

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

In the Matter of )  
 )  
DARIN COLBRY ) OAH No. 21-2385-PUA  
 ) Agency No. P21 994 03  
\_\_\_\_\_ )

**APPEAL DECISION**

**Docket Number:** P21 994 03

**Hearing Date:** November 8, 2021

**CLAIMANT APPEARANCES:**

Darin Colbry

**DETS APPEARANCES:**

None

**CASE HISTORY**

Mr. Colbry appealed a March 18, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The decision was recorded in Letter ID No. L0010309544. The Claim ID number is A00-000-0592-6605. When denying eligibility, the Division informed him that he had been deemed ineligible beginning the week ending November 7, 2020.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings on October 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 matter was heard in a recorded hearing on November 8, 2021. Mr. Colbry testified telephonically and under oath. At its own election, the Division of Employment and Training Services (Division) provided only written materials for the hearing and was not a live participant. The documents provided by DETS are identified as Exhibit 1 and were admitted into evidence at the hearing.

Mr. Colbry requested that the record in matter no. P21-576 be made part of this appeal.<sup>1</sup> That request is hereby granted. The findings of fact and the ruling of the tribunal as set out in the Appeal Decision of August 16, 2021 are hereby adopted by this tribunal and incorporated into this matter.

On November 8, 2021 an order was issued holding the record open until November 12, 2021. On November 9, 2021 Mr. Colbry filed documents from his snow removal

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<sup>1</sup>. The record and decision in P21-576/OAH CaseNo 21-1348 PUA, involve the same parties, the same claim of Mr. Colbry and the same issues of law.

clients for the months of November and December 2019 and January, February and March 2020. There are identified as Exhibit A. On November 9, 2021 Mr. Colbry also filed portions of his 2019 IRS form 1040. His tax documents had been provided to the Division on February 1, 2021.<sup>2</sup>

The matter was referred to the ALJ to consider two issues, in sequence: whether the lateness of Mr. Colbry's appeal disqualified him from challenging the determination of ineligibility, and, if not, whether Mr. Colbry meets the eligibility requirements under the act for any period after the week ending November 7, 2020.

## **FINDINGS OF FACT**

### **Timeliness**

The Notice of Non-Monetary Issue Determination that is the subject of this appeal was issued March 18, 2021. The claim ID number for that ruling is A00-000-0592-6605. In that letter the Division informed Mr. Colbry that he was ineligible for PUA benefits from the week ending November 7, 2020 onward. This is the determination that Mr. Colbry is now appealing. The Division reported that Mr. Colbry did not file an appeal of this determination until September 29, 2021.

On March 18, 2021 the division issued a separate Notice of Non-Monetary Issue Determination. That determination is Letter ID No. L0010352552. It has the same Claim ID number as the current matter. That determination addressed an earlier period of 2020 when the Division claimed that Mr. Colbry was not eligible for PUA benefits. On March 18, 2021 Mr. Colbry, called and filed an appeal.<sup>3</sup>

When the Division referred his appeal to OAH it identified that case as P21-576. The Exhibit 1 attached to P21-576 did not include the March 18, 2021 determination that is the subject of this instant appeal.

On August 16, 2021 the Appeal Decision was issued in P21-576. That decision reversed the Division's determination that Mr. Colbry was not eligible for PUA benefits from the week ending June 6, 2020 through the week ending August 1, 2020. That decision did not address or determine the issue of the denial of PUA benefits from the week ending November 7, 2020 onward since that issue was not placed before the ALJ in the Division's referral.

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<sup>2</sup>. Exhibit A; Pages 14-15./

<sup>3</sup>. Exhibit 1: Page 17 from P21-576 shows that Mr. Colbry contacted the Division on March 18, 2021 and lodged a timely appeal.

On August 24, 2021 Mr. Colbry received a separate notice from the Department of Labor informing him of his right to appeal the Appeal Decision.<sup>4</sup> He called the Division to check why he got the information on how to appeal a commissioner's determination. During that conversation he learned that the issue of benefits from November 7 onward had not been resolved. He was told that he still had to appeal the issue of his benefits ending November 7, 2020. The staff he talked to said that they would check and get back to him. After no one got back to him he contacted the Division and filed the appeal addressed in this decision on September 29, 2020.

## **Merits**

This appeal focuses on the Division's determination that Mr. Colbry was not eligible for benefits after the week ending November 7, 2020. At the time that decision was made the Division did not have the benefit of the Appeal Decision issued on August 16, 2021. In that matter the tribunal entered factual findings regarding Mr. Colbry's business and his status as a covered individual. Prior to the first appeal hearing, the Division had already determined that Mr. Colbry was eligible for PUA benefits from the week ending March 14, 2020 through the week ending May 30, 2020, and the period from the week ending August 7, 2020 through the week ending October 10, 2020. As a result of the tribunal Appeal Decision in P21-576 Mr. Colbry was also determined to be eligible for PUA benefits from the week ending June 6, 2020 through the week ending August 1, 2020.

In the August 16, 2021 ruling the tribunal also made the factual finding that Mr. Colbry's business offered not only window cleaning, lawn moving and landscaping services, but also that it offered snow removal for driveways.<sup>5</sup>

At the appeal hearing on November 8, 2021 Mr. Colbry testified credibly that he had offered snow removal services as part of his business in 2018, 2019 and January through mid-March 2020. He testified that his normal season for snow removal began in mid-October and lasted through the end of April. Each year would vary but that was the date range when he would expect snow and he had to be available to provide his services. Prior to the Covid closures, he had 8 clients who retained him to clear their driveways whenever there was a snow fall of 2 inches or more. He charged \$30.00 per trip. Mr. Colbry has provided documents to support his testimony.<sup>6</sup>

Mr. Colbry testified that by the time of the March 18, 2020 pandemic-related closures, his 2019-2020 season was almost over. He testified that when the 2020-2021 season began, he called his usual clients but none of them wanted him to come. He reported that they told him that they were still worried about catching Covid, and they were

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<sup>4</sup>. Alaska Department of Labor and Workforce Development; Appeals to the Commissioner. Case P21-994 03: Exhibit 1: Page 23.

<sup>5</sup>. Appeal Decision P21-576; issued August 16, 2021; Findings of Fact at Page 2.

<sup>6</sup>. Exhibit A; Client invoices for November and December 2019 and January, February, and March 2020.

waiting until they could get their vaccines. Mr. Colbry also looked for work driving his snowblower around and knocking on doors. No one was interested in hiring him.

Mr. Colbry has two children. In November 2020 his daughter was a student at Goldenview Middle School. Her school was on remote learning for all of the first semester and parts of the second semester of 2020-2021. Mr. Colbry testified that home schooling and supervising her did not reduce his ability to work after November 7, 2020<sup>7</sup> since he would bring her with him in the truck while looking for work. If he had been offered snow removal work, she could have ridden with him in the truck while he worked.

In May 2021 Mr. Colbry accepted a part-time job doing security for Williwaw restaurant.

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

### **AS. 23.20.340**

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under [AS 23.20.360](#), 23.20.362, 23.20.375, 23.20.378 - 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

### **8 AAC 85.151 provides in part,**

(b) An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on

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<sup>7</sup>. In school year 2019-2020 she was an elementary student and needed more supervision by him.

forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

**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—

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(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—

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(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

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(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).

### **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...

## **APPLICATION**

### **Timeliness**

The record in P21-576 and P21-994 03 taken together show that Mr. Colbry filed a timely appeal of both March 18, 2021 determination letters and that he filed that appeal on March 18, 2021. The Division’s decision to only refer one of its’ March 18, 2021 determinations to OAH in case P21-576 was not Mr. Colbry’s fault and any timeliness issues were the result of circumstances beyond his control. Had both letters been provided to OAH in P21-576, then all issues could have been determined at that time and Mr. Colbry would not have any issue with the timeliness of his appeal.

### **Merits**

It has already been determined by the Division, and by the prior Appeal Decision, that Mr. Colby is a covered individual beginning the week ending March 14, 2020 through the week ending October 10, 2020. Then, in the Determination at issue, the Division extended his eligibility through the week ending November 7, 2020.

Mr. Colby’s snow removal activities traditionally begin in mid- October and continue through April of the following year. Mr. Colby has provided convincing testimony and documents showing that he had an established practice of providing these services. He has also provided credible testimony that his clients remained uneasy about Covid

exposure, and as a result they did not want snow removal services from him in the 2020-2021 season.

This tribunal is also making a factual finding that Mr. Colbry has filed documentation in this matter that is of the type to satisfy the requirements of the Continued Assistance Act, Public Law (Pub. L) 116-26. He has filed business invoices for the months of November- December 2019 showing that he was performing snow removal during that time.<sup>8</sup> He has already provided the Division with his form 1040 for 2019.<sup>9</sup>

## DECISION


### Timeliness

Mr. Colbry filed a timely appeal on March 18, 2021. The fact that the Division bifurcated the issues and delayed a review of Notice ID No. L001030955 was not within his control.

### Merits

It is the determination of this tribunal that Mr. Colby 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. The DETS determination that he is ineligible for PUA benefits after the week ending November 7, 2020 is REVERSED. Mr. Colbry is eligible for PUA benefits from the week ending March 14, 2020 until the week ending May 1, 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.


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<sup>8</sup>. Exhibit A.

<sup>9</sup>. Exhibit 1: Page 18

**CERTIFICATE OF SERVICE**

I certify that on November 15, 2021 foregoing decision was served on Darin Colbry (by mail & email). A copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

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Office of Administrative Hearings