending December 26, 2020 (Letter ID: L00012827570) during the "winter break" in

PUA benefits. Mr. Scudero’s testimony centered on the geoduck and sea cucumber fisheries rather than the salmon fishery. He described in detail the impact of the closure of the Metlakala processing plant, and the Ketchikan based processors’ rota system on those fisheries in response to the drop in demand from Asia, which he also attributed to the COVID-19 pandemic. However, the DETS allowed PUA benefits for the period of the sea cucumber season and geoduck seasons. Therefore, the only question is whether Mr. Scudero is eligible for PUA benefits during the period of the 2020 drift gill net salmon season.

In 2019, Mr. Scudero did not fish his own boat, but went out with his father. He did not fish for salmon in 2020 because prices were so low, it would cost more in gas than he would get for his catch. He testified he stayed home and helped his mother. Mr. Scudero attributed the low prices to poor sales due to the closure of restaurants due to COVID-19, the closure of processors, and lack of cargo space on limited flights from Ketchikan. He did fish the geoduck and sea cucumber season, which ended December 20, 2020.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic UNEMPLOYMENT ASSISTANCE, AMENDED BY CONSOLIDATED APPROPRIATIONS ACT, PUBLIC LAW 116-260, DIV. N, TITLE II, SUBCHAPTER IV, SEC. 241 (A), CODIFIED AS 15 U.S.C. § 9021:

(a) DEFINITIONS.—In this section:

...

(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; 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; 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).

UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20, CHANGE 1, ISSUED APRIL 27, 2020 BY THE U.S. DEPARTMENT OF LABOR.

Guidance added eligibility provisions under Section 2102(a)(3)(A)(ii)(I)(kk): An independent contractor may be eligible for PUA if he or she is unemployed, partially unemployed, or unable or unavailable to work because of the COVID-19 reasons listed above, including an independent contractor who experiences a “significant diminution of work as a result of COVID-19.”

UNEMPLOYMENT INSURANCE PROGRAM LETTER (UIPL) 16-20, CHANGE 2, ISSUED JULY 21, 2020, BY THE U.S. DEPARTMENT OF LABOR:

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.

APPLICATION

Prior decisions of this Tribunal concerning independent fishermen who do not fish their customary season have turned on evidence of a listed reason under Section 2102(a)(3)(A)(ii)(I). For example, in *In the Matter of R. Kaer*, P20 233 (March 8, 2021), a commercial fisherman who decided not to fish the commercial halibut season due to physician advice to avoid exposure due to his age and hypertension was allowed PUA benefits for the period of his customary season. Other cases have turned on evidence of “significant diminution” of their work. An example of this analysis is presented by *In the Matter of I. Mullet*, P20 465 (March 17, 2021), in which a deckhand aboard a longlining vessel applied for PUA benefits for the period of time that the vessel owner

delayed going to fish for halibut and black cod due to a market crash he attributed to restaurant closures. In that case, the owner put the vessel in service as soon as prices had recovered slightly and fished the majority of the season. Similarly, in *In the Matter of D. Aers*, P20 466 (March 17, 2021) a commercial salmon fisherman who fished three openers in the Copper River fishery before it was closed due to low escapement, then several other fisheries in Prince William Sound and lost money due to low fish prices was found eligible for PUA benefits. Similarly, *In the Matter of T. Moffet*, P21 494 (Aug. 17, 2021) reversed an adverse determination in the case of a commercial fisherman who fished a variety of fisheries but lost income due to low prices attributed to the impact of COVID-19 on Black Cod in the Asian markets. *In the Matter of M. Poirier*, P21 976 (Nov. 6, 2021) also awarded benefits to a deckhand whose captain fished a shortened season in 2020.

The common thread in all these decisions is that the owner or captain of the vessel fished at least part of the relevant season. As a result, a comparison could be made between evidence of earnings from a prior season to those of the 2020 season that established “significant diminution” in these self-employed individuals’ work. However, a significant diminution cannot be established if 100% of the drop in earnings is the result of a voluntary withdrawal from the work, as is the case here. Mr. Scudero chose not to fish for salmon entirely, which is a voluntary withdrawal from the labor market. Such a withdrawal may have been motivated by financial prudence, but withdrawal out of financial prudence is not unemployment compelled by COVID-19. Mr. Scudero did not, as did Mr. Moffet and Mr. Aers, fish and lose money due to low prices and establish that low prices were the result of COVID-19. He did not, as Mr. Mullet or Mr. Poirier, fish a shortened season in an effort to offset the impact of low prices. Finally, he did not show, as did Mr. Kaer, that he met one of the listed COVID-19 reasons for eligibility. Therefore, I conclude that he is not entitled to PUA benefits for the period from the week ending May 9, 2020 through the week ending September 26, 2020.

Based on Mr. Scudero’s testimony, he fished the sea cucumber seasons, although his earnings were diminished owing to the limitations in the market and the rota system put in place to spread the benefit of the fishery to as many participants as possible. He is not eligible during the period that the fishery was closed (and before the next fishery opened that he participated in or began vessel work in preparation for the season). The 20/21 commercial sea cucumber season opened October 5, 2020 by Alaska Department of Fish and Game Emergency Order and continued to have weekly openings in Southeast waters through the end of 2020. Therefore, Mr. Scudero remained eligible for PUA benefits in the month of December 2020.

The DETS did not contest Mr. Scudero’s entitlement to benefits in 2021. Therefore, this decision does not address them. This decision also does not address Mr. Scudero’s entitlement to a waiver of recoupment of any overpayment of benefits. It is possible he could qualify for a waiver from recoupment or, if a waiver were not granted, he must be afforded an appeal hearing in which such matters as estoppel

could be explored. Because this referral does not encompass these issues, the present decision does not decide them for or against Mr. Scudero.

The Division has advised 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. Scudero can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The determination of April 30, 2021 (Letter ID: L0012833391) is **AFFIRMED** and the determination of April 30, 2021 (Letter ID: L0012827570) is **REVERSED**.

Dated: December 30, 2021,



Kris Knudsen
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 January 3, 2022, the foregoing decision was served on James Scudero (by mail and email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.


Office of Administrative Hearings