

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

In the Matter of)	
)	
JACOB FORTMAN)	OAH No. 21-1730-PUA
_____)	Agency No. P21 854 03

APPEAL DECISION

Docket Number: P21 854 03

Hearing Date: September 27, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Jacob Fortman

None

CASE HISTORY

The claimant, Jacob Fortman, appealed a February 21, 2021 re-determination 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. 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 27, 2021.

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

FINDINGS OF FACT

Jacob Fortman has supported himself as a construction worker or handyman for most of his adult life. As a construction worker, he is employed by other contractors and works individual jobs or seasons. As a handyman he finds and performs his own jobs. He is capable of “building your house from the ground up,” so as a handyman he can offer a wide range of construction services. Mr. Fortman has never been a general contractor: he has never been licensed or bonded as such. Mr. Fortman has also never had an Alaska business license for his handyman service business.

Mr. Fortman moved from Anchorage to the Matanuska Valley. When he did so, his handyman business became his primary source of income. However, by 2018 Mr. Fortman had fallen on some hard times. There was a lessened demand for handyman services. Many of his work tools had been stolen. His motor vehicle was no longer reliable enough for employment use. Thus, in 2019 his handyman work was limited to employment by family and friends. According to Mr. Fortman he reported

approximately \$19,000.00 in self-employment income for 2019 from those projects. He estimated that was half his prior annual income.

Mr. Fortman spoke with a friend, Jason Agre, who owned Jason's Painting and Drywall (Jason's), a small painting, texturing, and insulation business.¹ Mr. Agre and Mr. Fortman have been friends for more than 25 years. Mr. Fortman helped Mr. Agre open the painting business. Mr. Agre agreed to hire Mr. Fortman as a "subcontractor." Although Mr. Fortman and Mr. Agre used the term, Mr. Fortman was not in fact a subcontractor. Mr. Fortman did not supply his own materials, work the job, and bill Mr. Agre. Instead, the two men worked together. Mr. Fortman was paid directly by Mr. Agre but in cash, apparently so Mr. Agre could manage his finances in a way to reduce his reportable income for child support.

Jason's had several contracts for interior painting on the Anchorage Hillside for spring 2020. Mr. Fortman expected he would work the 2020 construction season at Jason's. Mr. Fortman typically does not work December, January, and February. He considers his construction season to be March through November.

Mr. Fortman and Mr. Agre were working interior painting jobs when the Governor's Disaster Declaration and first Alaska Health Mandates were announced in March 2020. Jason's was permitted to finish one job. The other homeowner cancelled the remainder of the job. Jason's other clients called with cancellations and requests to delay/reschedule. Mr. Agre told Mr. Fortman he would re-call him if the paint jobs renewed or new work came in.

During the summer of 2020, Mr. Fortman did not get personal calls for handyman services. No one wanted a stranger in their homes. Mr. Agre did not have painting or drywall work for Mr. Fortman. This is consistent with overall reports from the construction industry that construction work collapsed the spring, summer, and fall of 2020. Reportedly, Anchorage construction rebounded in March and April 2021, however.

On May 28, 2020, Mr. Fortman was arrested on misdemeanor charges.² He was released June 18, 2020 on conditions of bail. The conditions impose an area restriction around the location of the charged offense but permit him to work.³ Given the relationship between Mr. Agre and Mr. Fortman, this decision concludes Mr. Agre would have maintained Mr. Fortman's employment.

¹ Ak business license, 1049393. (Now expired).

² See, *Municipality of Anchorage v. Jacob Fortman*, 3AN20-04226CR. https://records.courts.alaska.gov/eaccess/searchresults.page?x=N2HwArwylNOy40IRdkIDJYjyVD6KSM0M0Rwu58G652mVYpa7ovvnMPurJJwstS3DYTtde5G3*mYs8ZEIMXfcbA

³ *Id.*

Jason's did not need Mr. Fortman the summer or fall of 2020 because there was no work. Mr. Fortman did not find personal handyman employment other than a minor repair project for an acquaintance.

Mr. Fortman established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 21, 2020. The Division approved his claim through the week ending November 7, 2020. He was paid approximately \$11,626.00 in benefits. Mr. Fortman testified he used the money to support himself and his household. He also used it to purchase new and updated tools for his construction work.

On February 21, 2021 the Division determined that the claimant was not eligible for PUA benefits because he was not impacted by COVID-19 in a manner that made him a covered individual under the program because he had not submitted requested verification paperwork. The February 21, 2021 re-determination did not include notice that the Division would seek repayment of the previously paid benefits.

The Division made a demand for repayment after the February 21, 2021 redetermination.

Mr. Fortman filed an appeal on June 23, 2021. Mr. Fortman testified he tried to file earlier but problems with the automated system made it impossible to submit his request telephonically until that date.

TIMELINESS OF THE APPEAL

Under AS 23.20.340 and 8 AAC 85.151 the appeal of an agency determination or re-determination must be filed within 30 days after the determination or redetermination is made. However, the 30-day period may be extended for a reasonable time if the appellant shows that the failure to file within this period was the result of circumstances beyond the appellant's control. In addition, due process requires claimants "be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department's actions."⁴

This Tribunal finds that because the February 21, 2021 re-determination notice did not inform Mr. Fortman that re-determination could result in a requirement he repay the previously dispersed sum, it did not provide him a meaningful opportunity to understand the import of the re-determination decision. Because his appeal occurred promptly after he was given such notice, this Tribunal finds his appeal was timely.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

⁴ *Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1007 (Alaska 2008); *see also Allen v. State, Dept. of Health & Social Services*, 203 P.3d 1155, 1168-70 (Alaska 2009)(discussing recoupment).

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law.⁵ The CARES Act creates three new unemployment insurance assistance (UI) programs: Pandemic Unemployment Compensation (PUC), Pandemic Emergency Unemployment Compensation, (PEUC) and Pandemic Unemployment Assistance (PUA). PUA provides emergency unemployment assistance to workers who are left out of regular state UI or who have exhausted their state UI benefits(including any Extended Benefits that might become available in the future).⁶

To be eligible, PUA applicants must establish that they are a covered individual under the ACT. CARES Act, Pub. L .No. 116-136 § 2102(a)(3)(A) defines “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

⁵ CARES Act, S. 3548, 116th Cong. (2002).

⁶ *Id.*

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

(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 (UIPL) 16-20, Change 5 Issued by U.S. Department of Labor on February 5, 2020:

Sec. 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. These criteria are typically announced via Unemployment Insurance

Program Letters (UIPL). On February 5, 2020, the Department issued UIPL 16-20, Change 5. In that UIPL change, the Department approved 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.”⁷

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.

This change is retroactive to the beginning of the PUA program.⁸ Because Mr. Fortman filed his PUA claim before December 27, 2020, he is entitled to backdate his claim to when he first met the updated applicable COVID-19 related reason.⁹ In this case, Mr. Fortman’s claim is effective the week ending March 21, 2020, the week he was laid off.

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. The claimant was not eligible for UC.

APPLICATION

Mr. Fortman was a covered individual under the reduced employment or laid-off prong of § 2102(a)(3)(A)(ii)(kk): he was able to demonstrate that his employment with Jason’s Painting and Drywall was impacted as a direct result of the COVID-19 pandemic.

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 due

⁷ UIPL, 16-20, Change 5, Sec. 4(a)(iii).

⁸ UIPL, 16-20, Change 5, Sec. 4(b)(i).

⁹ UIPL, 16-20, Change 5, Sec. 4(b)(iv)(A)

to one of the listed reasons related to the COVID-19 pandemic. Mr. Fortman's self-employment did not qualify him to claim regular unemployment benefits.

Mr. Fortman filed his PUA claim effective the week ending March 21, 2020. Mr. Fortman did not establish existence of a legitimate self-employment business as a handyman prior to the pandemic. He did not have a business name, license, business cards, records, or other indicia of an established business. This tribunal does not doubt that Mr. Forman did construction work for money when available, but it did not arise to a legitimate business under the law.

However, Mr. Fortman's records with the Alaska Department of Labor clearly demonstrate a lengthy history of reported work in the construction industry. Mr. Fortman's testimony he was hired by Jason's Painting and Drywall, but the owner preferred to label the relationship a "subcontractor" or "joint venture" was credible. There can be no legitimate dispute that when Mr. Fortman was laid off from Jason's due to cancellations caused by COVID-19, he was directly impacted by the pandemic and could be a covered individual under § 2102(a)(3)(A)(ii)(I)(kk) as expanded in UIPL 16-20, Change 5.

Mr. Fortman testified he does not work year-round as a construction worker. His season is March to November. He anticipated he would work the 2020 season for Jason's. Therefore, the Division's original decision to approve his claim from Marth to November was correct. Mr. Fortman became ineligible in November 2020, at the end of his typical work season.

In addition, Mr. Fortman was not eligible while he was incarcerated. His incarceration was not directly due to the pandemic.

NOTICE REGARDING POSSIBLE WAIVER OF REPAYMENT OF BENEFITS

This decision will affect repayment of previously approved benefits.

Mr. Fortman's benefits must be recalculated based on this decision. If the Division continues to seek recovery of previously paid benefits after this decision, Mr. Fortman can apply for a waiver from repayment. If a waiver is not granted, Mr. Fortman must be given a separate appeal hearing on that issue.

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, the claimant can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The March 21, 2021 re-determination by the Division is **MODIFIED**.

The Division's March 21, 2021 re-determination for the period beginning the week ending March 21, 2020 through the week ending May 30, 2020, the week Mr. Fortman was arrested is **Reversed**. Mr. Fortman is eligible for PUA benefits for the period beginning the week ending March 21, 2020 through the week ending May 30, 2020.

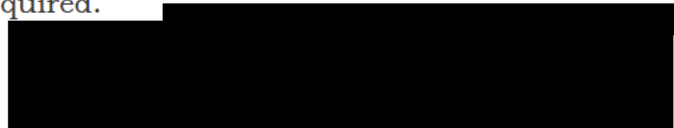
The Division's March 21, 2021 re-determination for the period beginning the week ending June 6, 2020 through the week ending June 20, 2020, the weeks Mr. Fortman was in custody, is **Affirmed**. Mr. Fortman is not eligible for PUA benefits for the period beginning the week ending June 6, 2020 through the week ending June 20, 2020.

The Division's March 21, 2021 re-determination for the period beginning the week ending June 27, 2020 through the week ending November 7, 2020 is **Reversed**. Mr. Fortman is eligible for PUA benefits for the period beginning the week ending June 27, 2020 through the week ending November 7, 2020.

The Division's March 21, 2021 re-determination for the period beginning the week ending November 14, 2020 through the week ending March 27, 2021, the week the Division issued the re-determination, is **Affirmed**. Mr. Fortman is not eligible for PUA benefits for the period beginning the week ending November 14, 2020 through the week ending March 27, 2021.

This decision does not address Mr. Fortman's eligibility after the week ending March 27, 2021. Subsequent eligibility should be determined by DETS, and Mr. Fortman provided a separate right to appeal if required.

Dated: September 27, 2021,


Carmen E. Clark
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 28, 2021, the foregoing decision was served on Jacob Fortman (by mail/email at [REDACTED]). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

[REDACTED]
Office of Administrative Hearings