

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

In the Matter of)
)
DELL WILSON) OAH No. 21-2386-PUA
) Agency No. P21-995
_____)

APPEAL DECISION

Docket Number: P21-995

Hearing Date: November 29, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Dell Wilson

Jurney Walls-Nitschke

CASE HISTORY

The claimant, Dell Wilson, timely appealed two determinations dated September 15, 2021, and one dated June 4, 2021, all of 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 October 1, 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 29, 2021. Mr. Wilson participated and represented himself. The Division of Employment and Training Services (Division) was represented by Jurney Walls-Nitschke. Both parties testified under oath. Mr. Wilson was given until December 3, 2021 to submit additional information relevant to his appeal, at which point the record closed.

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

FINDINGS OF FACT

Mr. Wilson established a claim for Pandemic Unemployment Assistance benefits effective the week ending April 11, 2020. The Division initially determined that the claimant was eligible for PUA benefits the week ending April 11, 2020 through the week ending May 29, 2021, having been impacted by COVID-19 in a manner that made him a covered individual under the program. The Division subsequently issued several redeterminations reversing this decision. Two were dated September 15, 2021 and notified him that as his claim lacked both identity verification and proof of COVID-19 impact he was ineligible beginning the week ending February 8, 2020. The third was dated June 4, 2021 and stated that he was ineligible beginning the week

ending January 2, 2021 as he had not submitted the necessary employment substantiation required by the Continued Assistance Act. The Division is now seeking to recoup approximately \$25,000 in benefits paid in error.

Mr. Wilson 58 years old and has long worked in the construction field as a worker, employee manager, and as a project supervisor. He was employed by BP for three years, then became president of construction for a Glenallen operation for seven. As old back injuries started to increasingly bother him, he shifted to working less hours on an on-call basis, making about \$28,000 annually. From 2017 through 2019 he was a contract construction worker, then on the payroll for the Central Council of the Tlingit and Haida Indian Tribes, working on various construction projects as funding allowed. He reached an agreement with his standing Council liaison Myrna Gardner that in the spring of 2020 he would meet with tribal members in Juneau to discuss a substantial list of pending projects within the town the Council wanted completed, taking him through the end of the year.

The following months unfolded very differently than he expected. He relocated to Juneau, but in 2019 Ms. Gardner left the Council, and Mr. Wilson had more difficulty contacting the Council for guidance regarding the pending projects. In the spring of 2020 the pandemic caused construction work to shut down due to COVID fears and supply shortages. The Council stopped all projects involving contract workers. Mr. Wilson went ahead and applied for PUA benefits online, indicating that with this loss of expected income, he was impacted by the COVID-19 pandemic the week ending April 11, 2020.

Mr. Wilson was approved as a “covered individual” under the CARES Act and received PUA benefits for many weeks following. It wasn’t until earlier 2021 that he received a letter notifying him that he owed \$10,000 in overpaid benefits paid out in the preceding weeks. Taken aback, he stopped applying. As the record was not explicitly clear as to why this happened, a Division representative was asked to participate in the hearing. The representative explained that his claim had been flagged as possibly “fraudulent,” as the Council had provided his last date of employment with the Tribe as May 2019, and Mr. Wilson listed on his PUA application that his job was impacted in April 2020.

Mr. Wilson testified credibly under oath that the electronic PUA application did not provide an option to explain that he stopped being on the Council payroll in 2019, and became their on-call, independent contractor in 2020 with the expectation to begin working on a list of projects for the Tribes in the spring. Therefore, his response was not fraudulent. Nevertheless, once the claim had been flagged the representative stated that the Division began examining it more closely and determined that his initial application should not have been approved, as he had never submitted proof of identification. Therefore, Mr. Wilson was sent a letter notifying him that all benefits he

had been paid from April 11, 2020 and onward, a sum of over \$25,000, were to be recouped.

Mr. Wilson testified credibly that this notification came as a great shock. His income in 2020 was approximately \$7500, and he relied heavily on subsistence hunting for survival. He remained in Juneau until April 18, 2021, when he moved back to Copper Center. It seems that perhaps due to the moves he only received some, not all the mail from the Division, and did not get the earlier notifications that his claim was lacking proof of identification or COVID impact. As he was receiving PUA benefits, he did not think to go online to check the status of his claim.

Prior to the close of the record, Mr. Wilson provided proof of his identification.

EXCERPTS OF RELEVANT 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—

* * *

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

UIPL 16-20, Issued by USDOL April 5, 2020

k. The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

- The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable

to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her *customary work* activities, and has thereby forced the individual to suspend such activities. . . . [italics added]

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, even absent a suspension of services. [italics added]

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 underemployed because of one or more listed reasons. There is no dispute the claimant is not eligible for benefits from other unemployment programs.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that a self-employed individual who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual.

Mr. Wilson has very long history of work in the construction field, most recently as a contract worker for the Council. He testified credibly that he had a very reasonable expectation of beginning a lengthy list construction projects in Juneau for the Tribes which would have lasted through the end of 2020. He showed a significant diminution of services as a direct result of the pandemic, and seemingly, the Division agreed, initially approving him as a “covered individual.” The Division’s September 15, 2021 redeterminations finding him ineligible hinged on COVID-19 eligibility, which he provided via his credible testimony under oath, and the deficiency of his application, which Mr. Wilson cured by providing a copy of his identification.

The claimant meets the definition of a covered individual from the week ending April 11, 2020, through the week ending December 26, 2020. This decision does not

evaluate impacts to his work as an independent contractor during the 2021 construction season. This appeal will be remanded to the Division to evaluate Mr. Wilson's eligibility in 2021, and to address the letter issued June 4, 2021 regarding employment substantiation in light of the Continued Assistance Act.

Depending on the outcome of the Division's determination regarding Mr. Wilson's eligibility in 2021, he may still have an overpayment balance. The Division has advised 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 determinations dated September 15, 2021 are **REVERSED IN PART, AFFIRMED IN PART**. The claimant is eligible for benefits from the Pandemic Unemployment Assistance program effective the week ending April 11, 2020 through the week ending December 26, 2020. Eligibility during the 2021 construction season has not been evaluated. This appeal is **REMANDED** to address this issue, as well as those raised by the determination dated June 4, 2021. As mail clearly does not reliably reach Mr. Wilson, the Division is to contact him via his email address of record.

Dated: December 8, 2021

Danika B. Swanson
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 December 8, 2021, the foregoing decision was served on Dell Wilson (by mail/email); Journey Walls-Nitschke (by email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

Office of Administrative Hearings