

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

In the Matter of)
)
BRIAN SMITH) OAH No. 21-2070-PUA
) Agency No. P21 980
_____)

APPEAL DECISION

Docket Number: P21 980

Hearing Date: November 2, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Brian Smith

None

CASE HISTORY

The claimant, Brian Smith, timely appealed an August 10, 2021 Division of Employment and Training Services (DETS) 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 in September of 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 November 2, 2021. Mr. Smith appeared telephonically from Palmer, Alaska and testified under oath. Although notified of the hearing, the DETS did not appear or make a representative available by telephone; it relied on the documents it filed in this appeal, which are admitted as Exhibit 1.

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

FINDINGS OF FACT

Brian Smith filed a claim for PUA benefits on July 19, 2021, effective December 6, 2020. The Division determined that the claimant was not eligible for PUA benefits effective the week ending August 7, 2021, because he was not able and available for work for reasons unrelated to COVID-19 and thus not a covered individual under the program. Mr. Smith asserts that he is a covered individual whose self-employment business was closed as a direct result of the COVID-19 public health emergency.

Mr. Smith is the owner and manager of Pioneer Pizza Co., a pick-up and delivery business that has been operated in Palmer for 31 years. He and his wife owned the business (an Alaska corporation) for the past 17 years.

At the beginning of 2020, Mr. Smith had about 13 people working at any one time: 5 drivers, 3 cooks, and 3 or 4 “inside” employees who took orders, helped with prep work, boxed pizzas, and cashiered. He and his wife worked in the business themselves, doing ordering, inventory, prep work and doing the books. Mr. Smith often filled in whenever an employee was missing. Mr. Smith was very proud of his relationship with former employees, including students from Colony High School, who would come back to work for him in the summer after being away at college. Mr. Smith was also proud of his last cook, a one-time student worker he had trained himself, and who left after five years, so that he could work in an institution that offered health insurance and retirement benefits.

Mr. Smith was notified March 20, 2020, that one of his employees had tested positive for COVID-19 and requested to quarantine. He closed the business for 14 days and donated all the perishable food to the food bank. When the business reopened, he did in compliance with CDC Guidance, including wearing masks, temperature checks, a log sheet of those present, and requiring sick employees to stay home. He did not have any subsequent employees exposed in the business.

However, beginning in June of 2020, Mr. Smith began to lose employees. He stated a certain amount of turnover was normal in the business, which employs many young people. However, he was finding it more difficult to get replacements. His summer college workers didn’t return. He found it more and more difficult to staff the restaurant, so that by April 2021 he was forced to close on the two slowest nights of the week, Sunday and Monday. Finally, the cook who’d been with him five years gave him 60-days’ notice, and in that time, despite aggressive recruitment, he was unable to find a replacement. Of his last three cooks, one left to go to Arizona, one went to work for the State of Alaska, and one went to work for the local school district.

Mr. Smith closed his business’s doors on July 31, 2021, after he was unable to hire cooks. Mr. Smith had previously scheduled his surgery on his shoulder, but it was delayed due to COVID-19 related hospital scheduling problems. He had a shoulder joint replacement and will be unable to use his left arm and shoulder for three to six months.

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 (also called Continued Assistance 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—

...

(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;

...

(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.

Guidance issued by the Secretary of Labor on April 27, 2020 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”.

Unemployment Insurance Program Letter No. 16-20, Change 4, Section C.15.

Issued by U.S. Department of Labor on January 8, 2021. Backdating Requirements and Limitations (Section 201(f) of the Continued Assistance Act). 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

Mr. Smith’s business closure in March of 2020 was clearly a direct result of the COVID-19 public health emergency. He was contacted by the State of Alaska’s Division of Public Health and directed to quarantine with all the other employees exposed to the infected employee, effectively closing his business for the required quarantine period. During that time, he would have been eligible for PUA benefits under Section 2102 (a)(3)(A)(ii)(I)(ee) and (a)(3)(A)(ii)(II). However, because he did not file his claim for PUA benefits until after December 27, 2020, his claim for that period is foreclosed by law. See, Unemployment Insurance Program Letter No. 16-20, Change 4, Section C.15.

Turning to the period from August 1, 2021, following the closure of the Pioneer Pizza Co., I find that this closure is not “a direct result of the COVID-19 public health emergency.” Mr. Smith contends that he was unable to recruit replacements for his employees because people were able to collect PUA benefits, so they did not need a job. He based this assertion on his discussions with other restaurant owners who also had trouble finding employees and who believed their difficulties were a result of people collecting more money in pandemic-related benefits than they could earn working. He did not attribute his difficulty recruiting to inability to compete for employees by offering health insurance benefits or other benefits, higher wages, or better hours and working conditions.

Mr. Smith produced records that he earned a profit of \$37,964 in 2019 and paid his wife, Teresa Smith, wages of \$115,890.94 in 2019. Mr. Smith’s claim of a diminution of business income in 2020 and 2021 was not challenged by the DETS investigator (Ex. 1, pg.12). However, it is not enough that the diminution exists; the diminution must be shown to be caused by one of the COVID-19 related reasons listed in Section 2102(a)(3)(A)(ii)(I). This is what Mr. Smith is unable to show.

Pioneer Pizza Co. had always been a local “delivery and pick-up” business, so Mr. Smith did not suffer by loss of dine-in clientele as other restaurant owners did following State COVID-19 Health Mandate 03. He is not dependent of tourists, so that, unlike other hospitality businesses reliant on the tourism industry, especially in the Denali Borough or in Southeast Alaska, he cannot show loss of business income was a direct result of the COVID-19 border closures, air travel disruptions, or closure of the cruise ship season. While some school activity-related business would have been lost in 2020 when the Mat-Su Borough School District was closed, he testified that he continued to have strong demand for his pizza – he could not get workers to remain open seven-days a week to meet the demand for his pizza. He testified his workers did not tell him they quit because they were afraid of contracting COVID-19 or because they, or their family members had contracted COVID-19. There were no state, borough or city orders in effect that limited his ability to hire replacement employees following normal turnover.

When workers, who are unemployed for non-COVID-19 related reasons, are unable to find jobs due to closure of businesses or businesses not hiring due to COVID-19, those workers are not eligible for PUA benefits. *See*, Unemployment Insurance Program Letter No. 16-20, Change2, Attachment 1, pg. I-6. Like the worker searching for a job, Mr. Smith was looking for an employee in a market where workers are choosing to leave the industry, perhaps due to other sectors of it closing due to COVID-19,¹ and perhaps, like his employees, seeking more stability, pay, benefits, and

¹ The Alaska Department of Labor and Workforce Development reported that in April of 2020, about 4,000 jobs were lost in the full-service restaurant industry in Alaska alone. The combined leisure and hospitality industry added 4,700 jobs in Alaska over September of 2020, although employment in the industry is still well below September of 2019. The unemployment

hours. In short, there is no evidence that the July 31, 2021 closure of Pioneer Pizza Co. was “a direct result” of the COVID-19 public health emergency.

Even if the closure of his business was due to the COVID-19 public health emergency, Mr. Smith must still be “able and available” for other work to qualify for PUA benefits as stated in Section 2102 (a)(3)(A)(ii)(I). Here, his physician had clearly indicated he would be unable to use his “left upper extremity” for three to six months following a total shoulder replacement on August 10, 2021, a condition that is not related to COVID-19. Mr. Smith testified that he had not been released to work following this surgery. Therefore, from the week ending August 14, 2021 until he is released to return to work, Mr. Smith is not eligible for PUA benefits.

DECISION

The determination of August 10, 2021 is **AFFIRMED**.

Dated: November 17, 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 November 18, 2021, the foregoing decision was served on Brian Smith (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

rate in the Matanuska-Susitna Borough was 5.5% in September 2021; an improvement over the 6.8% unemployment rate in September 2020.