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**APPEAL TRIBUNAL DECISION**

**Docket number:** 19 0878 **Hearing date:** October 16, 2019

**CLAIMANT: DETS:**

MILTON PLUMMER BENEFIT PAYMENT CONTROL UNIT

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Milton Plummer Sue Nichols

 **CASE HISTORY**

The claimant timely appealed a September 3, 2019 determination which 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:

* was available for work during a period of travel;
* knowingly made a false statement or misrepresentation in connection with the claim; and
* is liable for the repayment of benefits and the payment of a penalty.

**FINDINGS OF FACT**

On April 15, 2019, the claimant established a claim for unemployment benefits. His work had recently ended and he had another job set to start in June. On his claim application, the claimant provided that his mailing and physical addresses were in Wasilla, Alaska and that he was not travelling or relocating immediately. Bi-weekly certifications were filed for the next nine consecutive weeks, using the Division’s website certification forms. Benefits were deposited to the claimant’s bank account.

In July 2019, the Division received an anonymous report that the claimant was improperly claiming benefits. A Division investigator reviewed filing data collected when the claimant’s bi-weekly certifications were filed. The data indicated the certifications were filed using a computer located in Richland, Oregon. The investigator reviewed the claimant’s bank records and found transactions in Idaho beginning April 16, 2019 and in Oregon up until June 15, 2019. Transactions on June 16, 2019 and after were made in Alaska only.

The investigator contacted the claimant, who initially denied that he had been outside of Alaska during the period under review and that his wife had made the transactions outside Alaska. The claimant later recalled that he had traveled to Boise, Idaho to have a medical procedure after his work ended, and to Oregon, where he owns a house and where his wife resided. He could not recall the dates of his travel, only that he had a pre-op appointment in Boise and then returned for surgery later, possibly in May. The claimant’s procedure could have been done in Alaska, but he preferred to see a familiar doctor in Idaho. He returned to Alaska to begin work in June.

The investigator reviewed the claimant’s bi-weekly certifications. For each week being claimed, claimants are required to answer the question, “Did you travel?” and “Did you move to a different town?” For all weeks under review, both questions were answered, “No.”

The claimant denied that he filed the bi-weekly certifications to claim benefits. In the past, the claimant had given his wife permission to file for his unemployment benefits, and she still had online access to his claim. The claimant denied that he had directed his wife to file for his benefits after he opened his claim on April 15, 2019. He surmised that he might have mentioned to her that he had opened his claim for benefits, and then she filed for the benefits of her own accord. The claimant held that he established his claim after his work ended because he intended to “get his waiting week in.”

**PROVISIONS OF LAW**

**AS 23.20.378: Able to work and available for suitable work.**

1. 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 …

**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 23.20.387. 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.

# CONCLUSION

The first issue is whether the claimant was available for work during a period of travel. Alaska Statute 23.20.378 holds that claimants may not be required to be available for work when they travel to seek medical care that is not available in their area of residence, as long as they meet certain other requirements. The claimant in this case did not travel to seek medical care that was not available in his area, he chose to receive medical care in Idaho because he preferred his familiar doctor. The claimant is not waived from the requirement to be available for work during the period under review.

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. The claimant travelled away from his stated residence during the weeks under review.

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).

Furthermore, under 8 AAC 85.350, a claimant must be available for work at least five working days of their customary workweek. The claimant in this case did not travel for an allowable reason.

*Neither the Appeal Tribunal nor I have any jurisdiction to hold contrary to the clear wordage of the law. Scott, Com. Dec. 87H-EB-162, June 18, 1987.*

The Tribunal finds the claimant was not available for work in the weeks under review.

The second issue is whether the claimant knowingly made a false statement or misrepresentation in connection with the claim. The claimant argued that he did not file the bi-weekly certifications to claim benefits during the weeks under review.

This case turns on the credibility of the claimant, as it his contention that someone else filed the claims that is the basis of his argument on appeal.

*A Hearing Officer must base his decision on a "preponderance of evidence." Patterson, Com. Dec. 86H-UI-233, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.28, 10/16/86. "Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." Adelman, Comm. Dec. 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P. 861, 863 (WA).*

The claimant in this case shared all access to his unemployment claim with his wife and allowed her to file benefits on his behalf. The claimant made his wife his agent for the purpose of filing for benefits. The claimant himself established his claim for benefits by phone. The claimant stated his intention was to claim his waiting week, however a certification must be filed in order to get credit for a waiting week. The benefits claimed while the claimant was off work were deposited into a bank account used by the claimant during that time period. The bi-weekly claims ceased being filed when the claimant returned to work.

The preponderance of evidence in this case does not establish that the claimant was the victim of identity theft or that benefits were claimed without his knowledge while he was travelling. The Tribunal concludes that the claimant himself or his wife, acting as the claimant’s agent and using information he provided to her, intentionally misrepresented material facts in order to collect benefits to which the claimant was not entitled.

The third 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 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 September 3, 2019 is **AFFIRMED**.

* That portion of the determination holding that the claimant was not available for work during a period of travel is **AFFIRMED**. Benefits remain reduced under AS 23.20.378 for the weeks ending April 20, 2019 through June 15, 2019.
* That portion of the determination holding that the claimant committed fraud or intentional misrepresentation is **AFFIRMED**. A disqualification under AS 23.20.387 is imposed, and benefits are denied for weeks ending April 20, 2019 through June 15, 2019 and September 7, 2019 through August 20, 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 October 21, 2019.

 Rhonda Buness, Appeals Officer