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**APPEAL TRIBUNAL DECISION**

**Docket Number:** 18 1162 **Hearing Date:** August 27, 2018

**CLAIMANT: EMPLOYER:**

DANIEL WILKINS BENEFIT PAYMENT CONTROL

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Daniel Wilkins Sue Nichols

#### CASE HISTORY AND FINDINGS OF FACT

The claimant filed an appeal against a June 19, 2018 determination that denied unemployment benefits under AS 23.20.378, 387, and 085 and required repayment of benefits received plus a penalty under AS 23.20.390 on the ground that the claimant was not able and available for work, was out of the country, misrepresented his eligibility, and received benefits to which he was not entitled. The Division of Employment and Training Services mailed the determination to the claimant’s address of record on June 20, 2018. The claimant filed his appeal on August 2, 2018, bringing forth the issue of timeliness of the appeal.

The claimant contacted someone with the Division during the second week in July. He requested to appeal the determination of June 19, 2018. He was advised that his appeal hearing was scheduled for August 1, 2018 at 9:30 a.m. The claimant arranged his work schedule to be available on August 1, 2018 at 9:30 a.m.

The claimant did not receive a call at 9:30 on Wednesday, August 1, 2018. He tried to call the Appeals Office but was not able to get through. He called the next day and was told by a representative of the Appeals Office that no hearing had been scheduled for him for Wednesday or any other day. He filed an appeal on that day with the Appeals Office and another appeal with the Benefit Payment Control representative to whom he his call was transferred.

A Benefit Payment Control representative searched the phone records but was not able to locate an incoming call from the claimant’s telephone number.

#### PROVISIONS OF LAW

**AS 23.20.340. Determination of claims.**

(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;**

1. 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 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.

#### CONCLUSION

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*We find no material errors in the Tribunal's findings. However, we have previously ruled in* Murphy, Comm. Decision 87H-UI-283, Sept. 29, 1987*, and other cases, that a claimant may rely on the instructions received from an authorized representative of the Employment Security Division. Such instructions may supersede instructions given in written form, such as claimant information handbooks or determinations depending on the circumstances.* Vassar, Comm. Dec. 96 0614, May 15, 1996.

*Credibility choices are for the trier of the fact to make and his selection will generally be accepted by the reviewing court*. B.B.S. Construction Co., Inc. vs. Stone, 535 P.2d 271 (Alaska, 1975).

The claimant’s testimony was credible that he believed that he was speaking to a representative of the Division regarding his appeal. He believed that he had properly filed an appeal and that the appeal hearing was set for August 1, 2018.

Based upon B.B.S. Construction Co., Inc. vs. Stone, Murphy, and Vassar the Tribunal holds the claimant to have timely filed his appeal.

#### DECISION

The claimant’s appeal from the notice of determination issued on June 19, 2018 is **GRANTED**. A new hearing will be scheduled to hear the issue and a new notice will be sent. The parties are instructed to follow the instructions in the notice of hearing.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed 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 appeal rights and procedures is enclosed.

Dated and mailed on August 28, 2018.

Tom Mize

Appeals Officer