****

**APPEAL TRIBUNAL DECISION**

**Docket number:** 19 0754 **Hearing date:** August 27, 2019

**CLAIMANT: DETS:**

JAYSON PACANA BENEFIT PAYMENT CONTROL UNIT

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Jayson Pacana Wade Godfrey

 **CASE HISTORY**

The claimant timely appealed a July 25, 2019 determination which reduced benefits under AS 23.20.360, denied benefits under AS 23.20.378 and AS 23.20.387, and held the claimant liable for the repayment of benefits and the payment of a penalty under AS 23.20.390.

The issues before the Tribunal are whether the claimant:

* earned wages during weeks claimed;
* was available for work during a period of travel;
* was available for work while attending school;
* registered for work as required;
* knowingly made a false statement or misrepresentation; and
* is liable for the repayment of benefits and the payment of a penalty.

**FINDINGS OF FACT**

The claimant established a claim for unemployment insurance benefits effective April 23, 2014. He established a second benefit claim effective June 29, 2018.

The Division received a notice that the claimant had been hired by an employer, Hire Investments, LLC. An audit form was sent to the employer to request the claimant’s hours and earnings during a period when he had claimed unemployment benefits. The employer reported earnings for the claimant in the weeks ending September 22, 2018 through November 3, 2018.

The claimant filed bi-weekly certifications on the Division’s website to claim benefits for the weeks under review. The certification form requires claimants to answer the question, “Did you work for any employers?” for each week being claimed. The claimant answered, “No” to this question for each of the weeks under review. The claimant certified that his answers were correct. The claimant agreed that the employer’s report of his hours and earnings was correct. He thought he was only required to report full-time, permanent work.

When the Division investigator learned the claimant had failed to report earnings, he checked the Division’s records of the location of computers the claimant had used to file bi-weekly certifications for benefits. The investigator compared the filing locations to the claimant’s stated area of residence at the time he filed for benefits, and found possible discrepancies. The investigator obtained the claimant’s bank records and airline travel records. The records indicated the claimant traveled to Hawaii, Seward, Fairbanks and Seattle in the weeks ending May 17, 2014, May 31, 2014 and July 5, 2014. He traveled to Indiana in the weeks ending August 9, 2014 and August 16, 2014. The claimant agreed he had traveled during those weeks.

The investigator determined that some of the claimant’s travel was for medical reasons, however the claimant’s travel did not begin in the middle of an uninterrupted period of unemployment, and thus the claimant could not be waived from the requirement to be available for work during medical travel.

The Division’s bi-weekly certification form requires claimants to answer the question, “Did you travel?” for each week being claimed. The claimant answered, “No” to this question in each of the weeks under review. The claimant certified that his answers were correct. The claimant recalled that he answered the questions in a routine manner each time without reading or considering the questions.

The Division’s investigator reviewed a social media profile of the claimant. He learned the claimant had attended Alaska Career College full time during weeks ending June 7, 2014 through August 2, 2014 and September 13, 2014 through November 1, 2014, a period when he had claimed benefits. The investigator determined the claimant’s school attendance was vocational in nature because he attended a private, for-profit school. The investigator determined the claimant was not available for full-time work and was not eligible for a waiver of the requirement to be available for work while attending vocational school because the claimant had left skilled work as a certified nursing assistant to earn a certification as a medical assistant.

The Division’s bi-weekly certification form requires claimants to answer the question, “Were you attending school or a training program during the week?” for each week being claimed. The claimant answered, “No” to this question for each of the weeks under review. The claimant certified that his answers were correct. The claimant recalled that he answered the questions in a routine manner without reading or considering the questions.

When the claimant established his claim for benefits effective June 29, 2018, he provided a mailing address in Anchorage, but listed his residence address as being in Arizona. The claimant was advised at the end of the claim application that he was required to register for work as required by the State of Arizona. The Division mailed a notice to that effect to the claimant. The claimant did not receive the notice as it was sent to the address he provided in Anchorage. The claimant was having friends in Anchorage review his mail and tell him about important things. He does not recall being told of the requirement to register for work in Arizona and he did not register for work there because he intended to continue working in Alaska.

The Division mailed an Unemployment Insurance Claimant Handbook to the claimant each time he established a new claim for benefits. The claimant did not recall receiving the handbooks. The handbook provides instructions to claimants about reporting all earnings, reporting travel and school attendance and registration for work, and how those issues may affect a claimant’s eligibility for benefits.

The claimant argued that a language barrier accounted for some of his reporting errors because English is the not the claimant’s first language. When taking classes to obtain his medical assistant certification, the claimant sometimes stayed after class to get help when he had trouble understanding the instructor’s English instruction. The claimant did not contact the Division to ask for clarification of reporting or eligibility requirements. The claimant did not request an interpreter when being interviewed by the investigator or for this hearing.

**PROVISIONS OF LAW**

**AS 23.20.360. Earnings deducted from weekly benefit amount.**

The amount of benefits, excluding the allowance for dependents, payable to an insured worker for a week of unemployment shall be reduced by 75 percent of the wages payable to the insured worker for that week that are in excess of $50. However, the amount of benefits may not be reduced below zero. If the benefit is not a multiple of $1, it is computed to the next higher multiple of $1. If the benefit is zero, no allowance for dependents is payable.

**AS 23.20.387. Disqualification for misrepresentation.**

(a) An insured worker is disqualified for benefits for the week with respect to which the false statement or misrepresentation was made and for an additional period of not less than six weeks or more than 52 weeks if the department determines that the insured worker has knowingly made a false statement or misrepresentation of a material fact or knowingly failed to report a material fact with intent to obtain or increase benefits under this chapter. The length of the additional disqualification and the beginning date of that disqualification shall be determined by the department according to the circumstances in each case.

(b) A person may not be disqualified from receiving benefits under this section unless there is documented evidence that the person has made a false statement or a misrepresentation as to a material fact or has failed to disclose a material fact. Before a determination of fraudulent misrepresentation or nondisclosure may be made, there must be a preponderance of evidence of an intention to defraud, and the false statement or misrepresentation must be shown to be knowing and to involve a material fact.

**AS 23.20.390. Recovery of improper payments; penalty.**

(a) An individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual.

(f) In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits under this chapter. The department may, under regulations adopted under this chapter, waive the collection of a penalty under this section. The department shall deposit into the general fund the penalty that it collects.

**AS 23.20.378:**

(a) An insured worker is entitled to receive waiting-week credit or benefits for a week of unemployment if for that week the insured worker is able to work and available for suitable work. An insured worker is not considered available for work unless registered for work in accordance with regulations adopted by the department. An insured worker may not be disqualified for failure to comply with this subsection if

(1) the insured worker is not available for work because the insured worker . . .

(B) is traveling to obtain medical services that are not available in the area in which the insured worked resides, or, if a physician determines it is necessary, the insured worker is accompanying a spouse or dependent who is traveling to obtain medical services; and

  (2) a condition described in (1) of this subsection occurs during an uninterrupted period of unemployment immediately following a week for which the insured worker has filed a compensable claim, and work has not been offered that would have been suitable for the insured worker before the illness, disability, hunting, fishing, medical travel, jury service, or funeral attendance.

**8 AAC 85.010**

1. In this chapter, unless the context requires otherwise, . . .

(8) "compensable claim" means a continued claim for which a money benefit is payable or has been paid, or for which a credit against an overpayment is allowable or has been allowed;

**8 AAC 85.350: Able to work and available for suitable work: general provisions.**

(a) A claimant is considered able to work if the claimant is physically and mentally capable of performing work under the usual conditions of employment in the claimant's principal occupation or other occupations for which the claimant is reasonably fitted by training and experience.

(b) A claimant is considered available for suitable work for a week if the claimant

(1) registers for work as required under 8 AAC 85.351;

(2) makes independent efforts to find work as directed under 8 AAC 85.352 and 8 AAC 85.355;

(3) meets the requirements of 8 AAC 85.353 during periods of travel;

(4) meets the requirements of 8 AAC 85.356 while in training;

(5) is willing to accept and perform suitable work which the claimant does not have good cause to refuse;

(6) is available, for at least five working days in the week, to respond promptly to an offer of suitable work; and

(7) is available for a substantial amount of full-time employment.

**8 AAC 85.353: Able to work and available for suitable work: travel claims.**

(a) The requirements of this section apply to any period during which a claimant travels outside the customary commutable area in which the claimant resides, unless the claimant travels while exempted from availability requirements under AS 23.20.378(a) or in connection with training approved under AS 23.20.382. For purposes of this section, a customary commutable area means an area where a claimant customarily commutes to and from work each day.

(b) A claimant is available for work each week while traveling only if the claimant is traveling to

(1) search for work and is legally eligible to accept work in the area of travel;

(2) accept an offer of work that begins no later than 14 days after the claimant's departure; or

(3) establish or return to a residence immediately following the claimant's discharge from the armed forces.

(c) A claimant who travels in search of work must be legally eligible to accept work and make reasonable efforts to find work each week in the area of the claimant's travel, by

(1) contacting in person an employment office;

(2) making at least two in-person employer contacts;

(3) registering in person with the local chapter of the claimant's union that has jurisdiction over the area of the claimant's travel; a claimant who has previously registered with the local union that has jurisdiction over the area of the travel is available for work if the claimant makes contacts as required by the union to be eligible for dispatch in the area of the travel; or

(4) attending in person a pre-arranged job interview.

(d) A claimant is not available for work after the claimant travels for more than four consecutive calendar weeks to search for work. A

 claimant is not available for work after the claimant travels for more than seven days if traveling to

(1) accept an offer of work that begins 14 days after the claimant's departure; or

(2) establish or return to a residence immediately following the claimant's discharge from the armed forces.

**AS 23.20.382**

Benefits or waiting-week credit for any week may not be denied an otherwise eligible individual because the individual is attending a vocational training or retraining course with the approval of the director of the Division of Employment and Training Services (DETS) or because, while attending the course, the individual is not available for work or refuses an offer of work.

**8 AAC 85.356** provides in part:

A claimant who is attending training is available for work if

1. the claimant is not disqualified under AS 23.20.378(c);
2. the claimant is attached to the labor force and is ready and willing to immediately accept suitable full-time work for which the claimant is presently qualified; and
3. the claimant;
4. while working full-time and attending training, became unemployed for reasons not attributable to the training, and the hours of training have not changed substantially;
5. began attending training after becoming unemployed and no rearrangement of the training schedule would be necessary to accommodate at least one regular work shift in an occupation suitable for the claimant; or
6. is willing and able to change the training schedule or leave the training to accept suitable work.

**8 AAC 85.200** provides, in part:

 (b) The director shall approve training for a claimant if

 (1) the claimant needs training to

 (A) overcome immediate barriers to reemployment, including disability, obsolete skills, or lack of work search skills;

 (B) remain employable in the claimant's customary occupation;

 (C) end a pattern of employment in temporary, casual, or unskilled work and increase skill level, earning power, or employment opportunities; or

 (D) obtain a necessary occupational safety and health certification;

 (2) the training is

 (A) a vocational training or retraining course;

 (B) taken on the full time schedule offered by the training provider; and

 (C) is not a home-study or correspondence course;

 (3) a surplus of qualified workers in the training occupation does not exist in the geographical area in which the claimant is seeking work; and

 (4) the claimant has the aptitude to successfully complete the training.

(c) The director may not deny approval for training solely based on the

(1) length of the training;

(2) cost of the training; or

(3) lack of a contract of employment at the conclusion of the training.

(d) The director shall approve training for a claimant who leaves unskilled work to attend the training if the claimant meets the other requirements of this section.

(e) Notwithstanding (a) - (d) of this section, the director shall approve training for a claimant who is placed in the training under a state or federal training program sponsored directly or indirectly by

(1) the United States Secretary of Labor; or

(2) a state or federal employment or training agency.

**8 AAC 85.351 provides:**

(a) a claimant who files a claim for benefits in a state that acts as agent in taking claims for benefits held by this state shall register for work in accordance with the statutes, regulations, and procedures of the state in which the claim is filed.

(b) a claimant who files for benefits in this state shall register for work as required by AS 23.20 and this section. A claimant shall register for work

 (1) repealed 3/4/2006;

(2) in person or by mail at the employment service office of the division that is nearest the claimant’s residence;

(3) by telephone, if permitted by the director; or

(4) at the department’s website by electronic means, if available from the division.

 (c) The director shall find that a claimant is not available for work for any week ending before completion of a placement registration for work. To be considered available for work from the date of the initial claim, a claimant must complete a placement registration within seven days after filing the initial claim. If the placement registration is not completed within seven days, the claimant is considered available for work the week the placement registration is completed.

(g) The director may defer registration for work for a claimant who is

(1) temporarily unemployed with a definite date to return to full-time work within 45 days after the date the claimant files the initial claim;

(2) unemployed due to a labor dispute;

(3) traveling immediately following the filing of the initial claim, for the purpose of relocating outside of this state; upon arrival in the new area of residence, the claimant shall register for work as required in (a) of this section;

(5) normally hired through a trade union, if the union furnishes information when requested by the director to verify the claimant's current membership and eligibility for dispatch;

(8) under an approved waiver of availability under AS 23.20.378 or AS 23.20.382.

(i) If the director does not require the claimant to have a placement registration, the director shall inform the claimant that the placement registration requirement has been deferred and advise the claimant of available employment services.

# CONCLUSION

The first issue is whether the claimant worked and earned wages for the weeks in question. Under AS 23.20.360, the benefits that a person is entitled to receive must be reduced by the amount of wages a person earns. The amount of the deduction is figured using the formula found within the statute. The claimant had earnings as reported by Hire Investments, LLC. The claimant’s benefits for weeks ending September 22, 2018 through November 3, 2018 must be reduced accordingly.

The second issue is whether the claimant was available for work during periods of travel. The claimant did not meet the requirements of AS 23.20.378 to be waived from the requirement to be available for work when traveling for medical care. Regulation 8 AAC 85.353(a) provides that the requirements of this section apply to any period during which a claimant travels outside the area in which the claimant resides. 8 AAC 85.353(b) provides that a claimant who travels away from their area of residence during their customary workweek is considered available for work only if they travel for one of the three allowable reasons stated in section (c). Under 8 AAC 85.350, a claimant must be available for work at least five working days of their customary workweek.

The Tribunal finds the claimant was not available for work while traveling in the weeks ending May 17, 2014, May 31, 2014, July 5, 2014, August 9, 2014 and August 16, 2014.

The third issue is whether the claimant was available for work while attending school. The claimant attended school full time and was not eligible for a waiver of the requirement to be available for work while attending vocational training. The claimant was not available for work in the weeks ending June 7, 2014 through August 2, 2014 and September 13, 2014 through November 1, 2014.

The fourth issue is whether the claimant registered for work as required. The claimant was first notified on his claim application and then by a notice mailed to his address of record. The claimant did not get the mailed notice because he was directing his mail to Anchorage and having friends review it.

*The failure of a party's agent or employee to act is not such a circumstance [to grant reopening]. Anderson, Com. Dec. 84H-UI-186, July 20, 1984.*

Although Anderson is regarding a re-opening request, the principle here is the same. While it is unfortunate the claimant’s friends failed to notify the claimant he was required to register for work in Arizona, the claimant had, in effect, made his friends his agent for the collection of his mail. That the claimant’s friends failed to give the claimant his notice does not create a circumstance beyond the claimant’s control for his failure to register for work in Arizona. Regulation 8 AAC 85.351 holds that a claimant is not considered available for work unless the claimant has registered for work within seven days of establishing a claim for benefits. The claimant cannot be considered available for work in the weeks ending June 24, 2018 through November 3, 2018.

The next issue is whether the claimant knowingly made false statements or misrepresentations in connection with the claim. The claimant argued that he did not intend to provide false information.

*A presumption of intent to defraud arises on the basis of a falsified claim instrument itself. The division's claim form has but one purpose. It is the instrument executed by an individual desirous of receiving unemployment insurance benefits for a specific week. To this end, it contains clear and unambiguous language detailing the material factors upon which the division will base its decision to pay or not to pay. In addition, the individual completing the form certifies as to the truth of the answers and as to his understanding that legal penalties otherwise apply. Thus, once established that a claim instrument has been falsified, the burden of proof shifts to the individual [to establish there was no intent to defraud.] Morton, Com. Dec. 79H-149, 9/14/79.*

The claimant answered the questions in a routine pattern without reading them or considering his answers. He then certified his answers were correct for each of the weeks in question. The claimant argued that his language barrier hindered his ability to report correctly. The Tribunal does not agree. The questions on the Division’s form are simple and not open to interpretation. The claimant speaks English well enough to obtain a medical assistant certificate with only some help after class to completely understand an English-speaking instructor. He participated in the investigator’s interview and this hearing while demonstrating an understanding of all proceedings and he quickly and appropriately answered questions with minimal repetition or additional explanation. The Tribunal cannot agree that the claimant’s language affected his ability to correctly answer the questions on the Division’s bi-weekly certification.

In reaffirming that simply contending a mistake or oversight fails to rebut the presumption of fraud, the Commissioner held as follows in the matter of Gillen, Com. Dec. 9121667, December 6, 1991:

*If we were to allow this kind of excuse, the fraud provision would become a dead letter. Any claimant can come into a hearing and testify that the false claim was a mistake, or that he doesn't know or doesn't remember how the false entries were made.*

Based upon Morton and Gillen, the Tribunal must hold that the claimant intentionally misrepresented his eligibility for benefits for the weeks under review.

The final issue is whether the claimant is liable for the repayment of benefits and the payment of a penalty.

AS 23.20.390 states an individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual. In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits.

The evidence presented shows that the claimant received benefits to which he was not entitled and that he intentionally misrepresented his eligibility in order to receive benefits to which he was not entitled. The Tribunal holds that the claimant is liable to the fund the amount of benefits he received to which he was not entitled and the payment of a penalty under AS 23.20.387.

 **DECISION**

The notice of determination and determination of liability issued in this matter on July 25, 2019 is **AFFIRMED**.

* That portion of the determination holding that the claimant’s benefits are reduced due to receipt of wages is **AFFIRMED**. Benefits remain reduced under AS 23.20.360 for the weeks ending September 22, 2018 through November 3, 2018.
* That portion of the determination holding that the claimant was not available for work during a period of travel is **AFFIRMED**. Benefits remain denied under AS 23.20.378 and 8 AAC 85.353 for the weeks ending May 17, 2014, May 31, 2014, July 5, 2014, August 9, 2014 and August 16, 2014.
* That portion of the determination holding that the claimant was not available for work during a period of school attendance is **AFFIRMED**. Benefits remain denied under AS 23.20.382 and 8 AAC 85.200 for the weeks ending June 7, 2014 through August 2, 2014 and September 13, 2014 through November 1, 2014.
* That portion of the determination holding that the claimant failed to register for work is **AFFIRMED**. Benefits remain denied under AS 23.20.378 and 8 AAC 351(a) for the weeks ending June 24, 2018 through November 3, 2018.
* That portion of the determination holding that the claimant committed fraud or misrepresentation is **AFFIRMED**. A disqualification under AS 23.20.387 is imposed, and benefits are denied for the weeks ending May 17, 2014, May 31, 2014, July 5, 2014, June 7, 2014 through August 2, 2014, August 9, 2014, August 16, 2014, September 13, 2014 through November 1, 2014, June 24, 2018 through November 3, 2018, and July 27, 2019 through July 18, 2020.
* That portion of the determination holding that the claimant is liable for the repayment of benefits and for the payment of a penalty is **AFFIRMED**. The claimant remains liable to the fund for benefits he received to which he is not entitled and the payment of the assessed penalty.

 **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.

Dated and mailed on August 29, 2019.

 Rhonda Buness, Appeals Officer